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Directive 2017/541 on Combating Terrorism and its impact on fundamental rights: a case study from the Kingdom of Spain

Prof. Davide Paris
SUPERVISOR

Prof. Domenico Pauciulo
CO-SUPERVISOR

ID No. 648592

Carmengiulia
Cipullo
CANDIDATE

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INTRODUCTION

According to European Council, the fight against terrorism represents an "absolute priority"[1] that motivates the close cooperation between Member States, which all aim to prevent terrorist attacks in the territory of the Union. But why does the fight against terrorism represent an essential priority for the European Union even if security remains a national prerogative? In fact, international terrorist attacks carried out since 2001 have brought the attention to the need to assume a collective responsibility in order to efficiently tackle this issue. For this reason, the European Union has assumed a central role in providing an international forum to discuss the matter. Following the terrorist attacks of 2020, carried out in Germany, France and Austria, the Ministries of Home Affairs of all the Member States decided to further intensify the joint efforts to combat terrorism without compromising common Union values, such as democracy, justice, and freedom of expression[2].

The latter freedom represents a fundamental right for every human being, and it is essential for individual dignity and personal fulfilment, serving as the foundation for democracy, the rule of law, peace, and stability. Freedom of expression, including artistic expression, plays a crucial role in the shaping and expression of individuals' identities within society. In any community, open, varied, and autonomous media are fundamental for upholding and championing the right to express opinions and ideas, along with other human rights. Independent media serve as a vital pillar for democratic societies by enabling the unrestricted exchange of information and thoughts on matters of public concern, promoting transparency and accountability. Without freedom of expression and free media, it is unfeasible to have an informed, participative, and involved citizenry[3].

Advancements in information and communication technology have contributed to the creation of new ways for individuals to share information with a wide audience, and therefore the need to tackle the quick spread of terrorist propaganda and glorifying

[1] European Council, and Council of the European Union. 2022. "The EU's response to terrorism." December 15, 2022. https://www.consilium.europa.eu/it/policies/fight-against-terrorism/.
[2] Ibid.
[3] European Union. n.d. "EU Guidelines on Freedom of Expression Online and Offline." https://www.eeas.europa.eu/sites/default/files/09_hr_guidelines_expression_en.pdf.

or apologetic messages has soon surged in the Union counter-terrorism field. Freedom of expression, in fact, can be legally limited in cases of incitement to terrorism, and therefore the states' intervention implies a restriction of an individual's ability to express their ideas as they wish. Surely any prohibition on the free expression of one's ideas must be set out clearly and must comply with certain requirements[4]. According to Article 10 of the European Convention on Human Rights, the exercise of the freedom of expression

> "[…] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[5]

Therefore, there is a clear tradeoff between the need to ensure national security and states' obligation to respect and safeguard fundamental rights and freedoms, such as the right to freedom of expression. However, in the aftermath of a series of terrorist attacks carried out in the territory of the Union, an unprecedented expansion of national security laws and counter-terrorism measures has started to put at risk the abovementioned tradeoff. So, there is a clear risk that the fight against the terrorist threat could put at risk the correct safeguard of certain rights, such as the freedom of expression. Consequently, there could be a risk of having a contemporary variation of the Orwellian concept of "thought crime", where individuals could face prosecution for actions that have very weak connections to real criminal behaviour, with counter-terrorism initiatives being much more focused on prevention of crimes. The fear of being labelled as a security risk or an "extremist" could exercise an intimidating impact, restricting freedom of expression[6].

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[4] Ibid.

[5] Council of Europe. 1950. *European Convention on Human Rights*. https://www.echr.coe.int/documents/d/echr/Convention_ENG.

[6] Amnesty International. 2017. "EU: Orwellian Counter-Terrorism Laws Stripping Rights under Guise of Defending Them." Amnesty International. January 17, 2017. https://www.amnesty.org/en/latest/press-release/2017/01/eu-orwellian-counter-terrorism-laws-stripping-rights-under-guise-of-defending-them/.

The present thesis addresses the issue surrounding the protection of fundamental freedoms and rights in the fight against terrorism, and in particular it analyses the tension between the exercise of freedom of expression and the protection of national security, in cases of apology or glorification of terrorism. In order to do this, the research question guiding the structure of the thesis is the following: considering the minimum standards provided for by Directive 2017/541, are Member States able to guarantee a fair balance between the need to ensure the security of the state and protection of fundamental rights? In particular, is the offence of glorification of terrorism, as mentioned in Article 5 of the Directive, framed in a way that avoids excessive interference with the freedom of expression? In order to provide an answer to the abovementioned research question, the present thesis will follow a structure that shifts from the analysis of the "bigger picture" to the more in-depth and specific issues deriving from the latter. Accordingly, the thesis will be divided into three main chapters.

The first chapter will analyse the diversification of the terrorist menace, meaning the categorisation of the main terrorist movements and their ideologies; secondly it will provide a comprehensive analysis of the counter- terrorism measures and initiatives, since the early manifestation of the threat regionally, until nowadays; and lastly, the third section will provide a more specific focus on certain counter-terrorism initiatives, their effectiveness and shortcomings.

The second chapter will revolve around the central topic of discussion, that is to say Directive 2017/541 of the European Union. The opening section, after a brief introduction, will provide general information on the elements that brought to the adoption of the Directive and on the overall content of the document. The second section will report the main procedural flaws and criticisms on the Directive, followed by a third part on the assessment of the impact of the document on certain fundamental rights and liberties. Lastly, the second chapter will deepen the main transposition issues reported both by the Commission and by the Fundamental Rights Agency, from a fundamental rights perspective.

The third and last chapter aims to answer to the research question as it will provide an insight on the question of balancing national security and the right to freedom of expression in cases of glorification of terrorist acts. The final chapter will, in fact, provide a case study on the existing jurisprudence on the matter in the Spanish legal system and it will be divided as follows: a first section will be focused on the overall anti-terror legislative evolution in the Kingdom of Spain, from the pre-dictatorship era until recent times; the second section will deepen the offence of glorification of terrorism and humiliation of terrorism victims, as provided in the Spanish Penal Code, in order to help categorise this offence as a terrorist speech offence and understand its practical application; and lastly, the final three sections of the chapter will provide a review of three selected legal cases surrounding the question of balancing the right to freedom of expression and safeguarding the security of the state. In these sections, the judgements of the Spanish Supreme Court, the Spanish Constitutional Tribunal and the European Court of Human Rights will be analysed in order to examine the reasonings of the Courts when confronted with the question of balancing the right to freedom of expression and security of the state. These last sections will, therefore, be useful in order to formulate an answer to the research question, through the analysis of existing jurisprudence.

Chapter One: The terrorist menace in the European Union: the pathway leading to Directive EU 2017/541 and beyond

1. Introduction

Terrorism has become a prominent and widely discussed topic in our modern era, and its impact is evident in the policies of the European Union. Counter-terrorism has emerged as one of the rapidly evolving policy areas within the EU. It is noteworthy that the EU's involvement in combating terrorism remains a subject of debate and controversy. The unique characteristics of the European legal framework pose additional challenges in establishing a cohesive counter-terrorism policy regime. Over the past years, both the scope and effectiveness of efforts to combat terrorism within the EU have significantly intensified. There has been a notable increase in the quantity and quality of activities aimed at addressing and mitigating the threat of terrorism[7]. Before deepening the structure of the present chapter, it is important to highlight that the overall structure of the thesis shifts gradually from broader and more encompassing questions to more detailed issues, in order to present the specific impact of initiatives that have a broader origin.

The present chapter will deepen the main tools adopted at the EU level in order to combat the terrorist threat. In order to do so, the chapter will start by providing a brief overview of the different variants of terrorism and how they have affected, and continue to affect, EU Member States. In particular, this section will start by presenting some of the most common misconceptions about terrorism, then moving to the description of the four main categories according to which terrorism is conceptualised and finally it will present a thorough analysis of threat stemming from the leading movements of the past years. Following, the second descriptive section will start by enumerating the series of initiatives taken at the EU level in order to counter the terrorist threat ever since its early manifestation in the 1960s-1970s. The main argument that lies behind the development of EU counter-terrorism initiatives, policies

[7] Eckes, Christina. 2011. "The Legal Framework of the European Union's Counter-Terrorist Policies: Full of Good Intentions?" *Crime within the Area of Freedom, Security and Justice*, January, 127–58. https://doi.org/10.1017/cbo9780511751219.006.

and legislative instruments, is that it is determined by the sequence of critical junctures which fostered the acceleration of policymaking at both national and EU level. Critical junctures are, for instance, the September 11, 2001, attacks which enhanced the perception of a global threat stemming from religious extremism. Additional critical junctures are the 2015 Paris attacks, shortly followed by the Brussels attacks of March 2016, which opened the discussion for the adoption of a new, harmonising, criminal law instrument in order to confront the rising phenomenon of foreign fighters: Directive EU 2017/541 on Combating Terrorism, subject of the second chapter. Nevertheless, despite the lack of high-impact terrorist attacks in the following years, the Union has further diversified its response to the terrorist threat, giving rise to a trend of early detection and anticipation of the menace.

Then, the last section will be more focused on the assessment of certain counter-terrorism measures adopted at the EU level. This section, in fact, will not only focus on the features of these provisions, concerning the regulation of monetary policies, standards on the control of online platforms and cooperation between law enforcement agencies, but it will also highlight the controversial impact of the latter. Nevertheless, even if the latter have proven to be effective in order to tackle radicalisation and to early detect potential aspiring terrorists in the EU, the very same measures have been largely criticised and accused of excessively limiting the freedom of movement, the freedom of expression and of association of those concerned and beyond. In order to discuss such claims, two main examples on the shortcomings entailed by counter-terrorism measures will be provided. Firstly, the question of "terrorist blacklisting" and its collateral effects will be deepened; secondly, the alleged nexus between asylum seekers and terrorism will be analysed, as singled out by politicians and governments in order to justify how, during the refugee crisis, they have targeted Civil Society Organisations and migrating populations, exploiting nationalist sentiments. Then, the final part of the third paragraph will point out the major contradictions in terms of intelligence sharing at the EU level, by indicating its most recent development in the aftermath of the turning point represented by the November 2015 Paris attacks. Lastly, final remarks and considerations will be presented.

2. The diversification of the terrorist menace

2.1. Terrorism: common myths and perception

The terrorist threat does not arise from one specific ideology nor group/organisation. Mistakenly, especially after 9/11, misconceptions on the origins and dynamics behind the terrorist phenomenon have spread, first and foremost through politicians, media and policy analysts' allegations on the root causes of terrorism. For instance, following the attack on the Pentagon and the World Trade Centre, former U.S. President George W. Bush and former Secretary General Colin Powell argued that poverty laid at the roots of the terrorist threat, that manifested itself in terms of low per capita Gross Domestic Product (GDP) or underdeveloped economies in countries hosting terrorist groups. According to an additional misconception on the phenomenon, terrorism could be fought by promoting democracy in countries concerned by indigenous terrorism. Others associated terrorism with migration, a rhetoric appealing to populist parties and candidates in countries such as the U.S., Poland, Hungary, and elsewhere. Adding to this, it has been noted through Eurobarometer surveys[8] that citizens tend to be more worried and concerned about transnational terrorist attacks than domestic terrorist attacks[9]. Generally speaking, it can be asserted that transnational terrorist attacks are granted more media coverage since interests of a plurality of states are at stake. Furthermore, the public's preoccupation with cross-border acts of terrorism is reinforced by the media's comprehensive coverage of a handful of significant and dramatic incidents, such as the September 11 attacks or the March 11, 2004, Madrid bombings[10].

Overall speaking, terrorism is difficult to conceptualise since there is little consensus among scholars and policy analysts on the precise definition of the phenomenon. According to Walter Laqueur[11] this lack of consensus derives from the

[8] The Eurobarometer is a survey tool utilized by the European Commission, the European Parliament, and other EU institutions and agencies to regularly assess public opinion in Europe. It aims to gauge attitudes and perceptions on topics concerning the European Union, as well as broader political and social subjects.

[9] Economou, Athina, and Christos Kollias. 2018. "Security Policy Preferences of EU Citizens: Do Terrorist Events Affect Them?" *Public Choice* 178 (3-4): 445–71. https://doi.org/10.1007/s11127-018-0612-7.

[10] Gaibulloev, Khusrav, and Todd Sandler. 2022. "Common Myths of Terrorism." *Journal of Economic Surveys* 37 (2): 271–301. https://doi.org/10.1111/joes.12494.

[11] Laqueur, Walter. 1987. *The Age of Terrorism.* Little, Brown and Company.

fact that terrorism, both religious and traditional, is in a continuous evolution in its tactics, motives, means and actors. It is important to distinguish between these two branches of terrorism, traditional and religious, since the latter is "theoretically different from other types of terrorism"[12]. In fact, as the latter authors argue, religious extremists derive inspiration, justification, and their overall worldview from their faith, leading to a fundamentally distinct system of incentives compared to their secular counterparts. As the Institute for Economics and Peace[13] has reported through its analysis, despite the lower number of attacks perpetrated, religious terrorism, in its jihadist ramification, has been classified as more lethal than the traditional terrorism counterparts. Religiously motivated groups have been responsible for over 50 percent of the fatalities resulting from terrorism since 2007. As far as the 2023 analysis is concerned, closely behind are ideologically motivated attacks, which account for 31 percent of the deaths[14].

On the other hand, as reported by Jones, Toucas, and Markusen[15], in terms of casualties, between 2000 and 2017, terrorist attacks carried out by Islamic extremist groups constituted 3.78 percent of the total number of attacks. However, they accounted for a significant 71.15 percent of all fatalities resulting from these attacks[16]. However, between 2001 and 2009 identifiable religious terrorist attacks were exactly one third of the secular counterparts during the same period (2574 in the case of religious terrorism and 5759 in the case of secular/traditional terrorism)[17]. Therefore, it can be asserted that, despite perpetrating less attacks in proportion to other ideologically motivated terrorist groups, religious terrorist organisations cause more deaths mainly due to the type of weapons and attack methods employed, namely

[12] Saiya, Nilay, and Anthony Scime. 2014. "Explaining Religious Terrorism: A Data-Mined Analysis." *Conflict Management and Peace Science* 32 (5): 487–512. https://doi.org/10.1177/0738894214559667.
[13] Institute for Economics and Peace. 2019. "Global Terrorism Index 2019 Measuring the Impact of Terrorism." https://www.economicsandpeace.org/wp-content/uploads/2020/08/GTI-2019web.pdf.
[14] Institute for Economics and Peace. 2023. "Global Terrorism Index 2023." chrome-extension://efaidnbmnhttps//www.visionofhumanity.org/wp-content/uploads/2023/06/GPI-2023-Web.pdf.
[15] Jones, Seth, Boris Toucas, and Maxwell Markusen. 2018. "A Report of the CSIS Transnational Threats Program from the IRA to the Islamic State: The Evolving Terrorism Threat in Europe." https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/190103_EuropeanTerrorism_interior.pdf.
[16] Ibid.
[17] Saiya and Scime. 2014."Explaining Religious Terrorism: A Data-Mined Analysis."

decapitation, attacks with vehicles, suicide bombing and use of chemical weapons amongst others[18].

2.2. Religious Terrorism

Particularly concerning is the phenomenon of foreign terrorist fighters or foreign fighters, especially due to the complexity surrounding the process of radicalisation and terrorism in general. As a response to this phenomenon, Western states have prioritised prevention and punishment as their primary approaches, rather than emphasising dissuasion and reintegration efforts[19]. For the purposes of the Europol EU Trend and Situation report of 2023 (TE-SAT), jihadism has been defined as "a violent sub-current of Salafism, a revivalist Sunni Muslim movement that rejects democracy and elected parliaments, arguing that human legislation is at variance with God's status as sole lawgiver". Jihadist groups strive to establish an Islamic state that operates under their interpretation of Islamic law, known as *shari'a*[20]. From 2020 to 2022 the number of terrorist attacks claimed by terrorist organisations representative of the jihad, Al-Qaeda and the Islamic State, has declined since the last attack carried out in the EU claimed by IS took place in Vienna in November 2020, and in fact, the significance of affiliations with specific groups like IS and Al-Qaeda has diminished among supporters of jihadism.

Nevertheless, considering that same period of time, the number of arrests has increased, with the majority of the detained subjects being male (73%) captured for membership to a terrorist organisation, production and dissemination of propaganda, planning terrorist attacks, and terrorist financing. Those involved in the preparation and planning phases of the attacks mainly acted as lone actors or within cells and usually merged this activity with consulting online jihadist platforms. Suspects made use social media platforms and instant messaging channels to encourage group members to carry out terrorist attacks, pledge loyalty to terrorist organisations, and, in

[18] Karolczak, Krzysztof. 2022. "Terrorism Studies Analyses and Prevention." In *Terrorism Studies, Analyses, Prevention*. Terrorism Prevention Centre of Excellence.

[19] Bakker and Singleton in Capone, Francesca, Andrea De Guttry, and Christophe Paulussen. 2016. *Foreign Fighters under International Law and Beyond*. The Hague: Asser Press.

[20] Europol. 2023a. "European Union Terrorism Situation and Trend Report 2023." https://www.europol.europa.eu/publication-events/main-reports/european-union-terrorism-situation-and-trend-report-2023-te-sat.

certain instances, openly declared their intention to commit such acts. Specifically, supporters of the Islamic State established groups on gaming communication applications, dedicated to discussing various subjects such as media operations, translating propaganda material, and promoting religious migration[21]. As it will be discussed in the following paragraphs, the use of social media platforms, and in general of the internet, is a common denominator between religious terrorism and its secular counterparts, such as right-wing extremism and left-wing/anarchist terrorism.

2.3. Left-wing and Anarchist Terrorism

Traditional or secular terrorism is conceptualised as being divided into three different groups: left-wing/anarchist, right-wing and ethno-separatist. As far as left-wing and anarchist terrorism is concerned, movements pertaining to this category appeal to the Anarchist, Marxist and other socialist ideologies. The expression "left-wing and anarchist violent extremism" encompasses various political movements that aim to use violence to overthrow our democratic system of governance and capitalist economic structure, advocating for either a communist or socialist system or a form of anarchist self-government.

Anarchism, an ideology that opposes authority, is often considered a subset of left-wing violent extremism, although many anarchists see their goals as fundamentally incompatible with ideologies that promote a prominent role for a future Marxist state[22]. The movements pertaining to this branch of terrorism were mostly active in the 20th century in Europe, Latin America, and, to a lesser extent, in the Middle East[23]. During the 1970s and 1980s, numerous Western European countries encountered a surge of terrorist attacks carried out by left-wing extremist organisations such as Germany's *Red Army Faction* (RAF), Italy's *Red Brigades*, and France's *Action directe*. These groups disbanded in the late 1980s and 1990s as communist regimes in Europe collapsed. However, despite the current predominance of jihadist terrorism as the primary threat, left-wing and anarchist violent extremism and terrorism have never entirely vanished. In fact, in more recent years, environmental causes, animal rights,

[21] Ibid.
[22] EU Counter-Terrorism Co-Ordinator. 2021. "EU Action to Counter Left-Wing and Anarchist Violent Extremism and Terrorism: Discussion Paper."
[23] Gregg, Heather. 2014. "Defining and Distinguishing Secular and Religious Terrorism." *Source: Perspectives on Terrorism* 8 (2): 36–51.

important infrastructural projects and government policies on irregular migration have been at the centre of the attention of this branch of terrorism[24].

2.4. Right-wing Violent Extremism

As far as right-wing terrorism is concerned, the terminology refers to groups that employ fascists, racist and nationalistic motives and goals. This branch of terrorism was notably vigorous between the World Wars and re-emerged later in the 1980s. Examples of this branch of terrorism include the *Ku Klux Klan* and the *Rumanian Iron Guard*, mostly active in the 1930s, however, these groups have appeared in recent times in the form of violent anti-immigration and neo-Nazis groups[25]. Right-wing terrorism encompasses the utilisation of terrorist tactics by individuals and groups with right-wing extremist ideologies. These extremists employ, promote, incite, or endorse violence and animosity to advance their political or ideological objectives. Their aim is to transform the existing political, social, and economic system into an authoritarian model, rejecting democratic principles, values, and fundamental rights. The ideologies of violent right-wing extremism are primarily rooted in exclusionary nationalism, racism, xenophobia, and other forms of intolerance[26]. Compared to attacks carried out by Islamist extremist terrorists and other forms of terrorism, right-wing extremist attacks are often perceived as isolated incidents.

A notable example is the case of Germany, where a right-wing terrorist group known as the *National Socialist Underground* was uncovered in 2011. Despite having perpetrated at least 10 assassinations and carried out 2 bombings over nearly 14 years, their activities went unnoticed. In that same year, Anders Behring Breivik caused immense devastation by carrying out a bomb attack in Oslo and a mass shooting in Utøya, Norway, resulting in the loss of 77 lives. Before committing the attack, Breivik released a manifesto that detailed his ideology, which drew upon Christian fundamentalism and cultural racism as its foundations. These instances illustrate a longstanding occurrence of violent acts carried out by far-right individuals in the Western world. The refugee crisis in Europe since 2012 has further fuelled the rise of right-wing political parties and extremist networks. Consequently, there has been a

[24] EU Counter-Terrorism Co-Ordinator. 2021.
[25] Gregg, Heather. 2014. “Defining and Distinguishing Secular and Religious Terrorism.”
[26] Europol. 2023a. “European Union Terrorism Situation and Trend Report 2023.”

notable increase in xenophobic crimes, anti-immigration sentiments, and the emergence of social movements with such ideologies across nearly all European nations[27].

2.5. Ethno-separatist Movements

Lastly, traditional terrorism has been characterised by ethno-separatist movements, that are groups that employed violence and terrorist acts in order to achieve autonomy or independence from a state or an occupying force, such as in the case of the *Jewish Irgun* in Palestine during the British Mandate, the *IRA* (Irish Republican Army) under the British occupation, or groups that seek separation from an established state such as *ETA* (Euskadi Ta Askatasuna, meaning Basque Homeland and Liberty) active in the Basque province[28]. Ethno-nationalist and separatist terrorist organisations find motivation in factors such as nationalism, ethnicity, and/or religion. It is not unusual to find elements of left-wing or right-wing ideologies present within these groups, in fact, an instance of this can be seen in the ambiguity surrounding the distinction between left-wing extremists and separatists in the Basque region and Catalonia, particularly regarding the motivations behind their attacks[29].

As of the last data reported by Europol[30], it is possible to claim that there are three major ethno-nationalist and separatist movements in the territory of the EU. The TE-SAT report of 2023 suggests that one of them is represented by the independence movements of Catalonia and the Basque country, who use economic distress and social discontent in order target the most marginalized individuals in society for recruitment purposes. Another movement strongly present on EU soil is the PKK (Kurdistan Workers' Party), that mainly focuses its activity on the region in order to spread propaganda, recruit and finance their operations. Most arrests concerning individuals connected to the PKK were carried out in Germany, where four people were detained. Several PKK members resident in the EU or with EU citizenship have gone, according, to the report, to conflict zones in Syria and Iraq. A last movement identified in the report is the one represented by the Dissident Republican (DR) groups. These groups

[27] Koehler, Daniel. 2016. "Right-Wing Extremism and Terrorism in Europe." *PRISM* 6 (2): 85–104.

[28] Gregg. 2014.
[29] Europol. 2023a.
[30] Ibid.

operate mainly in Ireland and in the United Kingdom and aim to reunite Northern Ireland with Ireland, given that they are mainly motivated by historical nationalism, according to which they see Northern Ireland as an occupied territory. DR groups have hierarchical structure divided into two wings: a militarised wing and a political wing[31]. As far as recruitment is concerned, it has been noted that, differently from jihadist and right-wing extremist groups, dissident groups use in a remarkably limited manner digital platforms. The main reasons behind this peculiarity reside in the fact that firstly, most of the times, family ties and links to the "Republican tradition" facilitate the recruitment process and, secondly, republican sympathisers are aware of the risks that the use of digital platforms can entail[32].

2.6. The current state of the threat

Generally speaking, EU counter-terrorism initiatives and strategies, including Directive 2017/541 on Combating Terrorism, have attempted to cover all forms of terrorism. Taking into consideration the wording of the Directive on Combating Terrorism, which will be further deepened in the second chapter of the present thesis, the Directive has addressed all forms of terrorism offences due to its broad definitions. Nevertheless, national transpositions of the document have diverged largely among Member States, therefore some of them prosecute certain offences which other states do not even take into consideration. This is exactly the case of the German penal code, since it contemplates only acts perpetrated by organised groups, leaving aside acts conducted by lone actors[33]. Upon reviewing most recent policy documents, reports, and assessments, it becomes evident that the terrorism threat landscape in the EU has undergone significant transformations since the implementation of EU's counter-radicalisation policies. While jihadism continues to pose a threat, albeit in a more fragmented manner with lone actors and small groups carrying out most recent attacks, the initial concentration solely on jihadist terrorism has evolved into a more comprehensive approach addressing different manifestations of extremism.

[31] Ibid.
[32] Rickard, Kit. 2023. "25 Years after the Good Friday Agreement: Persistent Violence and the Role of Digital Platforms in Northern Ireland Today." GNET. April 11, 2023. https://gnet-research.org/2023/04/11/25-years-after-the-good-friday-agreement/.
[33] EU Counter-Terrorism Co-Ordinator. 2021.

As discussed by the Council in its meeting in October 2019, a growing interest has been directed towards right-wing extremism. In fact, the Council meeting called for the development and sharing of good practices in order to prevent, detect and address the threat stemming from this branch of terrorism and it requested MSs to address the spread of right-wing extremist content online and offline[34]. In addition to the discussion in the Council, some Member States[35] also decided to address the issue by creating a project-based collaboration facilitated by the European Commission and by agreeing on a non-legally binding definition of violent-right wing extremism[36] (VRWE). Overall, as highlighted by the Council of the European Union[37], during the pandemic, a strong presence of extremist groups of various ideological background has been detected. These groups have integrated the Covid-19 pandemic into their discourse, resulting in the emergence of extremist narratives that surpass conventional extremist perspectives. This increased presence of extremist groups online may lead to an increased polarisation of popular opinions soon.

In a December 2020 report on the role of algorithm amplification in promoting violent and extremist content, the EU Counter-Terrorism Co-Ordinator highlighted that, despite notable progress made in recent times, online platforms still serve as a channel for polarisation and radicalisation. In practice, recommendation algorithms often prioritise content associated with intense negative emotions, including extremist and divisive content, which hinders the visibility of more nuanced material[38]. The connection between online platforms and the surge of right-wing extremism was further emphasized in the Europol TE-SAT reports of 2021 and 2022. These reports specifically observed an escalated utilization of online video game platforms by right-

[34] Council of the European Union. 2019. "Outcome of Council Meeting - 3717th Council Meeting - Justice and Home Affairs."

[35] Bulgaria, Denmark, Finland, France, Germany, Greece, Ireland, Sweden. "Project Based Collaboration (PBC) on Violent Right-Wing Extremism (VRWE)." https://home-affairs.ec.europa.eu/system/files/2022-02/VRWE%20working%20definition_en.pdf.

[36] "are acts of individuals or groups who use, incite, threaten with, legitimise or support violence and hatred to further their political or ideological goals, motivated by ideologies based on the rejection of democratic order and values as well as of fundamental rights, and centred on exclusionary nationalism, racism, xenophobia and/or related intolerance." European Commission. 2021a. "Project Based Collaboration (PBC) on Violent Right-Wing Extremism (VRWE)." https://home-affairs.ec.europa.eu/system/files/2022-02/VRWE%20working%20definition_en.pdf.

[37] Council of the European Union. 2019.

[38] EU Counter-Terrorism Co-Ordinator. 2020. "The Role of Algorithmic Amplification in Promoting Violent and Extremist Content and Its Dissemination on Platforms and Social Media."

wing extremist groups for communication and the dissemination of propaganda[39]. As far as the forecast indicated in the analysis conducted by the International Counter-Terrorism Centre (ICCT), between 2019 and 2021, right-wing extremism was claimed to be possibly escalating in the next years, especially since it could take advantage of the Covid-19 protest movements and claim its entire leadership.

Alongside this, the ICCT has further highlighted in its concluding remarks that the left-wing and anarchist counterpart was expected to rise in the following years given the perception of a strong right-wing movement[40]. As a matter of facts, most of the terrorist attacks reported in the EU in 2022 were of leftist-anarchist origin, around 18 attacks, of which 13 were completed. Most of them were conducted in Italy (8), followed by Greece (3), Belgium (1) and Spain (1). The EU-SAT 2023 reported that, in 2022, there was an upturn in left-wing terrorist attacks compared to 2021, during which only one attack was reported by a Member State. The fluctuations in the number of terrorist attacks over the past three years can be attributed, at least in part, to the varying classification of left-wing incidents as either terrorist attacks or extremist incidents by the reporting countries.

As far as the use of the internet is concerned, the report identified that the use of technology and the internet, encompassing social media platforms, instant messaging applications, online forums, and video gaming platforms, remained pivotal in the process of radicalisation, recruitment of individuals, and the dissemination of propaganda material. The primary obstacle in tackling this particular aspect of the terrorist threat continues to be the presence of end-to-end encryption features in applications. These features hinder the ability of law enforcement and other authorised bodies to effectively remove online content promoting violent extremism. As the report further underlines, throughout 2022, terrorist and violent extremist entities and

[39] Europol. 2022a. "European Union Terrorism Situation and Trend Report 2021." https://www.europol.europa.eu/publications-events/main-reports/tesat-report. And Europol. 2022b. "European Union Terrorism Situation and Trend Report 2022." https://www.europol.europa.eu/publication-events/main-reports/european-union-terrorism-situation-and-trend-report-2022-te-sat.

[40] Van Dongen, Teun, Matthew Wentworth, and Hanna Rigault Arkhis. 2022. "Terrorist Threat Assessment." *International Centre for Counter-Terrorism.*

individuals persisted in leveraging gaming-related platforms for recruitment endeavours and the dissemination of propaganda. Similarly, right-wing extremist actors exploited the gaming realm by constructing virtual realms within popular video games that embodied right-wing extremist ideologies, featuring recreations of neo-Nazi elements, anti-Semitic content, and themes targeting the lesbian, gay, bisexual, transgender, queer+ (LGBTQ+) community[41].

Coupled with EU INTCEN[42] data, Europol TE-SAT reports of the past few years suggest that despite left-wing/anarchist terrorism is gaining the upper hand, it is far less lethal than jihadist terrorism and right-wing extremism[43]. The main activities of left-wing and anarchist groups consist in perpetrating minor attacks against critical infrastructures, by causing large-scale power outages, and against public and private property, causing millions of euros of damages; participating in rallies and protests and collecting funds for imprisoned like-minded[44]. The motivations behind these attacks remained the same: opposition to capitalism and to the state. Police forces have been increasingly targeted by the leftist and anarchist groups, especially during demonstrations where the black-bloc tactic is employed. The latter foresees that all demonstrators dress in black and hide their faces, while brutally confronting law enforcement forces and political opponents[45].

As far as the number of arrests in this category is concerned, as underlined by the ICCT report for 2019-2021[46], individuals pertaining to left-wing and anarchist organisations have been detained mostly in Mediterranean countries, Italy registering the highest number, followed by Greece, France, Spain and Portugal. However, the number of arrests is not necessarily related to the number of attacks carried out in a Member State. In fact, in the case of Germany, the country has been subject to a high number of attacks by leftist and anarchist movements but no arrest pertaining to this category has been registered. This may be explained by looking at the how German

[41] Europol. 2023a.
[42] EU Intelligence and Situation Centre.
[43] EU Counter-Terrorism Co-Ordinator. 2021.
[44] Europol. 2023a. and EU Counter-Terrorism Co-Ordinator. 2021.
[45] Europol. 2023a.
[46] Van Dongen, Teun, Matthew Wentworth, and Hanna Rigault Arkhis. 2022.

authorities categorise violent actions performed by left-wing and anarchist groups, since they are mainly classified as "violent" but not terrorist in nature[47].

In addition, the left-wing extremist movement has been consistently aligned with the Kurdish cause and the PKK, which has been a persistent concern. Not only there has been ideological support, but certain left-wing extremists have also engaged in training and combat alongside Kurdish forces in conflict zones for an extended period. In 2022, several Member States reported the repatriation of Foreign Terrorist Fighters from Rojava in North-East Syria. These individuals have received combat training and, as a result, may pose a potential threat to the security of the Member States (Europol 2023a). It has been noted that some volunteers belonging to leftist-anarchist organisations in the EU have joined also the YPG (People's Defence Unit), a Kurdish group fighting the Islamic State in Syria, as they are united by similar ideological convictions. However, since the EU does not recognise the YPG as a terrorist group, the volunteers leaving the EU, and joining this latter group in its armed fight in Syria, are not classified as foreign terrorist fighters and, consequently, do not face the possibility of being prosecuted in their home countries[48]. Some experts in the EU have asserted that their return does not represent a significant threat to home countries since individuals join the PKK cause, therefore it is not in their interest carrying out terrorist attacks in the EU. However, Greek volunteers active in YPG have reportedly showed interest in demonstrating the skills acquired in Syria in their home country[49].

3. The European Union instruments in the fight against terrorism: before and after Directive EU 2017/541

3.1. The EU first approach to terrorism

The terrorist threat in the European Union represents anything but a new phenomenon. Member States such as Italy, Spain, France, and the United Kingdom, have distinguished themselves in their history in the fight against endogenous forms of

[47] Bundesministerium des Innern, für Bau und Heimat. 2021. "Verfassungsschutzbericht 2020," 122–23.
[48] EU Counter-Terrorism Co-Ordinator. 2021.
[49] FRANCE24. 2018. "Aux Côtés Des Kurdes à Afrin : La Litigieuse Question Du Retour Des Combattants Français (2/2)." France 24. February 23, 2018. https://www.france24.com/fr/20180221-syrie-afrin-kurdes-litigieuse-question-retour-combattants-francais-partie2.

terrorism[50]. Historically speaking EU counter-terrorism policy can be traced back to 1970, when the European Political Cooperation (EPC) started as a separate and additional framework of cooperation between the then nine Member States of the Communities. According to the Cooperation, States agreed to cooperate on foreign policy matters[51] in order to respond to the terrorist attacks of the 1960s-1970s. However, soon after the EPC foundation, Member States became increasingly dissatisfied with the outcome of this international and intergovernmental cooperation and came to the conclusion that a more restricted, regional, approach would be more efficient in order to tackle the terrorist threat. Therefore, in addition to responding to the issue through diplomatic efforts made at the EPC level, states began also to develop a counter-terrorism policy both at the operational and legal level. As far as the operational aspect is concerned, the TREVI group was founded, whereas, from a legal standpoint, in 1979 the Member States negotiated the Dublin Agreement, through which the parties committed to the homogenous application of the Council of Europe's 1977 *European Convention on the Suppression of Terrorism* (ECST). Nevertheless, the implementation of both these instruments was characterised by difficulties, since most States refused to ratify the agreements due to fears of potential loss of sovereignty over the terrorism field[52].

The TREVI group contributed to adopt the first counter-terrorism measures in the European Community and served to frame terrorism as a crime[53]. Established in 1975, the TREVI framework, shortened version of *Terrorisme, Radicalisme, Extrémisme et Violence Internationale*[54], consisted of an intergovernmental network of representatives of Justice and Home Affairs Ministries, created in response to numerous terrorist attacks, and in particular in response to the hostage taking and

[50] Bąkowski, Piotr. 2023. "Briefing EU Policies -Insights." *Members' Research Service PE* 739: 395.
[51] Fitzgerald, Garret. 1976. *European Political Cooperation.* In Robertson, A.H. (eds) European Yearbook / Annuaire Europeen. Springer, Dordrecht.

[52] Bures, Oldrich. 2006. "EU Counterterrorism Policy: A Paper Tiger?" *Terrorism and Political Violence* 18 (1): 57–78. https://doi.org/10.1080/09546550500174905.
[53] Baker-Beall, Christopher. 2013. "The Evolution of the European Union's 'Fight against Terrorism' Discourse: Constructing the Terrorist 'Other.'" *Cooperation and Conflict* 49 (2): 212–38. https://doi.org/10.1177/0010836713483411. And Heikkilä, Mikaela, and Elina Pirjatanniemi. 2020. "EU Security and Counter-Terrorism Policies and Human Rights." *The European Union and Human Rights*, December, 457–77. https://doi.org/10.1093/oso/9780198814191.003.0021.
[54] Bąkowski, Piotr. 2023.

massacre that took place at the 1972 Olympic Games in Munich, Germany, and to different threats arising from nationalist groups across Europe[55]. Nevertheless, despite its initial task of coordinating the European Community members' counter-terrorism responses, the TREVI group extended its reach to include a wide range of matters concerning cross-border policing between the states. With the entry into force of the Treaty of Maastricht, in 1992, the TREVI group ceased its function and was absorbed into the so-called Justice and Home Affairs (JHA) pillar of the European Union[56].

In particular, mention of preventing and combating terrorism was made in Article K.1 of the Maastricht Treaty[57], among "matters of common interest". Even after the enforcement of the Amsterdam Treaty in 1997, the fight against terrorism continued to be listed among the primary objectives of the Police and Judicial Cooperation in Criminal Matters (Title VI Treaty on the European Union). Therefore, since the fight against the terrorist menace was still placed under "the third pillar", the adoption of policies and initiatives regarding the matter was constrained by the pillar structure and its deriving limits, namely the impossibility to adopt acts such as Directives and Regulations. What follows is that the first instruments that were adopted in the fight against terrorism were Framework Decisions, which limited Member States to the intended outcome but gave national authorities the option of form and manner[58].

3.2. The European Union's response to 9/11: the first critical juncture

The events of 11 September 2001 marked a turning point in the counter-terrorism efforts at the European level. The World Trade Centre attacks triggered an immediate perception that the terrorist threat was not only evolving but also global and borderless.

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[55] de Londras, Fiona, and Josephine Doody. 2017. *Impact, Legitimacy and Effectiveness of Eu Counter Terrorism.* S.L.: Routledge. And Council of the European Union. 2018. "Preparatory Dossier for the Interview with the Former Director."

[56] Council of the European Union. 2018.

[57] Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, […] (for complete version see https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A12002M029)

[58] Maliszewska-Nienartowicz, Justyna. 2017. "A New Chapter in the EU Counterterrorism Policy? The Main Changes Produced by the Directive 2017/541 on Combating Terrorism." *Polish Yearbook of International Law.* https://doi.org/10.7420/pyil2017h.

Following the events of September 11, the European Union embarked on a progressive harmonisation of counter-terrorism laws among its member states. This marked a shift away from the previously dominant intergovernmental approach that had characterised European institutional activities since the 1970s. The EU took on a central role in combating terrorism, introducing a range of criminalisation obligations for its p. In response to terrorist attacks in Europe, the EU legislature seized upon the sense of urgency prevailing during the first decade of the 21st century to foster cooperation in the realms of judiciary, law enforcement and legal integration among its member states[59]. In the aftermath of this tragic event, in fact, the European Council adopted the *Anti-terrorist roadmap*[60] listing 46 measures, which was later updated in November 2002, and the first Plan of Action on the *European policy to combat terrorism* of 21 September 2001[61] aimed at: enhancing police and judicial cooperation, developing international legal instruments, putting an end to the funding of terrorism, strengthening air security and coordinating the European Union's global action (European Council 2001b). Following the Plan of Action, on 13 June 2002, the European Union adopted two important pieces of legislation with regards to the fight against the terrorist menace: the Council Framework Decision on Combating Terrorism (2002/475/JHA)[62] and the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)[63].

The first mentioned instrument, the Council Framework Decision on Combating Terrorism, played a crucial role in the European Union's counter-terrorism policy by introducing a significant legislation that provided for a harmonised definition of terrorism in all Member States. This marked the first time that such shared definition

[59] Rossi, Francesco. 2022. *Il Contrasto al Terrorismo Internazionale Nelle Fonti Penali Multilivello*. Jovene editore.
[60] European Council. 2001a. "Anti-Terrorism Roadmap" Doc. SN 4019/01. www.statewatch.org/media/documents/news/2001/oct/sn4019-r1.pdf.
[61] Conclusions and Plan of Action of the Extraordinary Council European Meeting on 21September 2001. Maliszewska-Nienartowicz, Justyna. 2017.
[62] For more visit https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32002F0475
[63] For more visit https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584. Păunescu, Marius, and Adrian Băncilă. 2019. "Eu Instruments for Preventing and Combating Terrorism."

was established within the EU[64]. In addition, in order to prevent terrorists from seeking shelter in a Member State with milder laws, this Framework Decision established the minimum level of criminal penalties for terrorist acts insofar as they were subject to harsher deprivations of liberty than those allowed by national law. Furthermore, the Framework Decision imposed obligations on Member States to criminalise directing a terrorist group and participating to the activities of a terrorist group (Article 2§2(a)(b)), and to criminalise, as offences liked to terrorist purposes, acts of aggravated theft, extortion and drawing up false administrative documents connected with terrorist purposes (Article 3 (a)(b)(c)). The second instrument, the Council Framework Decision on the European arrest warrant and surrender procedures between Member States, provided for a total of 32 offences justifying the creation of the European Arrest Warrant (EAW), terrorism being the second listed[65].

3.3. The four pillars to counter terrorism

While the main responsibility for combating terrorism laid within the Member States, the European Union sought to fulfil a supportive role in addressing the transnational nature of the threat[66]. In the wake of the Madrid train bombings in March 2004, in fact, the European Union decided to reinforce its grip against the terrorist threat in the continent by revising the *EU Plan of Action on Combating Terrorism*[67] and by adopting a *Declaration on Combating Terrorism* which provided for the establishment of a Counter-Terrorism Co-Ordinator (CTC). The Co-Ordinator had, and is still entitled to, the responsibility of organising counter-terrorism efforts inside the EU, overseeing the application of the EU's counter-terrorism policy, and fostering better communication between the EU and non-EU nations[68]. The Counter-Terrorism Co-

[64] Kaunert, Christian, and Sarah Léonard. 2019. "The European Union's Response to the CBRN Terrorist Threat." *La Sécurité Intérieure Européenne Au Prisme de La Sociologie de l'Action Publique* 65. https://doi.org/10.2307/48598893.

[65] Păunescu, Marius, and Adrian Băncilă. 2019.

[66] International Centre for Counter-Terrorism, Bérénice Boutin, Grégory Chauzal, Jessica Dorsey, Marjolein Jegerings, Christophe Paulussen, Johanna Pohl, Alastair Reed, and Sofia Zavagli. 2016. "The Foreign Fighters Phenomenon in the European Union Profiles, Threats & Policies."

[67] de Londras, Fiona, and Josephine Doody. 2017

[68] European Council, and Council of the European Union. 2022. "The EU's Response to Terrorism." December 15, 2022. https://www.consilium.europa.eu/en/policies/fight-against-terrorism/#:~:text=borders%20(background%20information)-,EU%20counter%2Dterrorism%20coordinator,the%20EU%20Counter%2DTerrorism%20Coordinator.

Ordinator later drafted the *EU Counter-Terrorism Strategy*, which was then adopted by the European Council in 2005, in the aftermath of the 7/7 London Bombings[69].

The abovementioned strategy was based on four main pillars: prevent, protect, pursue and respond (PPPR). First of all, by focusing on prevention, the *Counter-Terrorism Strategy* focused on preventing the phenomenon of radicalisation and forestalling recruitment. The second main pillar of protecting against terrorism aimed to lessen the likelihood of attacks and to lessen the effects of any potential terrorist strikes. The third pillar, pursue, was directed at disrupting terrorist activity, ranging from planning to the creation of networks striving to pursue terrorist aims abroad. Lastly, the fourth pillar, respond, focused primarily on the victims' protection and on the preparation of crises response mechanisms[70]. Furthermore, the strategy was aimed to have a global reach and put the emphasis on cooperation with non-EU countries and international institutions. In fact, since the fight against terrorism acquired an external dimension, the Union has engaged in such cooperation by exchanging information, providing assistance in developing counter-terrorism capabilities outside the Union and cooperation between law enforcement agencies[71] .

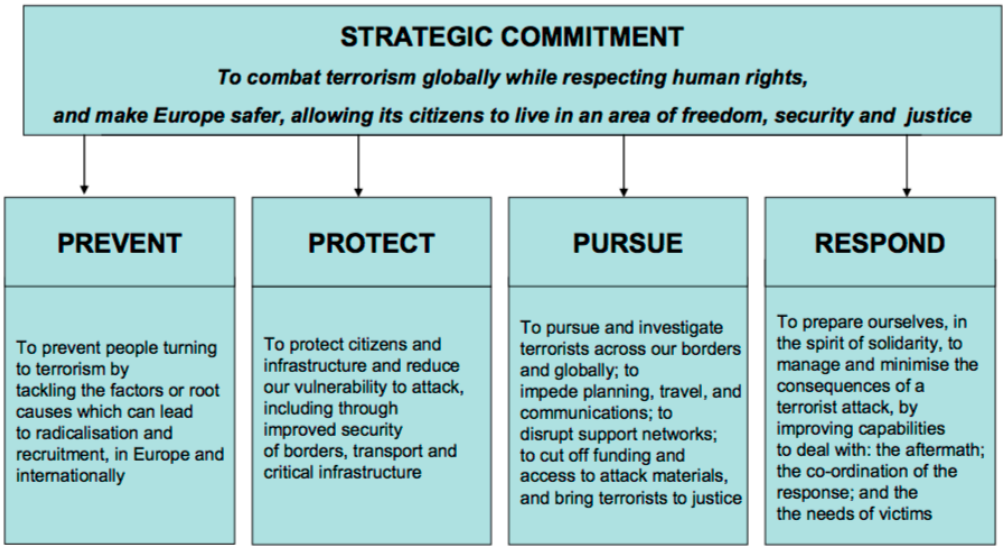

Figure 1. *Four Pillars of the EU Counter-Terrorism Strategy*[72]

[69] International Centre for Counter-Terrorism, et al. 2016.
[70] Ibid.
[71] Heikkilä, Mikaela, and Elina Pirjatanniemi. 2020.
[72] See Presidency and CT Co-Ordinator (CTC), "The European Union Counter-Terrorism Strategy", data.consilium.europa.eu/doc/document/ST%2014469%202005%20REV%204/EN/pdf.

It can be asserted that what distinguished the European Union's approach in the fight against terrorism from the one taken by the United States in the aftermath of 9/11 terrorist attacks is that, while the latter constructed a single threat narrative that viewed terrorism as an external security threat while declaring the "war on terror", the former's "fight against terrorism" reacted to the phenomenon by formulating a multi-faceted threat narrative according to which terrorism was primarily a threat to internal security and therefore needed to be fought through criminal justice means[73]. In fact, terrorism has been perceived mainly as a criminal offence since it has been associated with organised crime and labelled in public discourses as a "criminal act". In the *EU Counter-Terrorism Strategy* opening section, it was explicitly implied that terrorism ought to be viewed as equivalent to criminal behaviour. The document asserted that terrorism is criminal and cannot be justified in any circumstances[74]. In addition, it was *The Hague Programme* that, in the aftermath of the Madrid train bombings, further emphasized the interconnection of these two dangers by repeatedly highlighting the necessity of a transnational strategy in addressing "terrorism and organised crime"[75]. As Christopher Baker-Beall[76] claims, throughout the conceptualization of the "fight against terrorism" narrative, the European Union has always presented the latter threat in contraposition to the values, liberties and rights that constitute the basis of the Union, since terrorism jeopardizes its constitutive principles.

3.4. Increased tools in the fight against terrorism

Despite the European Union had already come across the terrorist menace long before 9/11, with the release of the *European Security Strategy*[77] in 2003, the Union addressed terrorist attacks as pertaining to a "new" branch of terrorism different to ones that the Union had to face prior to that moment[78]. According to Spence[79], the portrayal of terrorism as a comprehensive and multi-faceted threat has been instrumental in

[73] Baker-Beall, Christopher. 2013.

[74] Council of the European Union. 2005a. "The European Union Counter-Terrorism Strategy." November 30, 2005. https://data.consilium.europa.eu/doc/document/ST%2014469%202005%20REV%204/EN/pdf

[75] Council of the European Union. 2005b. "The Hague Programme: Strengthening Freedom, Security and Justice in the European Union." *Official Journal of the European Union,* March. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XG0303(01).

[76] Baker-Beall, Christopher. 2013.

[77] For more visit https://data.consilium.europa.eu/doc/document/ST-15895-2003-INIT/en/pdf

[78] Baker-Beall, Christopher. 2013.

[79] Spence, David. 2007. *The European Union and Terrorism*. London, U.K.: John Harper Publishing.

justifying and legitimising a wide array of EU security measures that encompass different aspects of internal and external security policy. In fact, as the author asserts, by framing jihadist terrorism as a "new" type of threat, new agencies at the European Union level such as Eurojust were founded, while other pre-existing agencies saw their competences increased, as in the case of Europol, which has been operational since 1999. The former agency, Eurojust, facilitates collaboration among relevant authorities in various Member States through mutual legal assistance, while the latter, Europol, the law enforcement agency of the European Union, facilitates the exchange of intelligence and provides support to Member States[80].

In addition, cooperation between the Old Continent and the U.S. was intensified through agreements such as the Passenger Names Record (PNR) agreement, that enables the transfer of certain passenger data to Customs and Border Protection (CBP) to ensure that travel is carried out efficiently and safely[81]. Aside from international agreements, the European Union's efforts to combat terrorism, primarily conducted within the Area of Freedom, Security, and Justice (AFSJ), encompass various measures across areas aside from criminal law, such as police cooperation, countering terrorism financing, and preventing radicalisation[82]. As observed by Ojanen[83], there has been also a substantive increase in the use of administrative law and measures to combat terrorism, as freezing of assets and not granting visas. Parallel to this, there was a growing trend in the use of criminal law especially when, in 2008, the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism was amended by Council Framework Decision 2008/919/JHA[84], particularly in light of the evolution of the terrorist threat thanks to new technologies and in particular the Internet, that "is used to inspire and mobilise local terrorist networks and individuals in Europe and also serves as a source of information on terrorist means and methods, thus functioning as a 'virtual training camp'." [85]. The novelty introduced by

[80] International Centre for Counter-Terrorism et al. 2016
[81] U.S. Department of Homeland Security. 2022. "Passenger Name Records Agreements | Homeland Security." Www.dhs.gov. September 15, 2022. https://www.dhs.gov/publication/passenger-name-records-agreements#:~:text=The%20Passenger%20Name%20Record%20(PNR.
[82] Heikkilä, Mikaela, and Elina Pirjatanniemi. 2020.
[83] Ojanen, Tuomas . 2013. "Administrative Measures in Counter-Terrorism Activities – More Leeway for the Imperatives of Security at the Expense of Human Rights?" In *Law and Security in Europe: Reconsidering the Security Constitution*, 179–95. Cambridge: Intersentia.
[84] For more visit https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0919
[85] Council Framework Decision 2008/919/JHA [2008] OJ L330/21.

the present amended version was the inclusion of offenses of "public provocation to commit a terrorist offence, recruitment for terrorism, training for terrorism" under the umbrella of Article 3 on offences linked to terrorist activities[86].

As highlighted by Heikkilä and Pirjatanniemi[87], in the past decade, there has been a significant increase in the number of measures taken in all four pillars of the European Union's counter-terrorism strategy. A noticeable trend in the Union's approach to counter-terrorism is the growing emphasis on a proactive stance, with a focus on combating terrorism threats. This shift has raised concerns that, in the fight against terrorism, security considerations sometimes take precedence over individual rights and freedoms. Additionally, the design of EU counter-terrorism measures has been found to be somewhat inconsistent, as they are often hastily adopted as immediate responses to shocking terrorist attacks. In the aftermath of the Lisbon Treaty, counter-terrorism legislation is now under Title V, Area of Freedom, Security and Justice of the Treaty on the Functioning of the European Union (TFEU). Article 83 TFEU[88] includes terrorism as one of the serious offences that have a cross-border aspect, and it allows for the potential establishment of shared minimum regulations. An additional significant provision is the "solidarity clause" (Article 222 TFEU)[89], which states that the European Union should utilize all available tools, including military resources provided by Member States, to prevent or respond to a terrorist attack occurring within any of its member countries[90].

3.5. The rise of the Foreign Fighters' phenomenon

Furthermore, the existing literature, as reported by Kaunert and Léonard[91], has generally agreed on the fact that the evolution of the European Union's counter-terrorism policy has predominantly been driven by reactive measures, responding to specific terrorist plots or attacks. This pattern often involves periods of inactivity followed by bursts of intense activity. In fact, more recently, the Union has responded mainly to the activities of two prevalent groups in the international terrorist scenario:

[86] Ibid.
[87] Heikkilä and Pirjatanniemi. 2020.
[88] For complete version https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E083
[89] For complete version https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E222
[90] Bąkowski, Piotr. 2023.
[91] Kaunert, Christian, and Sarah Léonard. 2019.

Al-Qaeda and Daesh or ISIL[92]. In particular, from 2012 onwards, initial reports emerged about individuals, referred to as "foreign fighters" (FF), who were departing from their home countries or regular places of residence to join the Syrian uprising against the Assad regime[93]. Even if there no unique internationally recognised definition of foreign fighter, the Geneva-based Academy of International Law and Human Rights[94] defines a foreign fighter as "an individual who leaves his or her country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who is primarily motivated by ideology, religion, and/or kinship".

From this kind of definition, one could argue that the phenomenon of FF is strictly linked to religion, however, when the United Nations security Council adopted Resolution 2178, in September 2014, it chose to define this category of individuals as "foreign *terrorist* fighters", leaving aside eventual motivations for mobilisation, by stating these are:

> "…nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training, including in connection with armed conflict."[95]

In June 2014, the Soufan Group, a New York- based security intelligence consultancy, published its initial report on Foreign Fighters in Syria, where it estimated the presence of around 12,000 individuals joining the conflict from 81 different countries[96]. While the Group asserted that there had been an overall increase in the number of individuals leaving to join the Islamic State of Iraq and the Levant (ISIL)

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[92] Used interchangeably with ISIS, IS and Daesh. See European Union Agency for Asylum. 2020. "1.4. Islamic State of Iraq and the Levant (ISIL)." https://euaa.europa.eu/country-guidance-syria/14-islamic-state-iraq-and-levant-isil.
[93] International Centre for Counter-Terrorism et al. 2016.
[94] Academy of International Law and Human Rights. 2014. "Foreign Fighters under International Law."

[95] United Nations Security Council. 2014. "Security Council Resolution 2178 (2014)." https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2178.pdf.
[96] Soufan Group. 2014. "Foreign Fighters, an Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq."

or other violent extremist groups in Syria or Iraq, the regions which, since June 2014, had shown a more prominent peak in the numbers were Western Europe and Russia/Central Asia. Of relevance was the flow of individuals who had returned to their home countries in Western Europe, which, as highlighted by the Soufan Group, represented a high security risk to the states. In fact, as the reports states "the average rate of returnees to Western countries" amounted to "around 20-30%, presenting a challenge to security and law enforcement agencies that must assess the threat they pose"[97].

Nevertheless, as stated in the European Parliament research *Foreign fighters: Member State responses and EU action*, the phenomenon of foreign fighters is not recent and, in fact, from 1980 to the mid-2010s "between 10.000 and 30.000 such fighters took part in armed conflict in the Muslim World"[98]. Possibly of greater significance, the mobilisation of foreign fighters empowers transnational terrorist organisations like Al-Qaeda, as participating in warfare serves as the primary pathway for individuals to engage in more radical forms of militancy. In addition, the phenomenon of foreign fighters is pivotal to understand transnational Islamist militancy since most transnational jihadist[99] groups derive from foreign fighters' mobilisation[100] . However, the events of the Arab Springs, that sparked into a full-blown civil war in Syria, contributed to the acquisition of a renewed dimension for the FF phenomenon[101].

In response to this evolution of the terrorist threat, in early 2013 the CTC first highlighted the importance to address this menace posed by individuals leaving for Syria and/or Iraq and returnees by formulating 22 proposals that were subsequently

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[97] Ibid.
[98] Bąkowski, Piotr, and Laura Puccio. 2016. "Foreign Fighters - Member State Responses and EU Action." European Parliament.
[99] As explained in the May 2015 report of the European Parliament, "while often equated with 'holy war', jihad generally means a religiously inspired 'effort' or 'struggle' towards a goal of a spiritual, personal, political or military nature." For more visit https://www.europarl.europa.eu/RegData/etudes/ATAG/2015/557007/EPRS_ATA(2015)557007_EN.pdf European Parliament. 2015a. "At a Glance - Understanding Jihad and Jihadism." https://www.europarl.europa.eu/RegData/etudes/ATAG/2015/557007/EPRS_ATA(2015)557007_EN.pdf.
[100] Hegghammer, Thomas. 2011. "The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad." *International Security* 35 (3): 53–94.
[101] Bąkowski, Piotr, and Laura Puccio. 2016.

approved by the Council in June of the same year. These 22 action points were likewise encompassed in the legally binding Resolution 2178 of the United Nations Security Council (September 2014), along with the recommended practices outlined in the *The Hague/Marrakech Memorandum*[102] adopted by the Global Counterterrorism Forum (GCTF) towards the end of 2014[103]. The CTC further underlined in his report the four areas of action where the European Union action could support its Member States, namely "prevention, information exchange on identification and detection travel, criminal justice response and cooperation with third countries"[104]. In August 2014, the European Council reached the conclusion that the establishment of an Islamic Caliphate in Iraq and Syria, along with the export of terrorism by Islamist extremists, posed a direct security threat to European countries. Recognising the gravity of the situation, the European Council emphasized the need for resolute measures to be taken to counter the influx of foreign fighters[105].

However, there exists a certain ambiguity in distinguishing between who is classified as a "terrorist" and who is considered a "foreign fighter". EU documents often employ the terms Foreign Fighter (FF), Foreign Terrorist Fighter (FTF), and terrorists in a somewhat interchangeable manner[106]. In the aftermath of the attacks to Jewish Museum in Brussels, not only the 2005 *Counter-Terrorism Strategy* was revised but also European Commission Radicalisation Awareness Network (RAN), that collects data on FF, issued the *Declaration of Good Practices for Engagement with Foreign Fighters for Prevention, Outreach, Rehabilitation and Reintegration*[107]. In October 2014, the Council discussed the issue of FF in-depth agreeing on a series of measures to take in order to prompt a response to the phenomenon, namely: finalizing the EU PNR directive, improving the checks at internal and external borders of the Schengen area, update the Council Framework Decision on Combating

[102] For complete version https://www.thegctf.org/documents/10162/140201/14Sept19_The+Hague-Marrakech+FTF+Memorandum.pdf
[103] International Centre for Counter-Terrorism et al. 2016.
[104] European Council and Council of the European Union. 2023. "Timeline: The EU's Response to Terrorism." Www.consilium.europa.eu. March 9, 2023. https://www.consilium.europa.eu/en/policies/fight-against-terrorism/history-fight-against-terrorism/.

[105] European Council. 2014. "Special Meeting of the European Council (30 August 2014) – Conclusions." https://www.consilium.europa.eu/Uedocs/Cms_data/Docs/Pressdata/En/Ec/144538.Pdf
[106] Ibid.
[107] Bąkowski, Piotr, and Laura Puccio. 2016.

Terrorism of June 2002, improve information sharing with an increased role for both Eurojust and Europol and ultimately expediting already existing measures[108].

On 20 October 2014 the Council adopted the *EU Counter-Terrorism/Foreign Fighters Strategy* requiring a comprehensive approach, covering several priority areas, among which the most important are: the political aspect, that is to say providing support to the Iraqi authorities and the moderate opposition in Syria; prevention, meaning collaborating with source countries of foreign fighters and enhancing strategic communication capabilities; pursuit, enhancing cooperation with third countries to detect recruitment networks and foreign fighters coupled with strengthening border security in neighbouring countries of Syria and Iraq; protection, i.e. developing regional capabilities in aviation security and preventing the proliferation of weapons from Syria and Iraq; response, specifically bolstering regional capacities to effectively respond to terrorist attacks; and finally engagement with key partners, to be more precise actively involving regional and other important partners, aiding in the implementation of UN Security Council resolutions by all nations[109].

3.6. The 2015-2016 critical juncture

In early January 2015, the European Union and the entire world was shocked by the atrocity of the attacks carried out in Paris, commonly known as the *Charlie Hebdo* shooting, during which the French state went through one of its worst security crises of all times. The attacks started with the massacre at the *Charlie Hebdo* offices, a satirical magazine located in the French capital, carried out by the Saïd and Chérif Kouachi, who took the life of 12 people among journalists and cartoonists[110]. The two brothers were both French nationals of Algerian origin and were previously known to the French security services. The two of them were known to the authorities either for having helped militants reach Iraq or having travelled to Yemen to train with Al-Qaeda

[108] Council of the European Union. 2014a. "Press Release 3336th Council Meeting Justice and Home Affairs." https://www.consilium.europa.eu/media/25127/145033.pdf.

[109] General Secretariat of the Council. 2015a. "Outline of the Counter-Terrorism Strategy for Syria and Iraq, with Particular Focus on Foreign Fighters." data.consilium.europa.eu/doc/document/ST-5369-2015-INIT/en/pdf.

[110] Penketh, Anne. 2015. "Charlie Hebdo Attack: The 12 Victims of the Terror Attack." *The Guardian*, January 8, 2015, sec. World news. https://www.theguardian.com/world/2015/jan/07/cartoonists-victims-charlie-hebdo-attack.

militants in 2011[111]. Following the *Charlie Hebdo* shooting, the European Union's response escalated and, in fact, during the same month of the attack, the Justice and Home Affairs Ministers met informally in Riga where a joint statement was issued. According to the latter, "the recent terrorist-attacks in France, the counter-terrorism measures taken in Belgium and the growing threat posed by the phenomenon of FTF all over the world sends a clear and strong message that counter-terrorism efforts have to be reinforced both at national and EU level"[112]. Furthermore, in the Joint Statement, JHA Ministers urged Europol to enhance the framework for exchanging information and conducting data-matching.

In February 2015, during an informal meeting of the Heads of State or Government in Brussels, the members of the European Council advocated for the comprehensive utilization of the existing Schengen framework and "proceed without delay to systemic and coordinated checks on individuals enjoying the right of free movement against databases relevant to the fight against terrorism based on common risk indicators"[113]. Later in October 2015, the European Parliament approved a non-binding resolution according to which illicit content that spreads violence and extremism should be deleted, "but in line with fundamental rights and the freedom of expression"[114] . Despite all the above-mentioned attempts to speed up the adoption of measures in order to counter the terrorist threat in the Union, on 13 November 2015, another series of coordinated terrorist attacks took place, operated mostly by Belgian and French nationals. Following these tragic events, former French President François Hollande immediately declared the state of emergency, the longest in French history, during which police authorities acted under increased emergency powers, amongst other aspects. According to Olivier Roy, an influential scholar specialized in the

[111] Euronews. 2015. "Who Are the Brothers Kouachi." January 9, 2015. https://www.euronews.com/2015/01/09/who-are-the-charlie-hebdo-suspects.
[112] General Secretariat of the Council. 2015b. "Informal Meeting of Justice and Home Affairs Ministers in Riga on 29 and 30 January 2015." Council of the European Union. https://data.consilium.europa.eu/doc/document/ST-5855-2015-INIT/en/pdf.

[113] European Council. 2015. "Informal Meeting of the Heads of State or Government Brussels, 12 February 2015 - Statement by the Members of the European Council." Www.consilium.europa.eu. February 12, 2015. https://www.consilium.europa.eu/en/press/press-releases/2015/02/12/european-council-statement-fight-against-terrorism/.
[114] European Parliament. 2015b. "Work Together to Fight Online Radicalisation and Extremism, MEPs Urge EU States | News | European Parliament." Www.europarl.europa.eu. October 20, 2015. https://www.europarl.europa.eu/news/en/press-room/20151019IPR98397/work-together-to-fight-online-radicalisation-and-extremism-meps-urge-eu-states.

relations between Europe and Islam, the real issue that France and European countries had to face was not the radicalisation of the Muslim populations, but rather the "generational revolt" carried out by young extremists who had embraced a radical and simplistic understanding of Islam rooted in the ultraconservative movement[115].

Few days after the attacks, EU Defence Ministers came to the rescue of France by expressing their full support and readiness to furnish support, while President Hollande invoked of Article 42§7 of the Treaty of the European Union, better known as the "mutual assistance clause"[116]. In addition, as a result of the decision made by the Ministers of Justice and Home Affairs in November 2015, Europol inaugurated the European Counter Terrorism Centre (ECTC) in The Hague in January 2016, a central operational facility and knowledge hub in order to meet the increasing demand for the EU to enhance its counter-terrorism efforts and ensure a robust and efficient response to these evolving threats[117]. In the following months a general and diffused acceleration amongst European Union institutions took precedence in order to speed up the implementation of stricter counter-terrorism measures. Among the initiatives, JHA Ministers discussed the finalisation of the EU PNR Directive, which was eventually adopted by the European Parliament and by the Council in April 2016, in addition to measures aimed at strengthening judicial cooperation and information sharing, aside from tackling the traffic of firearms and targeting terrorist financing.

Furthermore, to comply with the applicable United Nations Security Council Resolutions, the Council of Europe *Additional Protocol on Foreign Terrorist Fighters*, signed by the EU in October 2015, and the Financial Action Task Force (FATF) Recommendation, the European Commission put forth a directive proposal in December 2015 aimed at combating terrorism[118]. In March 2017, the Council and the Parliament adopted the above-mentioned Directive on Combating Terrorism

[115] Open Society Foundations. 2016. "Talking Justice: The Aftermath of the Paris Attacks." Www.opensocietyfoundations.org. February 29, 2016. https://www.opensocietyfoundations.org/podcasts/talking-justice-the-aftermath-of-the-paris-attacks.
[116] Council of the European Union. 2015. "Foreign Affairs Council, 16-17 November 2015." November 17, 2015. https://www.consilium.europa.eu/en/meetings/fac/2015/11/16-17/.

[117] Europol. 2023b. "European Counter Terrorism Centre - ECTC." Europol. January 11, 2023. https://www.europol.europa.eu/about-europol/european-counter-terrorism-centre-ectc#:~:text=In%20January%202016%2C%20Europol%20created.
[118] Bąkowski, Piotr, and Laura Puccio. 2016.

(Directive 2017/541 on Combating Terrorism OJ 88/6) aimed to replace the Council Framework Decision on combating terrorism 2002/475/JHA as amended by the Council Framework Decision 2008/919/JHA and to amend Council Decision 2005/671/JHA[119]. As it will be further discussed in the second chapter of the present thesis, the 2017 Directive represents the main criminal instrument at the EU level as it provides the definition of terrorist offences but most importantly it sets the minimum level of penal sanctions for the latter. It can be asserted that this new legal instrument to counter the terrorist threat is in continuity with the previous pieces of legislation adopted at the EU but, at the same time, it represents a breaking point with the previous instruments since it was adopted in order to tackle the growing threat posed by "foreign terrorist fighters"[120] in the Union, and to increase the protection of victims of terrorism[121].

3.7. After *Paris* and *Brussels*: the current framework of EU instruments in the fight against terrorism

Overall, since 2015, combating terrorism has emerged as one of the central priorities within the European agenda on security, alongside the fight against organised crime and cybercrime. This agenda serves as the primary policy framework guiding the European Union's response to security challenges from 2015 to 2020. Over time, the security agenda has evolved into a broader concept known as the security union, culminating in the adoption of the *Security Union Strategy*[122] for the 2020-2025 period in July 2020. The new strategy draws upon various sources, including the work of the European Parliament's TERR committee (Special Committee on Terrorism) and deliberations within the Council of the EU, to determine the future direction of internal security within the EU[123]. In addition to this, the European Commission, by emphasising information exchange and cooperation between law enforcement at the national and supranational level, has set the goal of ensuring new legislative proposals

[119] Council Decision 2005/671/JHA od 20 September 2005 on the exchange of information and cooperation concerning terrorist offences (OJ L 210 6.8.2008, p.1)
[120] As referred to in Recitals (4) and (5) of Directive (EU) 2017/541
[121] Maliszewska-Nienartowicz, Justyna. 2017.
[122] For more visit https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/european-security-union_en#:~:text=The%20EU%20Security%20Union%20Strategy,-The%20European%20Commission&text=The%20strategy%20covers%20the%20period,our%20European%20values%20and%20principles.
[123] Bąkowski, Piotr. 2023.

in order counter terrorist financing[124]. As a matter of facts, this objective was pursued through the adoption of the Regulation 2018/1805 of 14 November 2018 on the mutual recognition of freezing of orders and confiscation orders[125]. The Regulation was adopted in order to provide suitable measures aimed at depriving organised groups and individuals, linked to terrorist networks, of assets intended to finance terrorism[126].

In December 2020, the European Commission unveiled a fresh counter-terrorism agenda for the European Union[127], which follows a similar framework comprising four key elements: anticipation, prevention, protection, and response. This agenda builds upon the accomplishments of previous years and outlines the EU's strategic actions for the future. It places emphasis on various aspects, including the development of strategic intelligence, enhancing preparedness and early detection capabilities through research and emerging technologies, combating radicalisation and extremist ideologies, particularly in the online sphere, bolstering the resilience of critical infrastructure, and ensuring the safety of individuals in public spaces. Additionally, it focuses on strengthening the security of external borders by addressing gaps in information-sharing tools such as the Schengen Information System (SIS) and by modernising frameworks like the Prüm framework[128] and the Advanced Passenger Information (API) scheme.

Lastly, the agenda aims to enhance cooperation between law enforcement agencies and the judiciary through the anticipated adoption of an EU police cooperation code[129]. In the upcoming years, the European Union shows a clear intention to strengthen its anti-terrorism strategies, focusing on improved information sharing and data handling for both investigative and preventive purposes. In particular, in 2021 the European Commission has launched a new initiative aimed at supporting

[124] Silva, Patrícia Godinho. 2019. "Recent Developments in EU Legislation on Anti-Money Laundering and Terrorist Financing." *New Journal of European Criminal Law*, April, 203228441984044. https://doi.org/10.1177/2032284419840442.
[125] For more visit https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018R1805
[126] Ochnio, Ariadna H. 2018. "Between the Medium and the Minimum Options to Regulate Mutual Recognition of Confiscation Orders." *New Journal of European Criminal Law* 9 (4): 432–45.
[127] For more visit https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0795
[128] The Prüm Framework enables a Member State to inquire about DNA, fingerprint, and vehicle registration data in the national databases of one or more other Member States through automated data exchange. For more see https://home-affairs.ec.europa.eu/whats-new/strengthening-automated-data-exchange-under-prum-framework_en
[129] Bąkowski, Piotr. 2023.

Member States in reporting cases linked to terrorism to Eurojust and Europol and at enhancing the functioning of the *Counter-Terrorism Register*, created in 2019 to strengthen judicial cooperation and to help prosecutors in coordinating and identifying suspects or networks under investigation in specific cases with potential cross-border implications[130]. As far as the digital space is concerned, in 2021 the Council and the Parliament adopted Regulation 2021/784 on preventing the dissemination of terrorist content online[131].

Finally, in order to increase the Union's resilience to cyber-attacks the legislators have replaced, on 16 January 2023, the Directive (EU) 2016/1148 with Directive (EU) 2022/255[132]. The new Directive assigns ENISA (European Union Agency for Cybersecurity) a number of new tasks including the development and maintenance of a European vulnerability strategy and the establishment and maintenance of a register for entities offering services across borders[133]. To enhance the effectiveness and efficiency of current and future databases, the Commission put forward proposals on improving the interoperability among EU information systems, enabling smarter and more targeted utilization. The system, which was adopted in 2019, is expected to be fully operational by the end of 2023[134].

4. The Terrorist Threat and Counter-Terrorism measures in the EU: effectiveness and shortcomings

4.1. Counter-terrorism measures: a closer overview on overarching measures

While counter-terrorism has long been part of the European Union policy-making, following 9/11 counter-terrorism policies and law have been increasingly adopted, this leading to an interference with several aspects of everyday life, starting from the management of law enforcement and border security to the handling of monetary transactions and the regulation of the internet. According to the SECILE (meaning Securing Europe through Counter-Terrorism: Impact Legitimacy and Effectiveness

[130] Eurojust. 2023. And Rossi, Francesco. 2022.
[131] For more visit https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R0784
[132] Also known as the NIS2 Directive, since it replaces the NIS Directive entered into force in 2018. For more visit x https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022R0255
[133] ENISA European Union Agency for Cybersecurity. 2023. "NIS Directive." ENISA. 2023. https://www.enisa.europa.eu/topics/cybersecurity-policy/nis-directive-new.
[134] Bąkowski. 2023.

research project, a EU-funded initiative composed of universities, supreme courts of different countries, a research institute, an NGO, an institute of technology and a SME), from 2001 to 2013 the European Union has adopted around 238 counter-terrorism measures ranging from decisions, directives and regulations in the field of Justice and Home Affairs policy, to framework decisions, conventions, resolutions and decisions in the area of Common Foreign and Security Policy Common Strategies, amongst others. Of these 238 counter-terrorism measures around 37% were legally binding and therefore either required direct application by Member States or necessitated transposition into national legislation.

The European Union is one of the main actors in the contemporary counter-terrorism field, as highlighted in the previous paragraph[135]. Overall speaking, prior to 9/11, the advancements made in the police and judicial cooperation areas, as advocated by the Maastricht Treaty, were often slowly and painfully implemented[136]. After the tragic events at the World Trade Centre, a diffused sense of urgency spread across the European Union, and this can be detected by the hectic pace with which legislative measures were adopted thereafter. Surely, such pace was not maintained coherently until the present moment since, as stated previously, the adoption of counter-terrorism measures in the EU has been characterised by cyclical phases, depending on whether specific threats existed or not. Furthermore, as claimed by Dorine Dubois in the work conducted by Bures[137] "the events of 11 September have indirectly allowed the EU to become a consistent actor in the fight against terrorism."

In addition, the pressure caused by the terrorist events in the Union in the early 2000s brought to the adoption of legislative instruments on which Member States had previously struggled to find a consensus on. Symptom of this was the adoption of the Data Retention Directive, later overruled by the Court of Justice of the European Union (CJEU) in 2014. The present Directive was adopted in 2006 in order to require electronic communications providers to retain certain data for a maximum of 24 months, despite the European Parliament had previously rejected it twice before its

[135] de Londras and Doody. 2017.
[136] Bures, Oldrich. 2006.
[137] Ibid.

"hurried" adoption in the aftermath of the 7/7 London bombings[138]. Counter-terrorism strategy formed and still is a part of the broader "EU security architecture", although policy development in this domain has also been influenced by other overarching strategies. According to one of them, terrorism, along with organised crime and cybercrime, represented one of the priority areas for the regional security[139].

The multi-faceted approach of the European Union in combating terrorism encompasses various aspects, such as the exchange of information among law enforcement and intelligence agencies, the advancement of external action, the management of complex threats and natural disasters, the regulation of European borders, the fight against terrorist recruitment and financing, and the establishment of counter-terrorism legislation. As prevention formed one of the four fundamental pillars of the EU 2005 *Counter-Terrorism Strategy,* mentioned in the previous paragraph, addressing radicalization was deemed a crucial element of the EU's comprehensive approach to combating terrorism and countering radicalization and violent extremism. Numerous strategies and programs have been devised, including a "special EU *Strategy for Combating Radicalization and Recruitment to Terrorism*, a *Media Communication Strategy*, the Check-the-Web project, and the EU-wide Empowering Civil Society program"[140]. Nonetheless, in terms of mandates, the prevention of radicalisation is regarded as an area falling within the sovereign authority of Member States.

Within the realm of preventive measures, a significant aspect pertains to the implementation of measures and mechanisms for data collection, access to databases, and the exchange of information. The European Union has established multiple frameworks with the objective of facilitating data collection, operational collaboration, and information sharing in the domains of intelligence, law enforcement, and justice.

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[138] de Londras and Doody. 2017.

[139] Van Ballegooij, Wouter, and Piotr Bakowski. 2018. "STUDY EPRS | European Parliamentary Research Service the Fight against Terrorism Cost of Non-Europe Report."

[140] Directorate General for Internal Policies. 2017. "The European Union's Policies on Counter-Terrorism Relevance, Coherence and Effectiveness." https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU(2017)583124_EN.pdf.

Among the initiatives taken starting from the early 2000s, aside from the establishment of Eurojust with regards to the realm of police cooperation, in 2004, through Council Decision 2004/512/EC28, the VIS (Visa Information System) was established as to allow the processing of data on third-country nationals requesting short-stay visits. Additionally, Framework Decision 2006/960/JHA, commonly referred to as the "Swedish Decision", due to Sweden's initiative, laid down regulations for law enforcement agencies of member states.

The aim was to enhance the efficiency of information exchange in detecting, preventing, and investigating criminal offences, as well as conducting operations related to criminal intelligence. To ensure effective control over its external borders and provide support in managing migration, the European Union, with a primary focus on prevention, has developed tools and implemented specific measures. In 2003, the Eurodac (European Dactyloscopy) system was established as the EU's fingerprint database for the identification of asylum seekers and individuals crossing borders irregularly. Additionally, in October 2013, the EU introduced a regulation to establish Eurosur, a European border surveillance system. Eurosur served as a framework for exchanging information, enabling comprehensive situational awareness across the EU. Its objectives include detecting, preventing, and combating illegal immigration and cross-border crime, as well as ensuring the safety of migrants at the external borders of member states[141].

4.2. Supranational initiatives, surrender of powers and fundamental rights

Furthermore, counter-terrorism initiatives were taken also at the international level, and this determined the need to transpose such elements into the Union legislative framework. Pertaining to this group is the UN Security Council Resolution 1373 of 2001[142] on the freezing of funds and other financial aspects of persons and groups affiliated in terrorist groups. In response to this, the Council adopted the Common Position 2001/931/CFSP on the application of specific measures to combat terrorism[143]. The Common Position created a list of individuals and entities, that were

[141] Musolino, Santina. 2021. "EU Policies for Preventing Violent Extremism: A New Paradigm for Action?" *Revista CIDOB d'Afers Internacionals*, no. 128 (September): 39–57. https://doi.org/10.24241/rcai.2021.128.2.39/en.
[142] For more visit https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf
[143] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001E0931

further distinguished between two distinct categories. The Council urged EU Member States to strengthen their cooperation under the third pillar to proactively prevent terrorist acts for the first group. Regarding the second group, the EU was mandated to freeze their financial and/or economic assets. It is noteworthy that an additional instrument issued in December 2001, Council Regulation (EC) No 2580/2001[144], assigned the responsibility of executing the freezing of terrorist assets to the European Communities (EC) as part of the first pillar of the EU. This regulation also established a separate EU list of individuals and groups recognised as terrorists. Concerns arose when the list created according to the December 2001 Common Position 2001/931/CFSP showed discrepancies in both number of persons and groups with regards to the list established by the Council according to the December 2001 Regulation (EC) No 2580/2001[145].

Generally speaking, policies on the prevention of radicalisation and terrorism in the EU have not evolved unaccompanied by controversies and concerns, especially as far human rights, surrender of powers to other Member States and proportionality and accountability are concerned[146]. As far as human rights concerns are taken into consideration, a brief discussion of the characteristics and consequences derived by the two abovementioned instruments could be added. The idea behind an instrument such as Council Regulation (EC) No 2580/2001 has been labelled "terrorists blacklisting", meaning the "act of designating a group or an individual as 'terrorist', as an associate of known terrorists, or as a financial supporter of terrorism"[147]. The clear aim behind this type of sanctions is to undermine terrorist activities by cutting off terrorist groups' access to funds and criminalising their members. However, in practice, individuals targeted by these measures are not only limited in their financial funds but also in their freedom of movement. As a matter of facts, as reported by de Londras and Doody[148], the listing practice has long been criticised by organisations and academics insofar as the measures lack of an effective complaint mechanism in the listing procedure, aside from being politically motivated and open-ended in nature.

[144] https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex%3A32001R2580
[145] Bures. 2006.
[146] de Londras and Doody. 2017.
[147] Hayes, Ben, and Gavin Sullivan. 2010. "Statewatch Analysis Time to Rethink Terrorist Blacklisting."
[148] de Londras and Doody. 2017.

As signalled by the Statewacth[149] analysis conducted by Hayes and Sullivan[150] on terrorist blacklisting, too many individuals have been included in the blacklisting procedure while they have been repeatedly denied access to meaningful defence for the allegations against them. The negative impact of sanctions on fundamental rights is quite clear since gross violations of human rights have been recognised in judicial proceedings. Blacklisting is mainly conducted according to secret intelligence information that is not available neither to the targeted party nor to the court that is responsible to review the implementation of the lists. Therefore, it derives that the parties involved in the listing are prevented from knowing the allegations against them and, subsequently, to exercise their right of judicial review[151]. Terrorist listing has also been condemned for its broader impact on the principles of the rule of law as, according to the European Centre for Constitutional and Human Rights, as reported by de Londras and Doody[152], this practice contributes to the "externalisation and expansion of executive powers" that lack accountability, as states are claimed to intentionally bypass the evidentiary requirements of the criminal justice system in favour of "easier" administrative law measures, which are subject to less judicial and democratic oversight.

Of relevance for the EU level has been the challenge brought by Mr. Yassin Abdullah Kadi, a Saudi businessman, against his inclusion in the UN Sanctions list in 2001[153], as implemented by the Union, before the EU courts. The case started before the Court of Justice of the EU in 2001, after Kadi was blacklisted in the U.S. in September 2001 and later included in the UN Sanctions list of October 2001. Therefore, Kadi's blacklisting was transposed in the EU in the form of European Council Regulations 467/2001[154] and 881/2002[155]. As stated before, the motives behind Kadi's listing were classified and subsequently he could not the accede neither the accusations nor the evidence against him. In 2008, during one of the two cases concerning Kadi, the Court of Justice of the EU ruled what is considered to be a

[149] State watch is a non-profit organisation that produces and advocates for in-depth research, policy analysis, and investigative journalism with the aim of providing insights and informing discussions, movements, and campaigns regarding civil liberties, human rights, and democratic principles.
[150] Hayes, Ben, and Gavin Sullivan. 2010
[151] Ibid.
[152] de Londras and Doody. 2017.
[153] For more visit https://press.un.org/en/2001/sc7180.doc.htm
[154] For more visit https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001R0467
[155] For more visit https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002R0881

landmark decision from two different standpoints: first of all, the CJEU dismissed the claim according to which the obligations of the Community under international law prevented the assessment of blacklisting measures in accordance with the Community's own principles and human rights provisions; secondly, while performing a human rights review of the measures applied to the appellant[156], the Court concluded that "the rights of the defence, in particular the right to be heard, and the right to effective judicial review... were patently not respected"[157]. The Court then concluded that his inclusion in the UN sanctions list infringed his human rights and therefore needed to be remedied or annulled.

4.3. Counter-terrorism propaganda to limit migration and civil society

Counter-terrorism measures and the protection of national security also present a "side effect" that has impacted on the freedom of association, expression, and peaceful assembly in both democratic and undemocratic societies. Governments have tended to tighten their grip on Civil Society Organisations (CSOs), hindering their capacity of protecting rights and offering services to citizens. Governments employ various methods and strategies to restrict the openness of civic space. These include utilising legal restrictions, imprisoning activists without just cause, and engaging in public defamation or discrediting through media campaigns or online harassment orchestrated by non-governmental entities[158]. According to the CSIS database of legislation on the definition of terrorism[159], over 140 governments have adopted anti-terrorism legislation since 9/11, despite a universal and comprehensive definition of the phenomenon is still lacking. This brings to the question of how broadly and vaguely most of these governments, interested by anti-terrorism legislation, have framed the phenomenon, aside from having fused the terrorist issue with other topics. The civic space has only not been targeted by national counter-terrorism legislation but has also

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[156] De Goede, Marieke. 2011. "Blacklisting and the Ban: Contesting Targeted Sanctions in Europe." *Security Dialogue* 42 (6): 499–515. https://doi.org/10.1177/0967010611425368.

[157] Judgement of 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:461§334. For the complete judgement visit https://curia.europa.eu/juris/document/document.jsf?docid=67611&doclang=en

[158] Baydas, Lana, and Shannon N. Green. 2018. "Counterterrorism Measures and Civil Society - Changing the Will, Finding the Way." Center for Strategic and International Studies.

[159] Center for Strategic and International Studies. 2018. "Database of Legislation on the Definition of Terrorism | Aligning Security and Civic Space | CSIS." Www.csis.org. 2018. https://www.csis.org/programs/human-rights-initiative/legacy-works/closing-civic-space/aligning-security-and-civic-0.

suffered due to international measures aimed at disrupting the flow of financial funds to terrorist groups.

Subsequent to the expansion of the Financial Action Task Force on Money Laundering (FATF) mandate in the aftermath of 9/11, the latter adopted Recommendation 8 to prevent the abuse of the non-profit sector by terrorist organisations, given that all non-profit organisations were thought to be at high risk of being involved in terrorist financing. In addition to providing governments with a pretext to take action against peaceful and legitimate organisations that they view as a nuisance, many countries have utilised compliance with FATF requirements, whether directly or indirectly, as a rationale for enacting stringent legislation under the pretext of combating terrorism[160]. States have additionally created, in some cases, a narrative according to which migration and migrant-friendly CSOs are at odds with national security and stability. This perceived threat stemming from migration, that is often associated with terrorism, has reached its apex in 2015 when EU Member States faced a significant influx of asylum applications, totalling 1.9 million[161], with nearly half a million originating from Syria and another half a million from individuals from Afghanistan, Iraq, Pakistan, and Nigeria.

The countries of origin themselves may appear to imply a potential connection to terrorism. As the former President of the Czech Republic Milos Zeman has argued in 2015[162], these refugee flows, often consisting predominantly of young Muslim males, are intentionally exploited as a form of a covert infiltration or, as Zeman stated, a "Trojan horse". This perspective suggests that it is part of an orchestrated "organised invasion" of Muslims into Western countries[163]. The former Czech President was not alone in publicly stating such considerations at the apex of the migration crisis of the Union. Also, former Italian Foreign Affairs Minister Paolo Gentiloni claimed, in January 2015, that there was a threat deriving from the waves of migrants that were

[160] Baydas and N. Green. 2018.
[161] Data retrieved from the Global Terrorism Index 2015. For more visit https://www.visionofhumanity.org/maps/global-terrorism-index/#/
[162] For more visit https://www.welt.de/politik/ausland/article150346836/Zeman-nennt-Fluechtlingszustrom-organisierte-Invasion.html
[163] Schmid, Alex P. 2016. "Links between Terrorism and Migration: An Exploration." *Terrorism and Counter-Terrorism Studies*. https://doi.org/10.19165/2016.1.04.

reaching Italian shores from North Africa, since terrorists could easily hide among the thousands of people disembarking every year[164] .

A particular case in point is served by Hungary, since it is a particularly homogenous country, and this feature has been used by its former Prime Minister Orbán in order to create a dichotomy between the national population and the migrants reaching the country especially at the height of the migrant crisis. The latter has served the Hungarian Government the "perfect" opportunity to exploit Hungarians' distrust towards immigrants in order to expand its powers by creating a narrative of imminent national security threat. The Government did not lose occasion to publicly address the question of asylum seekers trying to reach the Western Balkan route as obviously linked to terrorism[165].

Orbán's party Fidesz has exaggerated the magnitude of the terrorist threat posed by migrants in the country for the scope of political gain since, despite Hungary received around 70.000 asylum applications between 2015 and 2016, the figure concerning those who remained in the country is much lower[166]. According to the RAND Database of Worldwide Terrorist Incidents (RDWTI)[167], a compilation of data that ranges from 1968 to 2009, Hungary has suffered from a relatively low terrorist threat, since only 11 terrorist incidents were detected during that period of time, most of which were politically motivated. In addition, in 2010, Orbán's government decided to set up the Counter-Terror Centre (TEK) in order to prevent terrorist attacks from being performed in the country, nevertheless it contributed to the further marginalisation of the civic space[168].

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[164] Bove, Vincenzo, and Tobias Böhmelt. 2016. "Does Immigration Induce Terrorism?" *The Journal of Politics* 78 (2): 572–88. https://doi.org/10.1086/684679. And ANSA. 2015. "Gentiloni Says Risk Terrorists among Migrants - Update 2 - English." ANSA.it. January 22, 2015. https://www.ansa.it/english/news/2015/01/22/gentiloni-says-risk-terrorists-among-migrants-update-2_06c48d8f-7d3b-4b99-90bd-009941aa54b1.html.

[165] Baydas and N. Green. 2018.

[166] Connor, Phillip. 2017. "Refugee Asylum Seekers Still Waiting in Europe." Pew Research Center's Global Attitudes Project. Pew Research Center. September 20, 2017. https://www.pewresearch.org/global/2017/09/20/a-million-asylum-seekers-await-word-on-whether-they-can-call-europe-home/.or

[167] For more visit https://www.rand.org/nsrd/projects/terrorism-incidents.html#:~:text=The%20RAND%20Database%20of%20Worldwide,on%20international%20and%20domestic%20terrorism.

[168] Baydas and N. Green. 2018.

4.4. Intelligence sharing in the EU: does it work?

Furthermore, one of the most critical aspects, concerning counter-terrorism measures, has been intelligence sharing in the EU. In fact, scholar Mathieu Deflem[169] observed that, while Europol intelligence and analysis capabilities were strengthened following the Madrid attacks, there was not a proportional increase in the actual sharing of intelligence. A general trend of reluctance on the part of Member States to share information regarding terrorism with Europol has been detected over the years, and this contributed to creating a situation where the latter was not presented neither with a complete picture of the counter-terrorism efforts taken by the Member States nor with a clear understanding of the threat levels[170]. The responsibility for accountability regarding national security rests with Member States and their respective services, who are reluctant to delegate this responsibility to EU agencies such as Europol. This reluctance raises doubts about the perceived value and effectiveness of these agencies[171]. Furthermore, a general sentiment of resentment towards supra-national cooperation, spread across internal security agencies, has hindered the compliance of the latter with governments' requests for increased intelligence sharing with organisations such as Europol. Coupled with this, there is clear gap between the organisational cultures across the several agencies entitled to conduct counter-terrorism operations.

One example could be the difference between the organisational culture of the police and of the security services. In the case of Europol, these legal and cultural differences between law enforcement and security services have hindered cooperation despite the strong pollical will of the Member States[172]. The presence of professional envy and the protection of sources are common traits within the security sectors and can be observed both within individual Member State and among different Member States. However, the November 2015 Paris attacks marked a crucial turning point,

[169] Deflem, Mathieu. 2006. "Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective." *Justice Quarterly* 23 (3): 336–59. https://doi.org/10.1080/07418820600869111.
[170] Bures, Oldrich. 2006.
[171] Andreeva, Christine. 2021. "The Evolution of Information-Sharing in EU Counter-Terrorism Post-2015: A Paradigm Shift?" *Global Affairs* 7 (5): 751–76. https://doi.org/10.1080/23340460.2021.1983728.

[172] Fägersten, Björn. 2010. "Bureaucratic Resistance to International Intelligence Cooperation – the Case of Europol." *Intelligence and National Security* 25 (4): 500–520. https://doi.org/10.1080/02684527.2010.537028.

highlighting the fact that Member States could no longer handle counter-terrorism solely at the national level. Prior to this event, terrorism was primarily seen as a matter of national security, and the practice of multilateral information exchange was uncommon. Sharing information was deemed risky, internal competition between institutions hindered collaboration, and there was generally no recognized urgency to engage in information-sharing efforts this prevented them from looking for cross-border elements in terrorist plots[173]. According to Müller-Wille[174], as reported by Andreeva[175], before 2015, international terrorism had a minor impact on EU intelligence sharing as the Union did not play any significant role at the operational or tactical level, while being confined to the strategic decision-making.

Rather than concentrating their efforts in the cooperation within the Europol framework, secret services of Member States often times decided to bypass such entity by creating new groupings, as in the case of the Counter-Terrorism Group (CTG) within the Club de Berne. The Group is fully devoted to the counter-terrorism field and presents an internal structure that is similar to the one of the Club de Berne despite not functioning inside the framework of the EU[176]. However, despite bilateral cooperation has long been the norm in intelligence sharing, progressively states recognised that a multilateral framework was necessary in order to tackle the evolving threat, especially since 2015-2016 with the Paris and Brussels terrorist attacks. In particular, the 2015 Paris attacks revealed the weaknesses and deficiencies in intelligence sharing within Europe. Former Europol Director Rob Wainwright aptly claimed that "there is a black hole of information", indicating a significant lack of information exchange and coordination. Wainwright's words need to be read in light of the fact that the Abdeslam brothers, the two French citizens living in Belgium, responsible for both the Paris (2015) and Brussels attacks (2016), were already known to Belgian and Dutch police for minor crimes and for attempting to travel to Syria, but neither the French authorities nor Europol had been informed[177]. As a result of the

[173] Andreeva, Christine. 2021.
[174] Müller-Wille, Björn. 2007. "The Effect of International Terrorism on EU Intelligence Co-Operation." *JCMS: Journal of Common Market Studies* 46 (1): 49–73. https://doi.org/10.1111/j.1468-5965.2007.00767.x.
[175] Andreeva, Christine. 2021.
[176] Fägersten, Björn. 2010.
[177] de La Baume, Maïa, and Giulia Paravicini. 2015. "Europe's Intelligence 'Black Hole.'" POLITICO. December 3, 2015. https://www.politico.eu/article/europes-intelligence-black-hole-europol-fbi-cia-paris-counter-terrorism/.

critical juncture represented by these two terrorist attacks, a strong political impetus mobilised in order to change the Union's intelligence cooperation through a series of reforms[178]. The starting point of those reforms was Europol, that saw the introduction of the *EU Internet Referral Unit* (IRU), through which the agency has successfully addressed trust issues by fostering connections between national practitioners and establishing interpersonal relationships among them.

In addition, Europol has acquired a level of expertise that surpasses what some member states possess, thereby enhancing its value in the eyes of European governments. Furthermore, the establishment of Europol's ECTC in 2016, as mentioned in the previous paragraph, has further strengthened the agency's capabilities by bringing together experts and facilitating collaboration among EU Member States in the battle against terrorism[179]. Since the CTG is perceived as the "de facto EU intelligence agency"[180], Europol started working more closely with the latter, which has been running an "operational platform" on "Islamist terrorism" in The Hague that includes real-time information and a secret shared file[181]. As far as the EU level is strictly concerned, new instruments were adopted with regards to information collecting and sharing, such as the previously mentioned PNR package and the Schengen Information System (SIS-II) database, tools that helped improving the interoperability of the EU information systems, aimed to provide connections between databases utilised by migration authorities and law enforcement agencies[182].

Following the occurrences of the Nice and Vienna attacks in 2020, there was a renewed discussion regarding the need to enhance information sharing at the European Union level. As a result, the *Counter-Terrorism Strategy* of 2005 was replaced by the *Counter-Terrorism Agenda for the EU* in 2020. The key distinction is that the 2020 *Agenda* focuses on bolstering international cooperation and coordination across all

[178] Andreeva, Christine. 2021.
[179] Europol. 2023b. "European Counter Terrorism Centre - ECTC." Europol. January 11, 2023. https://www.europol.europa.eu/about-europol/european-counter-terrorism-centre-ectc#:~:text=In%20January%202016%2C%20Europol%20created.
[180] Andreeva, Christine. 2021.
[181] European Parliament. 2019. "Parliamentary Question | Widening of Cooperation between Europol and the CTG | E-002517/2019 | European Parliament." Www.europarl.europa.eu. 2019. https://www.europarl.europa.eu/doceo/document/E-9-2019-002517_EN.html.

[182] Andreeva, Christine. 2021.

four pillars of counter-terrorism, namely anticipation, prevention, protection, and response to terrorist threats[183]. The document puts particular emphasis on the role of agencies such as Eurojust and Europol, in order to make the most of their operational support. As indicated by the analysis of the wording of the 2020 *Agenda* carried out by D'Amato and Terlizzi[184], while, on the one hand, the need to have a more operative role for the EU agencies is frequently emphasised, on the other, despite the clear articulation of objectives, the strategy falls short in specifically identifying the "enemy" it aims to counter. In other words, there is a lack of explicit recognition regarding the relational dynamics and potential adversaries involved in the strategy. Furthermore, the depiction of terrorism as a potential threat to destabilise democratic equilibria in Europe is accompanied by an ongoing discourse on the democratic limitations associated with the implementation of counterterrorism measures. Nevertheless, the main problem with the *Agenda*, as stated by D'Amato and Terlizzi[185], resides in the fact that policy measures remain vague and disperse.

The EU, to foster the cooperation and coordination required, as enshrined in the 2020 document, has created a number of specialised agencies and has favoured the creation of numerous networks. Conversely, these agencies and networks have fostered the information sharing issues that they were meant to solved in the first place. Indeed, the possession of additional information does not always simplify or enhance the effectiveness of the work of law enforcement agencies. The real conundrum resides in the question of finding and creating more effective and targeted information exchange while complying with the EU rule of law standards, and most importantly the right to an effective remedy and to a fair trial.

Therefore, EU counter-terrorism policies should focus on intelligence sharing that could be classified as "evidence" in criminal proceedings and that could be lawfully used to incriminate suspected terrorists. All EU Member States should ensure appropriate and comprehensive assurances regarding the quality, reliability, and

[183] European Commission. 2020b. "EUR-Lex - 52020DC0795 - EN - EUR-Lex." Europa.eu. 2020. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0795&qid=1631885972581.
[184] D'Amato, Silvia, and Andrea Terlizzi. 2022. "Strategic European Counterterrorism? An Empirical Analysis." *European Security* 31 (4): 540–57. https://doi.org/10.1080/09662839.2022.2029847.
[185] D'Amato, Silvia, and Andrea Terlizzi. 2022

adherence to fundamental rights of shared information in cross-border cooperation. Enhancing the exchange of information must be accompanied by stringent adherence to EU rule of law standards, as these two aspects are interdependent for the Union to effectively coordinate unified responses to terrorism. Moreover, holding Member States and their national security policies accountable at the EU level is necessary to ensure the legitimacy of public policy responses. Without this approach, EU measures will continue to fall short in effectively countering terrorism while upholding the principles of the rule of law and safeguarding fundamental rights[186].

5. Conclusion

The present chapter has provided a general overview of three main elements, corresponding to the three main paragraphs. Firstly, in order to give a clearer picture of the status of the terrorist threat in the past years, the main traits of the four primary terrorist groups and movements have been presented. This section has served the purpose of creating a "background" against which the subsequent sections were written, since the present thesis follows, as stated in the introduction, a structure that starts from broader topics with the intent to clarify the motive behind narrower issues. Secondly, the present chapter has presented the body of instruments, legislative and non-legislative, that the European Union has created in order to respond to the terrorist threat in the territory of its Member States. Lastly, the focus shifted on the measures taken in the field of counter-terrorism, and their tangible impact on the rights of citizens and certain categories of people that are particularly vulnerable to restriction of their rights and liberties.

As asserted in the introductive paragraph, the way in which the sections of the first chapter have been ordered serves a specific purpose, that of highlighting the shift in the Union's response towards the terrorist threat, depending on whether it originated from "internal", ideological, movements or from religiously inspired groups. It is clear that, since 9/11, the European Union has adopted a decisively proactive stance, towards the threat stemming from religious terrorist groups, concentrating most of its efforts to

[186] Bigo, Didier, Sergio Carrera, Elspeth Guild, and Valsamis Mitsilegas. 2016. "The EU and the 2016 Terrorist Attacks in Brussels: Better instead of More Information Sharing." CEPS. April 6, 2016. https://www.ceps.eu/ceps-publications/eu-and-2016-brussels-terrorist-attacks-better-instead-more-information-sharing/.

prompt a rapid and effective response. However, counter-terrorism measures have not always been effective and balanced for their own purposes, partly due to the excessive burden that they exercise on certain rights, as pointed out by several scholars, and partly due to internal obstacles both at the national and Union level. Since the danger posed by jihadist groups is no longer so imminent as it was during the peak of returning foreign fighters from the Syrian conflict in 2015-2016, the sense of urgency in adopting counter-terrorism measures seems now to have subsided.

In fact, as highlighted in the first section, currently the main source of concern seems derive from by left-wing and anarchist movements, given the increasing number of attacks these are carrying out, potentially causing significant economic damages, threatening the existing state and the democratic order. A more serious source of concern derives from the prospect of left-wing volunteers, who joined the PKK or the YPG, implementing their acquired skills in combat in their home countries. However, quite often, a lack of uniformity amongst the very same Member States in classifying these ideologically motivated terrorist groups hampers accurate reporting of the current state of the threat, as in the mentioned case of the German penal code. Other times, it appears that certain phenomena, as in the case of returning foreign fighters, are associated with one specific branch of terrorism, rather than being conceptualised as comprehensive of other definitions.

Keeping in mind what has been stated so far, the following chapter will deepen the core subject of the present thesis: Directive 541/2017/EU on Combating Terrorism. As was already anticipated in this chapter, this instrument represents the main legislative tool in the fight against terrorism in the European Union. As it will be further deepened, the Directive was adopted mainly to address the phenomenon of foreign fighters and served this purpose by harmonising EU criminal law on the topic and by adapting EU legislative instruments to supranational standards. Nevertheless, the adoption process and the implementation of the Directive did not go without criticism, especially due to its allegedly rushed adoption and to its disproportionate impact on certain fundamental rights.

Chapter Two: The Harmonisation of criminal law in the fight against terrorism in the European Union

1. Introduction

The adoption of Directive 2017/541 on combating terrorism has profoundly altered the shape of European counter-terrorism law. The path that led to the adoption of this instrument was characterised by long periods of stagnation, then followed by phases triggered by a spread sense of panic and urgency, particularly after the Paris attacks of November 2015. Many see the Directive as a *political*[1] response to the increasing flow of foreign terrorist fighters leaving Europe in order to join the armed struggle in Syria and Iraq[2]. The primary objective of the Directive was to broaden the range of criminal law applicable by EU Member States to encompass acts and dangers related to terrorism occurring within the European Union. However, the extensive and vague nature of numerous offences outlined in the Directive raised significant concerns about their alignment with key legal principles, such as legality, non-retroactivity, clarity, and foreseeability. According to one foundational tenet of criminal law, prosecution may only be derived from the outcome of the culpable actions and purposes of an individual. Several terrorism-related offences, particularly certain preparatory acts, appear to challenge this principle, given that liability for a certain conduct may be based on its mere exercise, without it being necessary to prove that the latter conduct has generated a risk of future harm[3].

The above represents a general overview of the content of the present chapter. The latter, in fact, will be divided into two main sections, the first centred on the process that led to the adoption of Directive 2017/541 on combating terrorism, considering both external impulses and internal necessities to counter the rapid development of the threatening phenomenon of foreign terrorist fighters. The first section of this chapter will deepen the motive behind the adoption and the content of the Directive, by analysing its wording and the novelties introduced by it.

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[1] Emphasis added.
[2] Gherbaoui, Tarik, and Martin Scheinin. 2022. "Time to Rewrite the EU Directive on Combating Terrorism." *Verfassungsblog*. https://doi.org/10.17176/20220125-180241-0.
[3] Babická, Karolína. 2020. "EU Counter-Terrorism Directive 2017/541: Impact on Human Rights and Way Forward at EU Level." Opinio Juris. November 20, 2020. http://opiniojuris.org.

The second section, on the other hand will take into consideration "the other side of the coin", meaning the procedural criticism regarding the adoption process of the Directive and the marginalisation of NGOs in the above. The third and fourth section will deepen the implications of this criminal law tool on the fundamental rights of EU citizens, as already anticipated few lines above, and the implementation issues concerning the Directive. For this purpose, the employed methodologies, aimed at furnishing an exhaustive elucidation of these implications, primarily encompass the analysis of the reports realised by civil society organisations. The section regarding the implementation issues will be based, on the other hand, on the Commission reports and on the document produced by the European Union Agency for Fundamental Rights (FRA). This component is to be construed as a credible source of testimonials emanating from practitioners in the field of criminal law, supplemented by a diverse array of narratives proffered by numerous civil society entities and adept jurists. While the sources of testimonies differ in several respects among themselves, they all share a singularly crucial element: the excessive impact of this counter-terrorism legislative measure on fundamental rights. This second chapter will then be followed by concluding remarks and considerations.

2. Directive EU 2017/541 on combating terrorism: why and what?

2.1. The international influence towards the adoption of a new instrument

Not long after the Paris terrorist attacks in November 2015, international actors began to perceive the need to review their criminal law tools in order to face the threat stemming from the rising phenomenon of foreign terrorist fighters. Already in September 2014, the United Nations Security Council (UNSC) adopted Resolution 2178, a first cornerstone document for the international contrast to this phenomenon. The Resolution "set the scene" on the contrast to the phenomenon of FTF[4] and invited states members to the United Nations to criminalise certain conducts that are specifically linked to foreign fighters' profiles[5]. The Resolution further invited all states

[4] Vavoula, Niovi. 2018. "Prevention, Surveillance, and the Transformation of Citizenship in the 'Security Union': The Case of Foreign Terrorist Fighters." *School of Law Legal Studies Research Paper* 293.
[5] Sánchez Frías, Alejandro. 2018. "The EU Directive on Combating Terrorism and the Criminalisation of Travelling." *European Criminal Law Review* 8 (2): 201–22. https://doi.org/10.5771/2193-5505-2018-2-201.

to ensure that "their domestic laws and regulations set serious criminal offences sufficient to provide the ability to prosecute and penalise […]:

(a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;

(b) […]

(c) the wilful organisation, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training."[6]

Later on, in November 2015, just a few days after the Paris attacks, the UNSC decided to adopt an additional instrument, Resolution 2249 (2015), where it urged States to increase their efforts in order to "stem the flow of foreign terrorist fighters to Iraq and Syria and to prevent and suppress the financing of terrorism […]"[7]. Following the lead of the United Nations, very soon, tools aimed at preparing European states to counter this phenomenon were adopted in the context of the Council of Europe (CoE). In fact, in October 2015, the CoE adopted the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, or more commonly known as the Riga Protocol[8]. The central focus of the Protocol was the regional-level implementation of the actions associated with travelling abroad[9], and in fact, in the preamble, the CoE expressed deep concern about "the threat posed by persons travelling abroad for the purpose of committing, contributing to or participating in terrorist offences, or the providing or receiving of training for terrorism in the territory of another State"[10].

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[6] United Nations Security Council. 2014. "Security Council Resolution 2178 (2014)." https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/547/98/PDF/N1454798.pdf?OpenElement

[7] United Nations. 2015. "Resolution 2249 (20 November 2015) S/RES/2249." chrome-extensiohttps://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/384/13/PDF/N1538413.pdf?OpenElement.

[8] Sánchez Frías, Alejandro. 2018.

[9] Vavoula, Niovi. 2018.

[10] Council of Europe. 2015. "Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism," October. https://rm.coe.int/168047c5ea.

Consequently, Member States were urged to take measures in order to stipulate that travelling abroad with the intention of engaging in terrorism, either from their own territory or by their citizens, would be considered a criminal offence according to their domestic laws, provided that travelling is committed unlawfully and intentionally, in accordance with the constitutional principles of the respective states[11]. Comparing the wording of Resolution 2178 (2014) and of the Additional Protocol, one could argue that the former did not impose an obligation to categorise, as a criminal offence, travelling for terrorist purposes. According to Resolution 2178 (2014), states could consider terrorist travel rather as a preparatory offence to the main terrorist offence or as an attempt to commit a terrorist offence. Nevertheless, the involvement of the CoE in this context has played a crucial role in legitimising and giving legal validity to the initiatives of the UN, which were originally developed outside the conventional frameworks of public international law[12].

Discussions, at the EU level, already began in the summer of 2014, when the European Council labelled the surge of the Islamic State of Iraq and the Levant as a "major threat to the European security and that determined action to stem the flow of foreign fighters from Europe is needed"[13]. In the same document, the Council called for the implementation of the abovementioned 22 measures against foreign terrorist fighters proposed by the EU Counter-Terrorism Co-Ordinator, that fell completely under the areas covered by Resolution 2178. The *Hague-Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon*, adopted by the Global Counter-Terrorism Forum (GCTF) in 2014, covered too the same areas as the 22 measures mentioned earlier. The package of 22 measures encompassed a range of topics including gaining a deeper understanding of the phenomenon, preventing radicalisation, strategic communications, countering narratives, addressing the issue of returnees, facilitating rehabilitation, enhancing information exchange, detecting travel, improving border security, implementing criminal justice responses, and fostering

[11] Ibid.
[12] Vavoula, Niovi. 2018.
[13] Council of the European Union. 2014b. *Foreign Fighters: Follow-up on the Conclusions of the European Council of 30 August 2014*. https://www.statewatch.org/media/documents/news/2014/oct/eu-council-conclusions-foreign-fighters-follow-up-14160-14.pdf.

cooperation with third countries[14]. The 22 measures additionally foresaw the reinforcement of the Schengen Framework, the PNR System, prioritisation of information sharing and operational cooperation, as well as the criminalisation of specific behaviours commonly linked to the actions of foreign terrorist fighters[15].

Amongst the other initiatives mentioned in the October 2014 follow-up on the conclusion of the European Council of 30 August 2014, the Council incited the Commission, with a certain sense of urgency, to avoid possible shortcomings in the implementation of Resolution 2178, alluding to the need for a new legislative instrument in order to counter the FTF threat[16]. In February 2015, the EU Parliament issued a Resolution on anti-terrorism measures where, taking into account of the data provided by Europol TE-SAT of 2014[17], where it highlighted the need to adopt specific measures in order to tackle the problem of EU citizens travelling abroad to fight for terrorist organisations[18]. Therefore, soon after its adoption, the EU decided to sign the Riga Protocol[19] and, in December 2015, for the purposes of criminal law harmonisation, the Commission issued a proposal, to the Council of the European Union, for the adoption of a new directive on combating terrorism, that would eventually replace the Council Framework Decision 2002/475/JHA on combating terrorism, as amended by the Council Framework Decision 2008/919/JHA. In the preamble of the proposal, a clear reference was made to Resolution 2178 (2014) and to the Additional Protocol[20].

Particularly the proposal stated that given the "evolution of terrorist threats", combined with the "legal obligations of the Union and Member States under

[14] De Kerchove, Gilles, and Christiane Höhn. 2016. "The Regional Answers and Governance Structure for Dealing with Foreign Fighters: The Case of the EU." In *Foreign Fighters under International Law and Beyond*. The Hague: Asser Press.
[15] Sánchez Frías. 2018.
[16] Council of the European Union. 2014b.
[17] According to which "Individuals and groups that have travelled from the EU to other parts of the world for terrorist purposes are assessed to pose an increased threat to all EU Member States upon their return […]". For more visit https://www.europol.europa.eu/cms/sites/default/files/documents/europol_tsat14_web_1%20%281%29.pdf
[18] European Parliament. 2015c. "European Parliament Resolution of 11 February 2015 on Anti-Terrorism Measures (2015/2530(RSP))." Www.europarl.europa.eu. February 11, 2015. https://www.europarl.europa.eu/doceo/document/TA-8-2015-0032_EN.html.
[19] Vavoula. 2018.
[20] European Commission. 2015. "Proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism." December 2, 2015.

international law, the definition of terrorist offences, offences related to a terrorist group and offences related to terrorist activities, should be further approximated, so that it covers more comprehensively conduct related to in particular foreign terrorist fighters and terrorist financing"[21]. For criminal law to be effective, in fact, updated definitions of criminal offences are pivotal as the latter need to evolve accordingly to the evolution of the terrorist threat. This necessity to replace the 2002 Council Framework Decision, as amended in 2008, mainly derived from the absence, in the wording of the decision, of the criminalisation of receiving terrorist training or preparation for travelling abroad for terrorist purposes[22].

2.2. The need to update criminal law: a new Directive on combating terrorism

On 15 March 2017, Directive 2017/541 on Combating Terrorism was adopted in order to harmonise the fight against terrorism and in particular to counter the phenomenon of foreign terrorist fighters[23]. In fact, harmonising criminalisation of offences related to foreign fighters throughout the European Union would help establish a unified legal framework. This framework would serve as a significant point of reference for EU agencies and would enhance cross-border cooperation. Without common minimum standards in criminalisation, variations among Member States could lead to gaps in prosecution[24]. Adopted upon the proposal of the Commission, after prior consultation of the opinion of the European Economic and Social Committee, this new legal instrument replaced the previous legal framework, comprehensive of the 2002 Council Framework Decision as amended in 2008, amended Council Decision 2005/671/JHA, and aimed to expand the range of terrorism-related offences by criminalising various acts.

By adopting this new legal instrument, the EU not only adhered to international law acts concerning terrorism but also notably expanded the scope of criminalisation in this regard. Specifically, concerning travel-related offences, the Directive introduced minimum rules to criminalise not only departing from a Member State but also

[21] Ibid.
[22] De Kerchove, Gilles, and Christiane Höhn. 2016.
[23] Vavoula. 2018.
[24] De Kerchove, Gilles, and Christiane Höhn. 2016.

travelling to it. Moreover, there was no exception to criminalisation for individuals travelling to their country of nationality or residence. The criminalisation of behaviours related to terrorist financing was also extended to cover those committed for the purpose of participating in a terrorist group's activities. The Directive aligned with FATF recommendations[25], which mandated the criminalisation of financing any terrorist offence, going beyond the original focus on criminalising financing for terrorist travel outlined in UNSC Resolution 2178 and the Additional Protocol of the Council of Europe. Furthermore, the obligation to criminalise receiving training for terrorism was not previously included in any UN legal act with binding effects. It was first introduced by Article 3 of the Additional Protocol of the Council of Europe, and the Directive adopted this provision without the restrictive requirement that training was to be derived "from another person" [26].

According to Article 1 of the Directive, the instrument was aimed to establish, as already anticipated, "minimum rules concerning the definition of criminal offences and sanctions in the area of terrorist offences, offences related to a terrorist group and offences related to terrorist activities, as well as measures of protection of, and support and assistance to, victims of terrorism"[27]. Before deepening the structure of the Directive and investigating on its content, it is important to stress that one notable aspect of the revised rules is that they explicitly require EU Member States to take measures to prevent individuals from travelling to conflict zones. This encompasses the imposition of penalties for traveling within, outside of, or to the European Union with the intent of engaging in acts of terrorism, as well as for the coordination and facilitation of such travel, which includes offering logistical and material assistance. The inclusion of terrorism travel as a criminal offence at the EU level was not an isolated occurrence but should be understood within a wider global security context[28].

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[25] FATF. 2016. "Guidance on Criminalising Terrorist Financing." Www.fatf-Gafi.org. 2016. https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Criminalising-terrorist-financing.html#:~:text=FATF%20Recommendation%205%20provides%20measures.

[26] Nikoletta Karaliota, Eliza Kompatsiari, Christos Lampakis, and Maria Kaiafa-Gbandi. 2020. "The New EU Counter-Terrorism Offences and the Complementary Mechanism of Controlling Terrorist Financing as Challenges for the Rule of Law." *Transnational Crime* 3 (1): 1–80. https://doi.org/10.1163/9789004424630_002.

[27] European Parliament and Council of the European Union. 2017. *Council Directive 2017/541/EU of the European Parliament and of the Council of 15 March [2017] on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA [2017] OJ L88/6.*

[28] Vavoula. 2018.

The adoption process followed a strict parliamentary scrutiny, both at the European and national level, and, in fact, a series of changes to the initial draft were introduced in the light of the principle of subsidiarity, in the case of national parliaments' intervention. It is important to underline that, since the Directive was adopted under Title V of the TFEU, on the Area of Freedom, Justice and Security, it was not binding for the United Kingdom, Ireland and Denmark[29], and in fact the latter two continued to be bound by the 2002 Council Framework Decision[30]. The legislative bases behind the adoption of the Directive were Article 83 (1), according to which "the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These crimes are the following: terrorism […]", and Article 82(2), according to which "to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules […]"[31].

The Directive divides offences into three different categories:

- terrorist offences (Article 3);
- offences related to a terrorist group (Article 4) and;
- offences related to terrorist activities (Articles 5-12).

This latter category hosts most provisions against terrorism such as: public provocation to commit a terrorist offence (Article 5), recruitment for terrorism (Article 6), providing training for terrorism (Article 7), receiving training for terrorism (Article

[29] See recitals 41 and 42 of the preamble of Directive 2017/541https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017L0541

[30] Maliszewska-Nienartowicz, Justyna. 2017. "A New Chapter in the EU Counterterrorism Policy? The Main Changes Produced by the Directive 2017/541 on Combating Terrorism." *Polish Yearbook of International Law*. https://doi.org/10.7420/pyil2017h.

[31] European Union. 2012. *Consolidated Version of the Treaty on the Functioning of the European Union*. Vol. C 326, 26/10/2012 P. 0001 - 0390. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT#:~:text=http%3A//data.europa.eu/eli/treaty/tfeu_2012/oj.

8), travelling for the purpose of terrorism (Article 9), organising or otherwise facilitating travelling for the purpose of terrorism (Article 10), terrorist financing (Article 11) and other offences related to terrorist activities (Article 12). The following articles of the Directive concern some of its most controversial features, such as Article 13 on the relationship to terrorist offences, according to which, for offences related to a terrorist group or to terrorist activities "[…] it shall *not*[32] be necessary that a terrorist offence may be actually committed, nor shall it be necessary" in the case of all offences included in Title III[33] of the Directive, exception made for terrorist financing (Article 11), "to establish a link to another specific offence laid down in this Directive"[34].

Other provisions legislate the question of aiding, abetting, inciting and attempting terrorist offences (Article 14), penalties for natural persons (Article 15), mitigating circumstances (Article 16), liability for legal persons (Article 17), sanctions for legal persons (Article 18), jurisdiction and prosecution (Article 19), investigative tools and confiscation (Article 20), measures against public provocation content online (Article 21) and amendments to Decision 2005/671/JHA (Article 22). The final part of the Directive is quite interesting to analyse since Article 23 ensures the respect of fundamental rights, already mentioned in Recital (1) of the Preamble, and fundamental legal principles, as enshrined in Article 6 TEU[35].

Then, Title V of the Directive introduces an additional source of novelty with regards to the 2002 Council Framework Decision, namely provisions on the "protection of, support to, and rights of victims of terrorism". Lastly, Title VI provides for the replacement of Council Framework Decision 2002/475/JHA, sets the national transposition limit for September 8, 2018, and tasks the Commission with issuing two reports, the initial report, scheduled for March 8, 2020, focuses on evaluating the degree to which Member States have implemented the required measures to align with the Directive. The second report, set for September 8, 2021, centres on assessing the Directive's contribution and effectiveness in the fight against terrorism. The Directive

[32] Emphasis added.
[33] Section of Directive 2017/541 concerning offences related to terrorist activities.
[34] European Parliament and Council of the European Union. 2017.
[35] For complete version visit https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M006

enjoyed full enforcement mechanisms that could be enacted by the Court of Justice of the EU or by the Commission[36], that can activate infringement proceedings.

2.3. A closer overview: what does Directive 2017/541 entail? From the definition of terrorism to offences relating to terrorist activities

In order to efficiently investigate on the content of the Directive, it is important to conduct a comparison exercise with the two preceding instruments that the Directive was meant to replace: Council Framework Decision 2002/475/JHA and its amendment, Council Framework Decision 2008/919/JHA. In fact, as far as the mere definition of terrorism is concerned, significant changes have been made to the extent that it might have acquired a new meaning[37]. In fact, as far as Article 1 of the 2002 Council Framework Decision is concerned, the definition of a terrorist offence is constituted by the coexistence of two objective elements. The first element provided for the incrimination under national law of the acts listed in the subsequent paragraphs, while, as far as the second element is concerned, the Framework Decision referred to the consequences of the act, providing for the differentiation of terrorist offences from less serious offences that are constituted by the same material element. The margin of differentiation derived from the seriousness of consequences of an offence on a state or an international organisation. The two objective elements needed then to be accompanied by a subjective counterpart, namely that offences were carried with a "specific intent"[38] that did not include political, religious, or ideological beliefs[39].

Article 2 of the Decision introduced the concept of "terrorist group" and criminalised both leading and taking part in its operations. Article 3 further complicated matters by introducing additional offences, known as "ancillary offences" which are

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[36] Murphy, Cian C. 2016. "The Draft EU Directive on Combating Terrorism: Much Ado about What?" EU Law Analysis. January 17, 2016. http://eulawanalysis.blogspot.com/2016/01/the-draft-eu-directive-on-combating.html.

[37] Wittendorp, Stef. 2016. "What's in a Definition? Is the Proposed EU Directive on Combating Terrorism Still about Terrorism?" Www.leidensecurityandglobalaffairs.nl. July 25, 2016. https://www.leidensecurityandglobalaffairs.nl/articles/whats-in-a-definition-is-the-proposed-eu-directive-on-combating-terrorism-s.

[38] "Seriously intimidating a population, or unduly compelling a government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization". For complete version visit https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32002F0475

[39] Dumitriu, Eugenia. 2004. "The E.U.'S Definition of Terrorism: The Council Framework Decision on Combating Terrorism." *German Law Journal* 5 (5): 585–602. https://doi.org/10.1017/s2071832200012700.

linked to terrorist activities, such as "aggravated theft", "extortion" and "forging official documents". Lastly, Article 4 allowed for the punishment of actions "inciting, aiding, abetting" the offences defined in Articles 1 and 2 and "attempting to commit an offence" included in Article 1(1)[40] and Article 3[41]. The 2008 amendment was introduced in order to add more ancillary offences to the one foreseen in the 2002 Council Decision. In fact, Article 3(2) of the 2008 document included "public provocation to commit a terrorist offence", "recruitment for terrorism", and "training for terrorism"[42]. What is clear from this comparison between the first two instruments adopted to counter the terrorist threat is that there has been a great deal of attention, with the passage of time, on the expansion of criminalisation of preparatory offences, and therefore an anticipation in the treatment of terrorist offences[43]. Directive 2017/541 seems to be perfectly in line with this trend of anticipation of the criminal conduct but before deepening this aspect it is important to assess the overall content of the document.

As far as the definition of terrorist offences is concerned, it appears that the wording of the 2017 Directive has not changed the constitutive elements defined in the 2002 Council Framework Decision. Therefore, in order for an offence to be classified as "terrorist", two objective elements (intentional acts defined as "offences under national law which may seriously damage a country or an international organisation"[44]) are to be interpreted in light of a subjective element, which leaves aside religious or political motives (offences are carried out with the aim of "seriously intimidating a population; unduly compelling a government or an international organisation to perform or abstain from performing any act; seriously destabilising or destroying the fundamental, political, constitutional, economic or social structures of a country or an international organisation")[45]. Article 3(1) of the 2017 Directive provides for ten categories of acts that classify as terrorist offences. Here, two important changes need to be highlighted: first, radiological weapons have been included in point (f) of the listed elements and, second, a new provision on illegal system interference and illegal

[40] Except for possession as intended in Article 1(1)(f) and offence in Article 1(1)(i).
[41] Wittendorp, Stef. 2016. And Council of the European Union. 2002. "Council Framework Decision of 13 June 2002 on Combating Terrorism." June 22, 2002.
[42] Council of the European Union. 2008. "Council Framework Decision 2008/919/JHA of 28 November 2008 Amending Framework Decision 2002/475/JHA on Combating Terrorism." November 28, 2008.
[43] Wittendorp, Stef. 2016.
[44] European Parliament and Council of the European Union. 2017. And Maliszewska-Nienartowicz, Justyna. 2017.
[45] Ibid.

data interference[46] was added to counter the cyber-attacks operated by terrorist organisations.

What is clear from the definition of terrorist offences in the 2017 Directive, similarly to the one provided by the 2002 Council Framework Decision, is that there was a particular stress on the aim of the action, rather than on the motive behind it. This surely represented a positive element, in the sense that the intent is often easier to prove in judicial proceedings, however, it also has downsides since the definition provided by the Directive was quite broad and vague, therefore it was unclear how certain expressions would be interpreted in practice, for instance causing "extensive destruction" or "major economic loss"[47], and furthermore this vagueness could potentially be exploited by states to criminalise public protests or other peaceful manifestation that may be deemed to be "seriously intimidating a population"[48].

Following, Article 4 of the Directive provides for offences related to terrorist group, that is defined in Article 2 as "a structure group of more than two persons, established for a period of time and acting in concert to commit terrorist offences […]". According to this provision, Member States are required to criminalise not only the actions of individuals who lead or direct a terrorist group but also those who actively participate in the activities of such a group[49] "with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group"[50]. Therefore, similarly to Article 2(2) of the 2002 Council Framework Decision, the Directive's definition of offences relating to a terrorist group includes another subjective element, which is challenging to prove, in fact, demonstrating the group members' awareness of the nature of its activities would be the responsibility of national authorities and possibly a burden for the investigations[51].

[46] As referred to in Directive 2013/40/EU of the European Parliament and the Council of 12 august 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/HA (OJ L 218, 14.8.2013, p.8)
[47] Maliszewska-Nienartowicz, Justyna. 2017.
[48] European Network Against Racism. 2016. "European Union Directive on Counterterrorism Is Seriously Flawed." European Network against Racism. November 30, 2016. https://www.enar-eu.org/european-union-directive-on-counterterrorism-is-seriously-flawed-1251/.
[49] "By supplying information or material resources, o by funding its activities in any way" Article 4(b) of Directive EU/2017/541.
[50] European Parliament and Council of the European Union. 2017.
[51] Dumitriu, Eugenia. 2004.

From Article 5 to Article 12, the offences that characterise terrorist activities are listed. It is clear that this list covers activities that are preparatory in nature and has been considerably extended compared to the 2002 and 2008 documents. The first enlisted offence is "public provocation to commit a terrorist offence"[52], which will be further deepened as transposed into national legislation in the third chapter of the present thesis, in order to argue how such provision on glorification of terrorist acts has been applied by certain Member States, putting into danger the full enjoyment of the freedom of expression, particularly in the case of artists and public figures.

The Directive renders it a criminal offense to publicly distribute messages, including those that "glorify" terrorist acts, if the distribution is intentional and poses a risk of a terrorist offense being committed. However, this broad criterion may be prone to abuse if not appropriately restricted. The United Nations, in fact, recommended focusing on incitement that directly and causally contributes to increasing the actual likelihood of an attack. It would have been beneficial for the Directive to include this language to prevent unwarranted interference with freedom of expression[53]. Article 8 of the 2017 Directive provides for the criminalisation of a new offence, "receiving training for terrorism"[54]. In fact, until the adoption of this instrument, only recruitment and providing training for terrorism were punished. The addition of this type of offence aimed to criminalise the behaviours of those individuals that "self-radicalise" and train themselves by consulting materials available on the internet[55].

Following, Articles 9 and 10 were specifically written in order to align the EU to new international standards set, in particular, by Resolution 2178 of the UNSC in

[52] European Parliament and Council of the European Union. 2017. "Member States shall take the necessary measures to ensure that the distribution or otherwise making available by any means, whether online or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (i) of Article 3(1) where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally."
[53] ENAR. 2016.
[54] Member States shall take the necessary measures to ensure that receiving instruction on the making of explosives, firearms or other weapons or noxious or hazardous substances or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1) is punishable as a criminal offence when committed intentionally."
[55] Murphy, Cian C. 2016.

order to counter the foreign fighters' phenomenon. In fact, according to this international standard, travelling for the purpose of terrorism as well as financing travel for terrorist purposes should be criminalised in national legislation. Therefore, the two aforementioned articles of the Directive required Member States to criminalise "travelling for the purpose of terrorism" and "organising or otherwise facilitating travelling for the purpose of terrorism" when those offences are committed intentionally.

Nevertheless, the act of travelling to another Member State should be criminalised only if it can be proved that the intended purpose behind travelling is to "contribute and commit terrorist offences, participate in the activities of a terrorist group, provide or receive terrorist training"[56]. Article 11 then provides for the criminalisation of terrorist financing, in order to ensure that "providing or collecting funds […] with the intention that they will be used, or in the knowledge that they are to be used […] to commit, or to contribute to the commission of, any of the offences referred to in Articles 3 to 10 is punishable as a criminal offence when committed intentionally." Therefore, this provision covers terrorist financing as far as terrorist offences, offences relating to a terrorist group and offences related to terrorist activities are concerned. At paragraph 2, it is specified that when financing concerns terrorist offences, offences relating to a terrorist group or travelling for the purpose of terrorism, "it shall *not*[57] be necessary that the funds be in fact used […] to commit, or to contribute to the commission of any, of those offences, nor shall it be required that the offender knows for which specific offence or offences are to be used"[58].

2.4. General provisions related to terrorist offences, offences relating to a terrorist group and terrorist activities

A quite controversial part of the Directive regards Article 13 on the relationship to terrorist offences, which states that "for an offence referred to in Article 4 or Title III to be punishable, it shall *not*[59] be necessary that a terrorist offence be actually committed, nor shall it be necessary, insofar as the offences referred to in Articles 5 to 10 and 12

[56] European Parliament and Council of the European Union. 2017.
[57] Emphasis added.
[58] European Parliament and Council of the European Union. 2017.
[59] Emphasis added.

are concerned, to establish a link to another specific offence laid down in this Directive"[60]. This, however, does not represent, *per se*, a novelty as this provision appears to be in line with Article (3) of the 2008 Amendment. According to the opinion of the Meijers Committee[61] on the European Commission's proposal, such provision, coupled with Article 11, extends the relationship between conducts and potential harmful outcomes excessively. The Committee insisted on the fact that, given such provisions, no relationship is required at all between those behaviours and consequences. The Directive additionally extended the scope of the punishment of "aiding and abetting, inciting and attempting" the offences therein included. In fact, now incitement is punishable in relation to all offences provided for in the Directive, while the criminalisation of aiding and abetting is foreseen in all cases, except for organising or facilitating travelling for the purpose of terrorism. Equally the criminalisation of attempting is extended to all offences, except for receiving training for terrorism and organising or otherwise facilitating travelling for the purpose of terrorism[62].

Furthermore, the 2017 document provides for the penalties of both natural and legal persons as foresaw by the 2002 and 2008 versions, however, in the case of the former, a new provision in the framework of penalties for natural persons has been added in order to safeguard child's interests. In fact, according to the latter, "Member States shall take the necessary measures to ensure that when a criminal offence referred to in Article 6 or 7[63] is directed towards a child, this may, in accordance with national law, be taken into account when sentencing"[64]. As far as mitigating circumstances are concerned, these are the same that were foreseen by the Council Framework Decision. By implementing ancillary offences, authorities can proactively intervene to thwart violent attacks before they happen. While this approach appears appealing as it expands the options available to combat terrorism, it also presents significant challenges. The primary issue is that these offences rely on suspicion rather than substantial or concrete

[60] European Parliament and Council of the European Union. 2017.
[61] The Meijers Committee is an independent group of experts that conducts its work on areas ranging from European criminal law to non-discrimination and criminal law. See https://www.commissie-meijers.nl/#:~:text=The%20Meijers%20Committee%20is%20an,non%2Ddiscrimination%20and%20constitutional%20law. Meijers Committee. 2016. "Note on a Proposal for a Directive on Combating Terrorism."
[62] European Parliament and Council of the European Union. 2017.
[63] Recruitment for terrorism or providing training for terrorism.
[64] European Parliament and Council of the European Union. 2017. See Article 5(4).

evidence. While they may indicate a potential for the perpetrator to commit a terrorist act, it is not a certainty. Acting pre-emptively, as permitted by ancillary and facilitative offences, raises questions about the evidentiary standards applied in convicting suspects and on the impact on fundamental rights[65].

However, in order to address this question about the controversial aspect of stretching ancillary offences, the Directive has a special provision entirely dedicated to fundamental rights (Article 23 of the Directive), which were briefly recalled in the Preamble of the document (Recital (1)). Furthermore, in Recital (40), the legislators clarified that "the expression of radical, polemic or controversial views in the public debate on sensitive political questions" is not criminalised under the offence of public provocation to commit terrorist offences. Therefore, the Directive provides Member States with the chance to establish greater legal predictability and to cease practices that result in unnecessary and disproportionate limitations on fundamental rights. Therefore, was the national implementation process done accordingly to the standards set by the Directive, "some mistakes made in the past would not be made in the future"[66].

In addition, despite the Directive has introduced new offences related to terrorist offences, it has not provided for specific sanctions that should be introduced in relation to the latter. The Directive only foresees that such penalties should be "effective, proportionate and dissuasive sanctions […]", therefore leaving to Member States the decision on how to criminalise such offences. Surely this may entail downsides since such wide margin of discretion may create discrepancies between Member States and jeopardise the fight against the terrorist threat[67]. As far as prosecution and jurisdiction are concerned, the 2017 Directive does not introduce radical changes with regards to the two previous instruments, except for prosecution of the offence of providing training for terrorist purposes. In fact, in this case each Member States can broaden the scope of its jurisdiction "where the offender provides training to its nationals or residents […]"[68]. On the other hand, in cases where the jurisdiction of two or more

[65] Wittendorp, Stef. 2016.
[66] Ollo, Anna. 2018. "Can We Ensure EU Terrorism Policies Respect Human Rights?" European Digital Rights (EDRi). 2018. https://edri.org/our-work/can-we-ensure-eu-terrorism-policies-respect-human-rights/.
[67] Maliszewska-Nienartowicz. 2017.
[68] Article 19 (2).

Member States overlaps, the states concerned shall engage in a cooperation in order to establish who will prosecute the offenders, in order to centralise proceedings in one state[69].

Regarding the question of investigative tools and confiscation, Article 20 establishes that Member States shall use effective investigative tools such as the ones used in organised crime or to prosecute other serious crimes, and shall take the necessary measures so that competent authorities confiscate or freeze the instruments and the assets that are intended to be used or derived from the contribution to or the commission of one of the offences enlisted in the Directive[70]. Furthermore, the latter imposes an obligation on States to promptly remove online content that contributes to public provocation to the commission of terrorist acts. Alternatively, States shall proceed, when removal is not possible, to block access to that content. Both removal and blocking shall follow transparent procedures and ensure sufficient safeguards in order to guarantee that the measures are "limited to what is necessary and proportionate", while the possibility of judicial redress shall also be ensured as part of the safeguards[71].

Finally, the Directive reserves an entire section (Title V) to provisions on the protection of, support to, and rights of victims of terrorism. The definition of victims of terrorism is provided at Recital (27), according to which a victim of terrorism is:

> "a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, insofar as that was directly caused by a terrorist offence, or a family member of a person whose death was directly caused by a terrorist offence and who has suffered harm as a result of that person's death."[72]

[69] Article 19 (3).
[70] According to paragraph 2 of the Article, freezing and confiscation should take place in accordance with Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p.39)
[71] Article 21.
[72] As provided for in Article 2 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protections of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 14.11.2012, p.57)

Before establishing the obligations of Member States in terms of services and support, the Directive clarifies at Article 24 (1) that investigations and prosecution of offences shall not be dependent on a report made by a victim of terrorism. Subsequent provisions establish that support services provided by Member States should be in line with Directive 2012/29/EU, and therefore should be available to victims of terrorism immediately after an attack and as long as they need them. These services shall be also "confidential, free of charge and easily accessible to all victims of terrorism", ranging from providing psychological assistance to aiding in the exercise of the victims' right to access information related to terrorism.

This provision seems to entail a potentially substantial allocation of resources for mental health services in Member States, which is undoubtedly praiseworthy. However, securing the necessary funding for this commitment may pose a challenge[73]. Furthermore, the right to access to legal aid and to medical treatment is guaranteed by paragraphs 5 and 6 of Article 24. Article 25 clarifies the status of the family members of victims of terrorism and extends their protection, also in the course of criminal proceedings[74]. Article 26, on the other hand, stipulates that if victims of terrorism reside in a different state than where the terrorist act occurred, they must be ensured complete access to their rights, support services, and compensation programs in both the Member State where the terrorist act occurred and the Member State where they reside[75]. Thus, the Directive not only recognises that terrorism is a cross-border phenomenon but also includes this aspect of terrorism in providing support to its victims[76].

3. Procedural criticism on the adoption process and marginalisation of NGOs

The EU not only followed the contemporary model of adopting criminal law rules, as in the case of UNSC Resolution 2178, but it also displayed an unprecedented sense of urgency in adopting Directive 2017/541. It even went to the extent of sidestepping the regular procedure for carrying out an impact assessment. Unlike the preceding legal acts on terrorism, the Directive's proposal was not accompanied by a relevant report, since the Commission itself clearly stated that "given the urgent need to improve the

[73] Murphy. 2016.
[74] Voronova, Sofija. 2017. "Briefing EU Legislation in Progress Combating Terrorism." https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608682/EPRS_BRI(2017)608682_EN.pdf.
[75] European Parliament and the Council of the European Union. 2017.
[76] Maliszewska-Nienartowicz. 2017.

EU framework to increase security in the light of recent terrorist attacks including by incorporating international obligations and standards, this proposal is exceptionally presented without an impact assessment"[77]. The series of terrorist attacks that occurred in Europe during 2014 and 2015, particularly the attacks in Paris on 13 November 2015, along with the phenomenon of "returning foreign fighters", played a significant role in legitimising and hastening the legislative procedure. This acceleration paved the way for an extensive expansion of criminalisation, surpassing even the definitions found in international law instruments in both depth and scope[78].

As a matter of facts, one of the main criticisms that was directed towards this new legislative instrument was the fact that the Commission did not conduct an ex-ante Impact Assessment of the instrument with regards to the EU Charter of Fundamental Rights[79], in contrast to both the European Agenda on Security[80] and to the Better Regulation Agenda[81]. As stated by the Commission, an Impact Assessment is a "valuable tool for examining different policy options, demonstrating that in proposing new EU legislation the Commission has taken full account of fundamental rights protected by the Charter"[82]. However, in the case of the 2017 Directive the Commission found that, due to the pressing necessity to enhance the EU framework and bolster security in response to recent terrorist attacks happened at that time, which also involved aligning with international obligations and standards, this proposal could be presented without a formal Impact Assessment[83]. Such Impact Assessment was expected to be given after 8 September 2021, when the Commission was to send a report to the Parliament and to the Council on the basis of Article 29(2) of the Directive on its application, a document that will be analysed later in this subparagraph.

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[77] European Commission. 2015.
[78] Nikoletta Karaliota, Eliza Kompatsiari, Christos Lampakis, and Maria Kaiafa-Gbandi. 2020.
[79] Sánchez Frías, Alejandro. 2018.
[80] For more visit https://home-affairs.ec.europa.eu/european-agenda-security-factsheets_en
[81] "The Better Regulation Agenda ensures evidence-based and transparent EU law-making based on the views of those who may be affected". For more visit https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation_en#:~:text=The%20Better%20Regulation%20agenda%20ensures,those%20that%20may%20be%20affected. And Gherbaoui, Tarik, and Martin Scheinin. 2022.
[82] European Commission. 2011. "Operational Guidance Fundamental Rights in Impact Assessments." https://commission.europa.eu/system/files/2017-09/opperational-guidance-fundamental-rights-in-impact-assessments_en.pdf.
[83] Ibid.

An additional voice that contributed to manifest criticism has been the European Parliament LIBE Committee[84], according to which it is "particularly striking the lack of an Impact Assessment where the new Directive on Combating Terrorism, that is to replace the Framework Decision 2002/475, is concerned. None of the Council initiatives had been accompanied by an Impact Assessment. The lack of public consultations and ex-ante assessments was not compensated by ex post reviews or evaluations"[85]. In its note on the draft proposal for a directive on combating terrorism, the Meijers Committee stated that a hurried procedure like the one that has eventually brought to the adoption of the 2017 Directive fails to adequately acknowledge the significance of a well-balanced legal approach to counterterrorism. This is especially concerning because the initial proposal involved extensive powers under criminal law that could be utilised at an early stage and profoundly impact people's lives[86].

The allegedly flawed adoption process of Directive 2017/541 was accompanied by the lack of access, on the part of civil society organisations, to the drafting procedure, raising concerns on the vague and broad wording of the document[87]. The hasty adoption process, the scope, and the potential human rights implications of the Directive have been subject to criticism. According to the International Commission of Jurists[88], ensuring its implementation while upholding human rights and the rule of law undeniably posed a challenge for national systems, especially for national legislatures, prosecutors, investigative judges, and the judiciary[89]. According to a July 2016 joint statement by Amnesty International[90], the International Commission of Jurists, and the

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[84] Committee on Civil Liberties, Justice and Home Affairs.

[85] Directorate General for Internal Policies. 2017. "The European Union's Policies on Counter-Terrorism Relevance, Coherence and Effectiveness."

[86] Meijers Committee. 2016.

[87] Open Society Foundations. 2021. "Joint Civil Society Report on the Fundamental Rights Impact of the EU Directive on Combating Terrorism."

[88] "The ICJ is an international non-governmental organisation which promotes human rights and the rule of law. Its membership consists of sixty eminent jurists from around the world". See https://justice.org.uk/international-commission-jurists-icj/#:~:text=The%20ICJ%20is%20an%20international,of%20the%20Republic%20of%20Ireland.

[89] International Commission of Jurists. 2020. "Counter-Terrorism and Human Rights in the Courts Guidance for Judges, Prosecutors and Lawyers on of EU Directive 2017/541 on Combatting Terrorism."

[90] "Amnesty International is an international organisation that campaigns to protect human rights of individuals and groups across the world. Amnesty undertakes research, information and education

Open Society Foundations[91], during the development of the Directive, the responsible authorities sidestepped crucial democratic processes.

The legislative process was deemed rushed and secretive, with closed-door meetings and, as previously explained, lacking an Impact Assessment to guide the Commission's proposal. Moreover, there was no public hearing in the European Parliament to engage with experts and practitioners and to gather valuable input. Furthermore, negotiations were set to begin without undergoing a parliamentary-wide review of the LIBE text[92]. In spite of the difficulties, civil society organisations persisted in offering expert analysis and evaluations of counter-terrorism laws. Human rights groups further facilitated several roundtable discussions before the trilogue negotiations[93].

Nevertheless, when the drafting process ended, and a final text was agreed, there were serious concerns about the latter running the risk of "undermining fundamental rights and having a disproportionate and discriminatory impact on ethnic and religious communities"[94]. Throughout the implementation phase, there was limited engagement with civil society, except for a handful of informal meetings to discuss the implementation process. Non-governmental organisations (NGOs) advocated for EU funding to be allocated to civil society to monitor the Directive's implementation and collaborate with relevant stakeholders to address concerns related to fundamental rights. A group of non-governmental organisations successfully obtained European Union funding to assist in the implementation of the Directive within the framework of a larger EU funding initiative dedicated to enhancing cooperation in criminal justice, as in the case of the *Judges Uniting to Stop Terrorism with International, Constitutional*

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campaigns to draw attention to human rights issues and violations". See https://human-rights-channel.coe.int/amnesty-international-en.html

[91] "The Open Society Foundations, founded by George Soros, are the world's largest private funder of independent groups working for justice, democratic governance, and human rights. We approach this mission through the illuminating principles of justice, equity, and expression—defining characteristics of any truly open society". See https://www.opensocietyfoundations.org/who-we-are

[92] Open Society Foundations. 2016. "After a Fast-Track Process the European Parliament Takes a Troubling Position on Counterterrorism." Www.opensocietyfoundations.org. July 13, 2016. https://www.opensocietyfoundations.org/newsroom/after-fast-track-process-european-parliament-takes-troubling-position.

[93] Ibid.

[94] Euractiv. 2016. "Rights Groups Expose Flaws in EU Counterterrorism Directive." Www.euractiv.com. December 1, 2016. https://www.euractiv.com/section/justice-home-affairs/news/rights-groups-expose-flaws-in-counterterrorism-directive/.

and European law (JUSTICE) project, co-ordinated by the International Commission of Jurists and the European Institutions office (EI)[95]. Although there were initial promising signs, dedicated funding specifically allocated for the implementation of the Directive never materialised. Consequently, there has been limited ability to consistently oversee and record the effects of the Directive or interact with stakeholders in the justice sector regarding its execution[96].

Joe McNamee, former executive director of European Digital Rights (EDRi)[97], was particularly sceptic towards the homogeneous application of the Directive as he claimed that it was "too unclear to be implemented in a harmonised way across the EU, too shrouded in secrecy to have public legitimacy and too open to interpretation to prevent wilful abuse by governments seeking to exploit its weaknesses"[98]. The vague and broad nature, often associated with the content of the Directive, appears to be at the opposite end with regards to the rights that this instrument has proposed itself to protect and ensure. Amongst the principles that the Directive should enforce and respect, the principle of legality, comprehensive of other elements, such as foreseeability and precision, stands out. The broad and vague terms of the legislative instrument go opposite ways the precision and clarity needed according to the abovementioned principle, especially since criminal behaviours should be clearly and specifically defined in unambiguous terms. Offences must have narrow and distinct definitions, ensuring a clear distinction between punishable and non-punishable conduct or conduct subject to different penalties. This clarity empowers individuals to regulate their actions in accordance with the established legal framework[99].

4. Directive EU 2017/541 in practice: impact on fundamental rights and freedoms

Another significant concern was that the Directive was in line with a broader pattern of criminal law assuming an ever more "preventive" role. This is achieved through the

[95] International Commission of Jurists. 2018. "Judges Uniting to Stop Terrorism with International, Constitutional and European Law (JUSTICE) Project." https://www.icj.org/wp-content/uploads/2018/10/JUSTICE-project.pdf.
[96] Open Society Foundations. 2021.
[97] The EDRi network comprises a vibrant and robust alliance of NGOs, experts, advocates, and academics dedicated to safeguarding and promoting digital rights throughout Europe. For more than twenty years, it has been the driving force behind the digital rights movement on the continent.
[98] Euractiv. 2016.
[99] Open Society Foundations. 2021.

inclusion of wide and ambiguously defined ancillary offences that, potentially, could be applied in a discriminatory manner or infringe upon human rights. Moreover, these provisions leave room for speculation about a person's potential future commission of an offence. However, criminal law must avoid penalising abstract or theoretical risks or actions that lack a direct connection between the offender's conduct and the actual harm caused. Moreover, because of the extensive definition of terrorism outlined in the Directive, deliberations regarding potential reasons for resorting to violent resistance in exceptional circumstances are also susceptible to being treated as criminal acts. In a society that values freedom and open discourse, such discussions should not be resolved through the application of criminal law. Additionally, the potential for accumulating multiple offences raises the concern of a "chilling effect" on freedom of speech, especially in the context of criminalising the funding of the spread of such ideologies. Another instance of the Directive's expansive language can be found in Articles 2 and 4, which establish the definition of a "terrorist group" and prescribe penalties for offences associated with a terrorist group, suggesting a restriction on the freedom of association.

Nevertheless, there seems to be doubts, as reported by Open Society Foundations, on whether the clarity of the designation of a terrorist group should be based on publicly available and well-defined criteria. Otherwise, there is a risk that groups, which might be contentious or perceived as irritants to the state, but are not terrorist organisations, could become subject to investigation and prosecution. Furthermore, regarding the term "structured group", the Directive's text lacks precise specifications, such as the degree of organisation necessary or the duration of time that would indicate a group was not formed arbitrarily. As far as direction of, and participation in, a terrorist group is concerned, Article 4 is drafted in a manner that encompasses any criminal activity, irrespective of their terrorist nature, within the scope of criminality[100]. As in the words of the UN Special Rapporteur in the 2019 report to the Human Rights Council,

> "qualifying a wide range of acts as impermissible "support for terrorism", counter-terrorism measures are found in laws that apply extraterritorially […].

[100] Ibid.

This results in harassment, arrest and prosecution of humanitarian, human rights and other civil society actors".[101]

At the same time, Article 5, on the public provocation to commit a terrorist offence, has been largely criticised due to exceptionally low standard established, by defining an act as punishable if it poses a risk of leading to an offence and criminalises conducts that directly or indirectly promote terrorist offences. It is clear that such provision has caused deep warning, during the drafting process, especially in relation to Article 10[102] of the Charter and Article 11[103] of the European Convention on Human Rights[104]. The Meijers Committee asserted that, in the language used in Article 5, a more stringent criterion was required to limit the applicability of the provocation offence. Given the clear involvement of the right to freedom of expression, the offence should have been carefully circumscribed. As it stands, the offence could potentially criminalise individuals who sympathise with the ideology of terrorist groups but do not necessarily endorse their violent actions.

Article 5 explicitly criminalises *indirect*[105] provocation of terrorist offences. When combined with the preamble, which highlights offences related to public provocation, including glorification, justification, and dissemination of messages or images related to terrorism victims, it results in an undue infringement on freedom of expression, including press freedom[106]. In relation to this particular concern, in 2018, the Commissioner for Human Rights, in a human rights comment addressed to the CoE,

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[101] UN Special Rapporteur on Counter-Terrorism. 2019. "Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders." Documents-Dds-Ny.un.org. March 1, 2019. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/057/59/PDF/G1905759.pdf?OpenElement.

[102] 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

[103] "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

[104] Open Society Foundations. 2021.

[105] Emphasis added.

[106] Meijers Committee. 2016.

asserted that the misuse of anti-terror legislation has turned into one of the most widespread threats to the freedom of expression and to freedom of the media[107]. The Commissioner went ahead and noted that there has been a surge in the enactment of laws criminalising actions like "encouragement of terrorism" or "extremist activities", and praising or glorifying terrorism among CoE Member States. The apology of terrorism is prevalent, especially on online platforms, and requires effective measures to combat it. However, counter-terrorism laws can potentially become a risky instrument for suppressing freedom of expression when used to curtail legitimate reporting or criticism. Issues arise when these offences are ambiguously defined or overly broad, leading to unnecessary or disproportionate limitations on the right to freedom of expression[108].

As far as the major novelties of the Directive are concerned, the offences related to Article 7 and 8, that is to say providing and receiving terrorist training, interfere with one's right to receive information, aside from freedom of expression and the right to education, according to the Open Society Foundations' report[109]. Within the scope of these offences, activities that are neutral in nature, such as online learning, could potentially be subject to criminalisation. During the drafting process of the 2017 Directive, the French Constitutional Court addressed the question related to repeatedly accessing terrorist websites which made available messages that directly provoked the commission of terrorist offences. Criminalisation of such behaviours was considered unconstitutional by the Court since it "jeopardised the freedom of communication in a way that is not necessary, appropriate and proportionate"[110].

In a case happened before the Court of First Instance of Sweden, where the defendant acquired information that was linked with ISIL on how to make or use explosives, weapons and other hazardous substances. Nonetheless, as per the Court's

[107] Commissioner for Human Rights. 2018. "Misuse of Anti-Terror Legislation Threatens Freedom of Expression - Commissioner for Human Rights - Www.coe.int." *Council of Europe*, December 4, 2018. https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fcounter-terrorism.
[108] Ibid.
[109] Open Society Foundations. 2021.
[110] Berthélémy, Chloé. 2020. "French Avia Law Declared Unconstitutional: What Does This Teach Us at EU Level?" *European Digital Rights (EDRi)*, June 24, 2020. https://edri.org/our-work/french-avia-law-declared-unconstitutional-what-does-this-teach-us-at-eu-level/.

decision, there was insufficient evidence to demonstrate that the defendant had a clear intention to utilise the acquired information for the purpose of engaging in or contributing to a terrorist act. What all these cases have in common is that they derive mainly from the broad nature of certain pieces of legislation that focus on the punishment of some pre-emptive offences[111], criminalising conducts that do not necessarily and directly entail harm to others[112]. At the same time, the provision on the criminalisation of terrorist financing (Article 11) seems to heighten the chances of a potentially arbitrary or discriminatory application of criminal law by establishing an excessively low threshold of intent and not requiring an actual commission of a principal offence. Therefore, a great risk of misuse seems to be attached to similar provisions, especially in the case of cracking down the opposition and civil society[113].

As far as the criminalisation of travelling for the purpose of terrorism (Article 9), the combination of the words "contribute to criminal activities" renders the offence quite unclear and far-reaching. Coupled with Article 10 "otherwise facilitating", the provision aims to reach individuals that are not necessarily part of the organisation but facilitate the traveller in a number of ways. The combination of these factors results in a significant expansion of criminal liability for what would otherwise be considered a routine activity: travelling abroad. The crucial determination will centre on the alleged intentions of the traveller, a judgment that is left to the discretion of domestic law. Some Member States may interpret this broadly, possibly deeming travel to certain "suspicious" regions as *prima facie* evidence of a terrorist purpose. Consequently, there is a potential risk of shifting the burden of proof, which could pose particular challenges for humanitarian organisations and journalists[114].

In addition, some commentators have argued that Article 21 raises concerns. Specifically, this provision mandates that Member States must implement measures to guarantee the swift removal of terrorist content, whether it is hosted within their own territory or beyond, and they should also take steps to block such content if removal

[111] Ibid.
[112] European Network Against Racism. 2021. "Suspicion, Discrimination and Surveillance: The Impact of Counter-Terrorism Law and Policy on Racialised Groups at Risk of Racism in Europe." https://www.enar-eu.org/wp-content/uploads/suspicion_discrimination_surveillance_report_2021.pdf.
[113] Open Society Foundations. 2021.
[114] Meijers Committee. 2016.

proves to be unfeasible[115]. This provision has faced numerous criticisms. It has been accused of being too vaguely formulated, making a broad reference to the internet without specifying what exactly constitutes content related to public provocation. There exists an intermediate area between content with a radical ideology and content directly linked to terrorism, which is entirely left to the discretion of individual Member States to manage[116].

To conclude on the issues related to the impact of Directive 2017/541, while the latter is neutral and does not consequently target a specific category of individuals, at least in its wording, Open Society Foundations[117] found that certain Member States implemented the Directive, and more broadly other counter-terrorism measures, as to target specific groups that are consequently stereotyped. That has been the case of Hungary, as mentioned in the previous chapter, but also of Poland that, with the draft Anti-Terrorism Act of 2016, presented a "catalogue of terrorist incidents" that comprehended establishing an Islamic university or Islamic clerics visiting prisons[118]. This fear of potential discrimination stemming from counter-terrorism norms was additionally underlined by the Meijers Committee, in its note on the proposal of the Directive back in March 2016, where it claimed that the implementation of certain provisions envisioned in the proposal of the Directive would, in practice, result in infringing upon the right of non-discrimination by disproportionately targeting Muslims[119].

Overall speaking, civil society organisations have pointed out how the Directive has taken a step forward in the criminalisation of preparatory acts that do not necessarily imply the commission of a primary offence. The "broadening" of criminal law within the realm of counter-terrorism is further complicated by the growing utilisation of administrative measures[120]. Given that EU legislative provisions do not significantly differ from the changes introduced by many Member States in their domestic legal systems, numerous organisations have expressed critical views on the Directive. The

[115] European Parliament and Council of the European Union. 2017.
[116]De Luca, Simona. 2017. "La Direttiva 2017/541/UE E Il Difficile Bilanciamento Tra Esigenze Di Pubblica Sicurezza E Rispetto Dei Diritti Umani." *Eurojus* 4 (3).
[117] Open Society Foundations. 2021.
[118] European Network Against Racism. 2021
[119] Meijers Committee. 2016.
[120] Open Society Foundations. 2021

Meijers Committee and European Digital Rights, among others, have pointed out the insufficient documentation provided by the EU to justify such an anticipation of criminal protection. They argue that this anticipation should be avoided, especially considering that, for some actions, the actual commission of a terrorist act is not even necessary. The vagueness of the provisions does not mandate a concrete link to the principal offence, which contradicts the principle of legality as established in Article 49 of the Charter of Fundamental Rights of the European Union and Article 7 of the European Convention on Human Rights[121].

More in depth, according to the opinion of the Meijers Committee, the then envisioned text of the Directive extended in an excessive manner the scope of criminal law, putting at risk fundamental rights. The Committee further underlined in its opinion how the provisions included in the Directive would not reconcile with other initiatives taken by the EU institutions, on deradicalisation, disengagement, and rehabilitation of foreign fighters. In fact, the preventive turn in criminal law, that is embedded in the Directive, seems to be discouraging for foreign fighters and would potentially prevent them from returning. This not only applies to the case of returnees but also to aspiring foreign fighters, whose families may be prevented from alerting the competent authorities for their relatives' signs of radicalisation[122]. The Meijers Committee further stated that the hurried procedure for the drafting of the Directive did not adequately acknowledge the significance of a well-balanced legal approach to terrorism, especially considering the extensive powers under criminal law that can be implemented at an early stage and profoundly affect individuals' lives. In fact, counter-terrorism legislation, including EU legislation, often exhibits a short-term focus and lacks thorough legislative scrutiny, while the newly introduced far-reaching powers are retained for a considerable period, sometimes even employed beyond the counter-terrorism realm[123].

In addition, judges play a critical role, especially considering the wide-ranging and vulnerable nature of some counter-terrorism offences, in preventing the arbitrary application of criminal law. They must guarantee that criminal law strictly adheres to

[121] De Luca, Simona. 2017.
[122] Meijers Committee. 2016.
[123] Ibid.

the demanding standards of legality, which encompass the fundamental principles of *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law).While prosecuting individuals for inchoate offences[124], such as those where the act of terrorism has not been completed, may be possible, a clear boundary should be drawn to avoid prosecuting individuals solely based on their thoughts rather than their actions. Judges must also safeguard the integrity of the *mens rea* (intent) requirement concerning the conduct that constitutes the offence (*actus rea*). Presumptions of intent, such as automatically assuming that traveling to a particular region implies an intention to participate in terrorism, should be dismissed in order to safeguard the presumption of innocence and maintain the requirement for proving guilt in criminal cases[125].

5. Transposition issues

5.1. The reports of the Commission

As anticipated, the Commission was entitled by the very same text of the Directive to draft two separated reports on the basis of Article 29. According to paragraph 1 of this article, "the Commission shall, by 8 March 2020, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures to comply with this Directive" while paragraph 2 stated that "the Commission shall, by 8 September 2021, submit a report to the European Parliament and to the Council, assessing the added value of this Directive with regard to combating terrorism. The report shall also cover the impact of this Directive on fundamental rights and freedoms, including on non-discrimination, on the rule of law, and on the level of protection and assistance provided to victims of terrorism"[126].

When considering the initial report derived from Article 29(1) of the Directive, the Commission has submitted this document to both the Parliament and the Council as an evaluation of the degree to which Member States have implemented the Directive, with a primary focus on emphasising issues related to transposition. Despite such report

[124] Inchoate offences are those types of crimes that are "committed by taking a punishable step towards the commission of another crime. The three basic inchoate offences are attempt, solicitation and conspiracy." See https://www.law.cornell.edu/wex/inchoate_offense

[125] International Commission of Jurists. 2020.

[126] European Parliament and Council of the European Union. 2017.

was supposed to be due by early March 2020, the content of the report is entirely based on the information provided by national authorities by April 2020 and, consequently, was only finalised in September 2020. According to the report, only seven Member States respected the deadline set for 8 September 2018 and, for this reason, infringement proceedings were initiated in November 2018 by the Commission. However, fifteen of the Member States against which infringement actions were commenced reported having adopted the Directive by the end of July 2020. All other Member States passed legislation to implement the Directive, except Italy and France, whose pre-existing law was thought to be sufficient. In any event, it was typically an issue of amending existing law, more commonly the Criminal Code, when new provisions were introduced to transpose the text. A notable exception has been the case of Cyprus, which had to adopt new and specific legislation in order to transpose the Directive into its national legislation[127].

In general, the Commission concluded that the transposition process was successful; however, several issues emerged, particularly concerning: the accurate and comprehensive transposition of the offences outlined in Article 3; the omission of the phrase "contribute to the commission" in Articles 6, 7, 8, 9, and 11; the incomplete or inaccurate transposition of Article 9 and 11; challenges in transposing articles related to the protection of victims. The difficulty in transposing the crimes mentioned in Article 3 originated primarily from the requirement, in compliance with paragraph 1, that the crimes listed therein be also classified as "terrorist offences" by national legislation. Nevertheless, some other Member States, such as Germany, lack specific laws categorising the offences detailed in paragraph 1 as terrorist offences when committed with the intentions delineated in paragraph 2, except in the cases of terrorist funding and offenses associated with a terrorist group. This signals a shortcoming in the harmonisation of criminal law highlighted in the previous chapter, since, in the case of Germany, an individual acting alone is not going to be punished if committing one of the acts listed in paragraph 2 of Article 3, except in cases of collaboration with a terrorist group and terrorist financing[128].

[127] European Commission. 2020c. "Report from the Commission to the European Parliament and the Council Based on Article 29(1) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA."
[128] Ibid.

As far as the transposition of the offence of travelling for the purpose of terrorism (Article 9) is concerned, some Member States did not specifically transpose the phrase "contribute to the commission" of the crime, and in other instances, terrorist financing (Article 11) does not seem to cover all the offenses listed from Article 3 to Article 10. As far as provisions on the support and protection of victims are concerned, while, in certain Member States, specific victims support services were not established, in some other countries, existing legislation did not seem to provide for support services destined to the specific needs of victims of terrorism. Other criteria, such as the need that these support services are free of charge and confidential, did not appear to have been explicitly transposed. Further complications emerged during the transposition of Article 25, which stipulates that the measures available to safeguard victims of terrorism and their relatives should align with Directive 2012/29/EU. However, in certain instances, complete protection was not extended to family members of victims of terrorism[129].

On the whole, in its September 2020 report the Commission reached the conclusion that the transposition of the Directive could be considered overall satisfactory, nevertheless, some concerns arose from the way offences listed in Article 3 had been transposed, particularly since it would cause a "domino effect" on how other provisions of the directive would have been transposed. Adding to that, another source of concern derived from the incorrect or/and incomplete transposition of Article 9, and that happened when national legislation included a narrower definition of the individuals that travel for the purpose of terrorism or the territories they travel to. The same incompleteness stood for the application of Article 11 on terrorist financing. Lastly, according to the Commission, the difficulties in the implementation process of the provisions regarding terrorism victims and their family members' protection could potentially exercise a negative impact on those same services[130].

The second report that was drafted had its legal basis within Article 29(2) of the Directive, according to this provision, the Commission was tasked with evaluating the

[129] Ibid.
[130] Ibid.

additional benefits brought about by the Directive in the context of countering terrorism. Additionally, it was required to assess the document's influence on "fundamental rights and freedoms, including the principle of non-discrimination and the rule of law"[131], and the magnitude of the protection and assistance furnished to terrorism victims. The report was released in November 2021 and was conducted on the basis of desk and field research. The stakeholders consulted for the drafting of the present report comprehended: Member States' authorities responsible for the implementation of the Directive, several Directorates General within the Commission, the European External Action Service (EEAS), the Fundamental Rights Agency (FRA), Europol, Eurojust and Civil Society Organisations[132].

Overall, the assessment of the functioning of the Directive turned out to be positive as the latter has achieved its main objective of combating terrorism. The assessment found that: the scope and definition of the Directive were highly relevant; the Directive achieved its objectives to a satisfactory extent, however, there were specific factors that limited its effectiveness in relation to combating right-wing extremism; the costs associated with the application of the Directive appeared to be low; the Directive was found to be overall internally coherent; and, lastly, the Directive "generated added value beyond what could have been achieved unilaterally by single Member States"[133]. The report claimed that restrictions on fundamental freedoms and rights mostly adhered to the standards of necessity and proportionality. Some concerns, meanwhile, were noted as having the potential to conflict with the prerequisites of necessity and proportionality. Some of them were directly linked to the Directive itself, while others were indirectly linked to it, such as procedural rights of terrorist suspects[134].

Likewise, the Directive had a restricted influence on the rule of law; however, certain concerns were raised concerning the adoption process, given the already mentioned lack of an Impact Assessment, in addition to issue that were found regarding

[131] European Commission. 2021b. "Report from the Commission to the European Parliament and the Council Based on Article 29(2) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA."
[132] Ibid.
[133] Ibid.
[134] Ibid.

the legal clarity of the document, the practical difficulty in proving terrorist intent and foreseeability, aside from the impact on lawful activities. Despite this, the Directive was found to have exercised a *positive*[135] effect on enhancing the level of support and protection for victims of terrorism. Nonetheless, in the real-world application of the articles pertaining to this matter (specifically, Article 24, 25, and 26), stakeholders have brought to light challenges, particularly in cases involving cross-border assistance and protection for victims. On the other hand, the report also uncovered a number of problems that have an effect on the Directive's proper operation. First of all, proving terrorist intent has proven difficult for a number of national judges and national authorities. The issue related mostly to the factual circumstance, that is the gathering of evidence, especially when the case was located outside the borders of the state. A similar problem was identified in situations involving travel for terrorist purposes, where prosecutors encountered difficulties in establishing the subjective element of terrorist intent[136].

Despite the fact that the Directive legally covers all types of terrorism, it was noted that it was difficult to categorise right-wing extremist attacks. The most persistent problem in this case was demonstrating the terrorist purpose behind right-wing extremist activities, primarily due to the dearth of supporting evidence. Another issue related to the right-wing extremist groups was related to the environment in which they operated, as the latter is characterised by great homogeneity and interconnections between long-existing groups and present-day organisations. In this situation, authorities faced challenges when considering prosecuting individuals for participating in terrorist group activities, as this offence needed a clear connection between the suspect and the organisation to be established. The Commission report continued by highlighting that the evaluation process identified some provisions as needing clarification, such as the wording, at Article 3, of an act "seriously damaging a country or international organisation"[137]. It is clear that this report did not focus too much on the question of fundamental rights and freedoms, therefore it has been object of criticism, since, as reported by the European Network of National Human Rights

[135] Emphasis added.
[136] Ibid.
[137] Ibid.

Institutions[138], the Commission has concentrated most of its efforts in the demonstrating the added value of the Directive rather than assessing the impact that this instrument has exercised on fundamental rights[139].

5.2. The evaluation of the European Union Agency for Fundamental Rights

In order to enrich its own assessment of the added value of the Directive, on the basis of Article 29(2) of the latter, the European Commission entitled the European Union Agency for Fundamental Rights to lead research on the instrument's impact on fundamental rights and freedoms. Located in Wien, the EU Agency for Fundamental Rights (FRA) is a body in charge of providing "independent, and evidence-based advice to EU and national decision-makers, thereby helping to make debates, policies and legislation on fundamental rights better informed and targeted"[140]. In practical terms, the body advises national and European institutions on fundamental rights in the areas of victims' rights, discrimination, data protection, racism, and access to justice, among others. The Agency's objective is to enhance the promotion and safeguarding of fundamental rights throughout the EU. To accomplish this objective, it collaborates and consults with its partners to gather and analyse information and data through socio-legal research. It also offers assistance and expert guidance while communicating and increasing awareness of rights[141]. As stated by the Report of the FRA on Directive 2017/541, the document seeks to examine the primary criminal law tool within the European Union's counter-terrorism efforts, namely the Directive. It places particular emphasis on the matter of safeguarding the fundamental rights of individuals, groups, and society as a whole[142].

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[138] The European Network of National Human Rights Institutions is a hub that brings together the over 40 National Human Rights Institutions in order to enhance the promotion and protection of human rights.
[139] European Network of National Human Rights Institutions. 2022. "Counter-Terrorism Measures in the EU Need a Human Rights-Based Approach - ENNHRI." European Network of National Human Rights Institutions. May 25, 2022. https://ennhri.org/news-and-blog/eu-counter-terrorism-measures-need-a-human-rights-based-approach/.
[140] European Commission. 2021b. "Report from the Commission to the European Parliament and the Council Based on Article 29(2) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA."
[141] Ibid.
[142] European Union Agency for Fundamental Rights. 2021. "Directive (EU) 2017/541 on Combating Terrorism - Impact on Fundamental Rights and Freedoms." https://fra.europa.eu/en/publication/2022/directive-eu-2017541-combating-terrorism-impact-fundamental-rights-and-freedoms.

Before starting to deepen the main findings of the FRA report, it is important to clarify that the subsequent paragraphs will provide a comprehensive summary of the main findings of this 110-pages report which was based on the data collected in seven Member States: France, Belgium, Spain, the Netherlands, Germany, Hungary and Sweden. The decision to concentrate on the abovementioned countries was based mainly on geographical balance and diversity of experiences. More than a hundred interviews were conducted with professionals ranging from judges, defence lawyers, prosecutors, law enforcement officers, non-governmental organisations and oversight institutions, coupled with desk research on institutional and legal frameworks. In the words of the Director of the FRA, Michael O'Flaherty, the results concentrated on the practical application of the Directive when considering fundamental rights and focused mainly on three offences therein provided: public provocation to commit a terrorist offence, travelling for the purpose of terrorism, receiving training for terrorism, since all the latter activities involved the exercise of legal actions, such as reading online material or travelling, if committed without malevolent intent. O'Flaherty further highlighted that there was a tangible risk of discouraging such legal activities and restricting certain rights, such as the freedom of movement[143].

The report is divided into five main chapters, the first one regarding criminal proceedings in terrorism cases, the second on public provocation to commit a terrorist offence, the third on travelling for the purpose of terrorism, the fourth one on receiving training for terrorism, and lastly, the fifth chapter concerns the application of administrative measures in terrorism cases. In the introductory section, concerning the main findings of the report, the FRA claims that their research confirms what many civil society organisations had previously stated, as reported in the following subparagraph, according to which "the Directive affects a wide range of fundamental rights and freedoms"[144], as enshrined in the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights[145], and the International

[143] European Union Agency for Fundamental Rights. 2021.
[144] Ibid.
[145] "The European Convention on Human Rights is the first Council of Europe's convention and the cornerstone of all its activities. It was adopted in 1950 and entered into force in 1953". For more visit https://www.coe.int/en/web/human-rights-convention#:~:text=The%20Convention%20protects%20the%20right,death%20penalty%2C%20discrimination%2C%20slavery%E2%80%A6

Covenant on Civil and Political Rights[146]. The report then continues by highlighting six recommendations, or better said, opinions, the first of which claims that Member States should ensure "foreseeability and clarity of criminal offences in the field of terrorism"[147]. This is due to the fact that, according to the reasoning of the FRA, the directive "builds on broad definitions of terrorist offences […]", therefore the scope of the offences is considered to be unclear. Specifically, the individuals interviewed discovered that the extent of certain offences remains subject to interpretation. This includes offences such as public provocation to commit a terrorist act, receiving training for terrorism, and traveling for the purpose of terrorism[148].

According to the second opinion of the FRA, Member States should "avoid criminalising lawful activities and objectively determine terrorist intent"[149]. They should make sure that, when pursuing preparatory offences, there is no undue encroachment on the legitimate exercise of individual rights, nor should it create a chilling effect on these rights. In addition, respondents have affirmed that, because establishing a person's intent, which plays a significant role in determining the criminal nature of their actions, is challenging to prove, there are worries that authorities might resort to subjective criteria and cues, assuming the presence of intent, and in certain instances, shifting the burden of proving innocence onto the defence. Moving to the third recommendation, Member States are urged to "apply effective safeguards to the use of investigative tools and evidence"[150]. The use of those tools should be "targeted, proportionate and accompanied by safeguards reflecting their invasive nature […]", furthermore, when intelligence information is utilised in legal proceedings, the evidence should undergo judicial scrutiny to ensure adherence to the right of defence. Meanwhile, the report affirms, when evidence is gathered outside the Member States, there should be a mechanism to endure that such data has not been collected through torture or other violations of human rights[151].

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[146] The International Covenant on Civil and Political Rights is a multilateral treaty according to which nations commit to the respect of civil and political rights of individuals. It was adopted by the United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966. For more visit https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

[147] European Union Agency for Fundamental Rights. 2021.

[148] Ibid.

[149] Ibid.

[150] Ibid.

[151] Ibid.

Opinion number four encourages states to "avoid discriminatory impact of counter-terrorism measured on specific groups, in particular Muslims"[152] to achieve this, national professionals engaged in investigations should receive adequate training and clear guidance to ensure that religious beliefs and practices are not wrongly categorised or stigmatised "proxy for signs of radicalisation and terrorist intent"[153]. Following the fifth recommendation of FRA experts urges EU Member States to "apply counter-terrorism measures only to conduct that is of a terrorist nature". This is due to the fact that the findings of the FRA research have shown that, in some Member States, the concept of terrorism and the subsequent application of counter-terrorism measures are extended to activities, ideologies, groups and individuals that are categorised as non-desirable. This may, of course, result in surpassing the legitimate purpose of counter-terrorism initiatives. Lastly, according to the sixth opinion, states should ensure proportionate "use of administrative measures and access to an effective remedy"[154]. The use of administrative measures is specifically concerned in Article 28 (1) and is applied to individuals who have been absolved or against whom no criminal proceedings have been started. Given that these measures are not subjected to the same procedural guarantees as measures under criminal law, the former can be used to circumvent obstacles connected to criminal law, reducing the transparency of the measures and potentially leading to a reversal of the burden of proof[155].

Following, as far as the first chapter of the report is concerned, the scope of criminal proceedings in terrorism cases was taken under analysis. Although the Directive does not inherently introduce new regulations regarding criminal proceedings, it does establish various new behaviours that could trigger investigations and the utilisation of investigative techniques. This is particularly the scope of Article 20 (1) of the Directive, according to which, Member States should make use of the same investigative tools, in terrorist offences, as the ones used in relation to organised

[152] European Union Agency for Fundamental Rights. 2022. "Directive (EU) 2017/541 on Combating Terrorism - Impact on Fundamental Rights and Freedoms Summary." https://fra.europa.eu/en/publication/2022/directive-eu-2017541-combating-terrorism-impact-fundamental-rights-and-freedoms.
[153] Ibid.
[154] Ibid.
[155] European Union Agency for Fundamental Rights. 2021.

crime[156]. These investigative tools include searching personal property, covert surveillance, interception of communications, and financial investigations[157]. The report states that the main issues arising from the use of investigative tools and powers, in the case of terrorism, arise from the Directive's "vague substantive criminal provisions"[158]. According to a number of judges, academics, NGOs and defence lawyers interviewed for the purposes of the report, "the preparatory nature of most terrorist and related offences results in authorising intrusive investigative tools with less available tangible evidence than in other crimes"[159]. Additionally, some respondents showed some concern regarding public prosecutors' power to authorise certain special investigative tools, instead of this being in the hands of judges. Concerns were raised in this regard because, based on the interviews, it was noted that prosecutors often prioritise prosecution over the protection of the rights of the individuals involved[160].

Another source of concern expressed by the respondents of the report was related to the power of law enforcement or intelligence agencies to carry out surveillance of communications, as there is limited oversight that is particularly concerning because it extends to the data-processing capabilities of these agencies. Furthermore, interception and surveillance of communications for counter-terrorism purposes, which fall outside the realm of criminal proceedings, are also not subject to substantial external scrutiny, do not require judicial authorisation or, in other cases, are subject to a limited judicial scrutiny. Concerning the assessment of intent, some respondents have expressed fears on the potential influence of a person's background of beliefs and religious convictions. Despite law enforcement officers claimed that a person's religious beliefs do not provide for the basis in establishing the intent of committing terrorist offences, findings indicated that one's background and religion often proved to be a bias[161].

As far as the second chapter is concerned, the question of public provocation to commit a terrorist offence is deepened. Respondents from various Member States have

[156] European Parliament and Council of the European Union. 2017.
[157] Ibid.
[158] European Union Agency for Fundamental Rights. 2021.
[159] Ibid.
[160] Ibid.
[161] Ibid.

voiced criticism regarding this type of offence, citing its lack of clarity and ambiguity. Consequently, they have expressed doubts about whether the offense of public provocation aligns with the principle of legality in criminal offences and whether it adheres to the criterion of foreseeability. Some have additionally agreed on the fact that differentiating between lawful and unlawful expression is kind of challenging, particularly in the absence of a universal criteria. As a result, the report highlights a range of potential risks to fundamental rights arising from the blurred distinction between freedom of expression and engaging in criminal activities. Other interviewees expressed concern on the impact that criminal law response can exercise on the freedom of speech when it comes to public provocation to commit a terrorist offence. In fact, this kind of approach to the issue can cause severe and long prison sentences due to, for instance, posting content on social media. Furthermore, as noted by specific defense lawyers, non-governmental organisations (NGOs), and academics, the ambiguous scope of the offence may lead to uncertainty and the possibility of selective interpretation by courts and authorities. This could potentially result in the provisions being construed according to their individual values or political motivations[162].

A major challenge across Member States has emerged in proving terrorist intent in the case involving the dissemination of terrorist speech or content. According to judges, in fact, there is a lack of harmonized criteria in assessing the required intent. A case in point in this regard is Spain, where a great disparity between the decisions of Constitutional Court and the Supreme Court, with regard to proving intent, has caused negative consequences on the freedom of expression. Moreover, the phrasing of the Directive stipulated that the terrorist speech or content must pose a danger that a terrorist act might occur. However, this requirement was not consistently included in all national transpositions. In addition, there was a risk of discrimination in the implementation of the overall provisions, but particularly in the case of public provocation, since the identity of a person may be interpreted by the authorities as a tool through which filter the expression of one's ideas. In fact, defence lawyers and oversight bodies have noticed a particular focus on Muslim people, and this is even more striking if compared to individuals with a right-wing extremism background, as they are not treated equally to people with Muslim background. Public provocation to

[162] Ibid.

commit a terrorist offence is often not used to convict right-wing glorification or incitement, the report claimed[163].

Thirdly, the report analysed the question of travelling for the purpose of terrorism, one of the key novelties introduced by Directive 2017/541 compared to past legislative instruments. A number of legal experts were indeed concerned about the criminalisation of travelling for the purpose of terrorism as a preparatory act, taken in isolation from other offences. Concern arose particularly in the case of humanitarian organisations and journalists, who travel to specific zones for legitimate professional purposes, whose freedom of assembly and association (Article 11 ECHR and Article 12 CFR) may be seriously restricted by such provisions. Experts additionally alarmed against the foreseeability of the present offence, and most importantly they underlined that the objective element of the latter represents a lawful activity, that is travelling, therefore criminalising travelling represents a clear restriction on its exercise. Furthermore, interviewees have highlighted that not very often criminal law measures are used in isolation when it comes to individuals suspected of travelling for the purpose of terrorism. In practice, these measures are often employed in tandem with administrative measures such as travel restrictions or the confiscation of documents[164].

Further, experts have highlighted the difficulty in assessing the terrorist intent behind travelling, something that works as a divide between regular travel and travel for the purpose of terrorism. Indeed, concrete evidence of intent is frequently absent, and as a result, respondents have acknowledged that relying on indirect evidence of intent has consequences for an individual's right to a defence and shifts the burden of proof onto the defendant. Even in the case of terrorist travel, as seen also in the case of dissemination of terrorist speech or content, there has been concerned about certain individuals being more likely subjected to criminal investigations, in this case mainly on the basis of their religious background. One of the respondents provided the example of a Kurdish individual taking part into Kurdish events that consequently became "relevant to the authorities" as soon as they travelled to certain zones. Respondents also highlighted issues in dealing with women and children in relation to the offence of

[163] Ibid.
[164] Ibid.

travelling for the purpose of terrorism. Certain Member States, such as France and Spain, have reported cases, in fact, where women were condemned even if their travel to conflict zones was attributed to providing support to their husbands or protecting their children[165].

The fourth chapter concerns the criminalisation of receiving training for terrorism and concerns were soon highlighted on the potential criminalisation of activities that were not of a terrorist nature. Even though it has been recognised that an anticipatory approach is necessary in this case, some judges and prosecutors have admitted that there is a risk of disproportionate impact on the rights of the individuals. Moreover, when this offence was incorporated into national legislation, concerns were raised regarding its alignment with the principles of legality and the proportionality of interference with the freedom of information and belief. Some NGOs and academics have further highlighted how the offence of receiving training for terrorism may incriminate individuals that have a professional interest in terrorism-related content, such as literature and websites. As far as the assessment of intent in receiving training for terrorism is concerned, transposing this subjective element into national legislation brought several doubts concerning the risk of the creating a "thought crime". Even in this case, the report found that background and personal beliefs may play a role in moving the authorities' suspicion of one being involved in terrorist training[166].

The fifth and last chapter of the report concerned the application of administrative measures in terrorism cases, in fact, despite the Directive is mainly a criminal law instrument, the transposition of the criminalisation of certain terrorist offences therein included has been accompanied by the introduction of administrative measures. The use of the latter in the count-terrorism realm surely presented fundamental rights implications, the report affirmed. Administrative measures exhibit a range of scopes and can be categorised into four groups: measures employed for the surveillance of convicted or suspected individuals; specific measures imposed as penalties, such as revoking nationality due to security apprehensions; measures imposing restrictions on the movement of a suspected individual; measures used under

[165] Ibid.
[166] Ibid.

immigration laws, such as prohibiting entry. These measures have been indicated, by respondents, as impacting on the prohibition of discrimination, right to respect for private and family life, especially in the case of deprivation of nationality, since the latter mostly targets individuals holding dual nationalities[167].

The main issue regarding the use of administrative measures, whichever they are, is related to the limited safeguards attached to them and the potential threat of bypassing procedural guarantees. In fact, respondents have underlined questions related to the shifting of the burden of proof aside from transparency, and, additionally, accessing legal aid was reported to be challenging, due to the length of the procedure and to the lack of information about one's rights. Furthermore, adopting administrative measures is easier compared to criminal measures, given that administrative measures operate with lower standards of proof and are based on criteria that often leave room for arbitrariness, as reported by respondents. Therefore, in its concluding section the report claimed that a number of fundamental rights issues arose from the application of the Directive, but these do not have their origin in the latter taken in isolation, but more broadly their root resides in national and EU legislation on counter-terrorism taken as a whole and comprehensive of the Directive[168].

6. Conclusion

The present chapter has provided, compared to the preceding one, a closer and more in-depth analysis of the main criminal law instrument existing in the European Union in the fight against terrorism: Directive 2017/541. Given that the structure of the present thesis shifts from the broader to the narrower, this chapter has focused firstly on the main elements that contributed to the discussion and later adoption of the Directive, which showed the need for an harmonised fight against the phenomenon of foreign terrorist fighters. Therefore, both the need to comply with international standards and the urgency to prompt an effective and coherent response to events similar to the attacks perpetrated in Paris in November 2015 brought the Commission, the Council and the Parliament to table in order update the already existing legislative framework in the criminal prosecution of terrorism.

[167] Ibid.
[168] Ibid.

The first section then continues by explaining in detail the content of the new Directive and the novelties therein introduced, comparing it to the 2002 Council Framework Decision and its later amendment in 2008. The principal distinction between the 2017 document and its earlier versions lies in the incorporation of new criminal offences connected to terrorist activities. These include traveling for the purpose of terrorism, receiving training for terrorism, and terrorist financing. It is clear that the criminalisation of these acts represents a move forward and an adjustment to modern developments in the terrorism field of EU criminal law. From the analysis drawn in this section, it emerges that there was a clear concentration on preparatory offences and an anticipation of criminal protection, an element that raised some concern in the assessment carried out by experts and civil society organisations.

Already in this section, criticism emerged on the drafting and adoption process of the Directive, given the bypassing of standard procedural rules during this phase coupled with the lack of oversight of civil society organisation. The concerns expressed by these actors has been accompanied by the evaluation conducted by the FRA, as part of the assessment that the Commission carried out on the fundamental rights impact of the Directive. According to the FRA the Directive presents a number of "weak points" which should be addressed through the national implementation of the document. In order to do so the FRA urged states to ensure clarity of criminal offences in the terrorism realm, avoid criminalising lawful activities, guarantee effective safeguards in the use of investigative tools, avoid any kind of discrimination in the application of counter-terrorism measures, and, lastly, ensure an effective remedy and a proportionate use of administrative measures.

Therefore, after providing an assessment of the content of the Directive and of its procedural flows, this chapter has served the purpose of highlighting the incompatibility between this piece of legislation with certain fundamental principles of criminal law, highlighting some of its most critical aspects: the vagueness of the wording, especially in defining ancillary offences, the risk of penalisation of intentions, the anticipation of criminal protection and the chilling effect on the exercise of certain rights such as freedom of speech. In the following chapter, it will be explained how these problems have been specifically addressed in one legal system, namely the

Spanish one, with respect to a particular case, that is to say glorification of terrorist acts and humiliation of terrorism victims, which can be found under the scope of the offence of public provocation to commit terrorist acts, as established in Article 5 of the 2017 Directive.

Chapter Three: The offence of glorification of terrorist acts in Spain: a fair balance between freedom of expression and security of the state?

1. Introduction

The Penal Code of the Kingdom of Spain originally did not envision a precise definition of the terrorist phenomenon, nevertheless, one reform after the other, the anti-terror legislative framework has vigorously expanded and has generated several overlaps between different offences, that are considered to be terrorist in nature[169]. The subsequent amendments that were conducted in order to expand the scope of these offences were not always shared, nor seen as proportionate by external experts. The United Nations Special Rapporteurs themselves issued a statement, back in 2015, expressing their concerns about the content and the modalities that enabled the reform. According to the latter, in fact, "the text of the reform included broad and ambiguous definitions that pave the way for a disproportionate and discriminatory enforcement of the law by the authorities" and put at risk the fundamental rights and liberties of its citizens[170]. Particularly threatening, according to the report of Amnesty International, was the criminalisation of "glorification" of terrorism, given the broad terms of the provision that would potentially threaten legitimate forms of expression[171].

This latter element of risk represents, in fact, one of the main focuses of analysis of the present chapter. Nevertheless, given the important historical relation between the Spanish State, as we know it nowadays, and the terrorist phenomenon, it is pivotal to dedicate some space to deepen the historical developments of this relation, starting from the pre-Francoist era until recent years. In this first section of the chapter, in fact, it will be explained how the presence of a strong terrorist organisation, namely ETA, has shaped through the years, and especially since the 1960s, the State's anti-terror legislation. The following section will present a further focus on a particular provision

[169] Amnesty International. 2017. "Europe: Dangerously Disproportionate: The Ever-Expanding National Security State in Europe." Amnesty International. January 17, 2017. https://www.amnesty.org/en/documents/eur01/5342/2017/en/.
[170] United Nations Human Rights Office of the High Commissioner. 2015. "'Two Legal Reform Projects Undermine the Rights of Assembly and Expression in Spain' - UN Experts." OHCHR. February 23, 2015. https://www.ohchr.org/en/press-releases/2015/02/two-legal-reform-projects-undermine-rights-assembly-and-expression-spain-un?LangID=E&NewsID=15597.
[171] Amnesty International. 2017.

of the Penal Code, that is to say Article 578 on the offence of glorification of terrorism and humiliation of terrorism victims.

The reason behind the choice of this particular provision derives from the presence of a significant body of jurisprudence on the matter, which allowed both the highest judicial body, the *Tribunal Supremo*, and the highest guarantor of the constitution, the *Tribunal Constitucional*, to judge on the behaviours, in form of speeches or tweets, of ordinary citizens, artists or individuals close to the Basque nationalist environment. Three sections will be dedicated, for this purpose, to the in-depth analysis of the reasoning of the national and European courts on the matter, in order to highlight the presence of two major stream of interpretation of the offence of glorification of terrorism and humiliation of terrorist victims, one that is more restrictive, while the other claims to be in line with the provision included in Directive 2017/541 of the European Union. Lastly, before concluding remarks, a final section will briefly present the proposal for the amendment of Article 578 of the Penal Code, aimed at strengthening its regime of application in case the offence is committed by certain categories of people.

2. The terrorist "other" in the Kingdom of Spain: legislative framework

2.1. The origin of the anti-terror legislation

According to Eurojust *Terrorism Convictions Monitor*[172], in 2014, the EU state that registered the highest number of sentences for terrorist offences was the Kingdom of Spain. Surely, if analysed from a closer and more detailed perspective, it is possible to see that most of these convictions, during that given year, mainly concerned individuals associated with the separatist branch of terrorism. It should be, in fact, pointed out that the country has a particular troubled political-constitutional history, mainly due to its Francoist legacy, as well as to the presence of parliamentary groups overtly linked to the separatist organisation ETA[173], already cited in the first chapter. Numerous terrorist groups and organisations have operated in Spain for a long time, causing severe social

[172] "The Terrorism Convictions Monitor (TCM) is intended to provide regular overview of the terrorism-related developments throughout the EU area. The Monitor has been developed on the basis of open sources information available to the Case Analysis Unit and methodologies such as individual case studies and comparative analysis.". Eurojust. 2014. "Terrorism Convictions Monitor." https://www.eurojust.europa.eu/sites/default/files/assets/2014-05-tcm-19-en.pdf.

[173] Rossi, Francesco. 2022. *Il Contrasto al Terrorismo Internazionale Nelle Fonti Penali Multilivello.* Jovene editore.

unrest and numerous fatalities. Because of this, Spanish law has attempted to offer a severe reaction to the problems caused by both internal and, more lately, international terrorism[174].

Nevertheless, anti-terror legislation is anything but recent since the first criminal legislation punishing those who "attack people or cause damage to things"[175] was issued in July 1894, long before the Basque separatist movement started its violent attacks. Nevertheless, the first piece of legislation in Spanish law that represented a true anti-terror legislative instrument was the *Special Criminal Act* of 11 October 1934, where it was possible to find the criminalisation of some elements that were commonly known for characterising terrorist activities[176]. The list included acts "disturbing the public order, terrorising the inhabitants of a town or to carry out any revenge of a social nature, making use of explosive or inflammable substances or employing any other means or device proportionate and sufficient to cause serious damage, and causing accidents by rail or other means of transport by land or air"[177]. Despite this, it was not until the following year, with the Law of 23 November 1935, that the concept of "terrorist offence" appeared for the first time. The abovementioned law was aimed at amending the pre-existing piece of legislation of August 1933 on "vagrants and delinquents", according to which individuals could be "declared as dangerous anti-socials" if "their activity of propaganda repeatedly incites to the commission of terrorist felonies or robbery […]"[178].

Broadly speaking, Spanish political and legal response to terrorism has been determined mostly by the experience of internal terrorism, as already stated, and its main objective had a name: *Euskadi Ta Askatasuna* (Basque Homeland and Freedom). The latter organisation was born from the split of the Basque Nationalist Party in

[174] Rueda, Maria Ángeles, and Miguel Ángel Boldova. 2015. "Spain." In *Comparative Counter-Terrorism Law*. Cambridge University Press.
[175] BOE (Spanish Official Journal). 1894. *Ley 192 Del 11 Julio 1894*. Vol. 156. https://www.boe.es/datos/pdfs/BOE/1894/192/A00155-00156.pdf.
[176] Rueda, Maria Ángeles, and Miguel Ángel Boldova. 2015
[177] BOE (Spanish Official Journal). 1934. *Ley 290 Del 17 Octubre 1934*. Vol. 379. http://www.boe.es/datos/pdfs/BOE/1934/290/A00379-00379.pdf.
[178] BOE (Spanish Official Journal). 1935. *Ley 332 Del 28 Noviembre 1935*. Vol. 1715. https://www.boe.es/datos/pdfs/BOE/1935/332/A01715-01715.pdf.

1958[179] and it strived to achieve the independence of the Basque country, using violence as the main strategy. The ideological clash between ETA's ideology and the values imposed by Franco's dictatorship, since 1939, seemed to provide the perfect path for the gruesome violence employed by the organisation[180]. The first violent act struck by ETA dates back to 1961, but it was not until 1968 that the nationalist movement caused its first victim[181]. The dictatorship responded by using the standard tools of security: giving police more authority, though without many legal safeguards; declaring a state of emergency if necessary; and creating special tribunals.

When ETA first appeared, the regime's reaction and its determination to use special laws to legally and politically consider all opposition in terms of freemasonry, communism, banditry, and terrorism had the opposite effect with regards to the one intended. In fact, ETA "self-qualified" as patriotic, independentist, socialist, and revolutionary and was initially viewed, both nationally and internationally, as a member of the opposition to Franco[182], especially since the latter prohibited minority cultures, traditions, and languages, including the language of the Basques, and repressed political opponents[183]. Nevertheless, contrary to what is commonly thought, the Basque separatist movement did not emerge as a direct consequence of the existence of Franco's dictatorship, since, during the same period of time in which ETA started its activity, other terrorist groups across Europe started to emerge. Nevertheless, the main aim of the Basque group was to incite a cycle of violence by carrying out assaults, inciting the dictatorship to retaliate violently, and then stirring up support for its cause among the Basque and Navarrese communities[184].

In the early 1960s, a hopeful process of liberalisation started, during which the dispositions adopted by the Franco regime promoted the freedom of the press and

[179] Carmona, Miguel. n.d. "La Spagna Tra Vecchio E Nuovo Terrorismo?" Www.questionegiustizia.it. https://www.questionegiustizia.it/speciale/articolo/la-spagna-tra-vecchio-e-nuovo-terrorismo__24.php.
[180] Dolphin, Sally. 2022. "The Rise and Fall of ETA: The Spanish Terrorist Groups' Bloodiest Years." Retrospect Journal. February 20, 2022. https://retrospectjournal.com/2022/02/20/the-rise-and-fall-of-eta-the-spanish-terrorist-groups-bloodiest-years/.
[181] Spanish Ministry for Home Affairs. n.d. "Terrorism in Spain." https://www.interior.gob.es/opencms/pdf/servicios-al-ciudadano/ayudas-y-subvenciones/ayudas-a-victimas-de-actos-terroristas/unidades-didacticas-en-ingles/01_TERRORISM-IN-SPAIN_4-ESO.pdf.
[182] Carmona, Miguel. n.d. "La Spagna Tra Vecchio E Nuovo Terrorismo?" Www.questionegiustizia.it. https://www.questionegiustizia.it/speciale/articolo/la-spagna-tra-vecchio-e-nuovo-terrorismo__24.php.
[183] Dolphin, Sally. 2022.
[184] Spanish Ministry for Home Affairs. n.d.

freedom of association. Nevertheless, very soon this liberalisation process ended with the promulgation of the Decree 9/1968 of 16 August, which expanded the regulation of the offences under the *Decreto* 17/94 *de 21 de septiembre de 1960 sobre rebelión militar, bandidaje y terrorismo y la aparación de las organisaciones terroristas*[185]. The 1960 Decree was adopted was adopted "to repress efficiently subversive or dangerous activities which produce or may produce serious results, either for political-social or for terrorist reasons or simply for impulses of singular criminality"[186]. This specific piece of legislation was used in order to provide the basis for the Burgos trials[187], a large trial against ETA before the Military Court of the General Captaincy of Burgos in 1970[188]. The trial had significant implications both within the country and on the global stage, playing a substantial role in portraying ETA as a political entity engaged in violent resistance against the Franco regime[189]. Therefore, it should come as no surprise that the regime had to deal with a sizable protest movement, both national and international, even fostered through the help of Pope Paul VI, in the face of which Franco was forced to grant pardons to those who had been sentenced to death after attempting to stage the Burgos trials[190].

2.2. The end of the Francoist dictatorship and the increased terrorist violence

Despite the increasing democratisation of the country, the terrorist group's lethal actions continued until Franco's death in 1975. ETA persisted in laying roadside explosives and launching rockets against a wide range of Spanish civilians, including newspaper publishers and politicians. The Madrid central government attempted to give the Basque area considerable autonomy after the death of Franco, in part to assuage the demands and threats of ETA, but the organisation remained adamant about achieving complete independence. But as ETA members' narrow-minded viewpoints grew more

[185] Oehmichen, Anna. 2009. "Terrorism and Anti-Terror Legislation -the Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France." *Citation Oehmichen, A*. https://scholarlypublications.universiteitleiden.nl/access/item%3A2923063/view.
[186] BOE (Spanish Official Journal). 1960. *Decreto 1794/1960, de 21 de Septiembre, Revisando, Y Unificando La Ley de Dos de Marzo de Mil Novecientos Cuarenta Y Tres Y El Decreto-Ley de Dieciocho de Abril de Mil Novecientos Cuarenta Y Siete.* https://www.boe.es/diario_boe/txt.php?id=BOE-A-1960-13701.
[187] Oehmichen, Anna. 2009.
[188] Carmona, Miguel. n.d.
[189] Oehmichen, Anna. 2009.
[190] Carmona, Miguel. n.d.

incompatible with contemporary Spanish democratic ideals, the group's support base shrank, and the organisation went on to commit hundreds of further murders[191].

This new political phase was accompanied by a generally spread sense of hope that ETA would cease its violent attacks now that their main oppressor was gone. Despite all the attempts aimed at cooling the Basque menace, the initial years of Spanish democracy were marked by ETA's most violent assaults since its leaders were convinced that increasing terrorist activity would cause the democratic system to become unstable, favouring autonomist ideas. The endurance of ETA's terrorist attacks, coupled with its impact on the Spanish society, has influenced the political life of the country, as well as its legislative response to the threat, to the extent that some of those reforms were met with political and press demands for tightening the penal system and restriction of procedural guarantees[192].

Dictator Francisco Franco's death marked, among other things, the start of a series of political and legislative reforms, the most important of which was represented by the 1977 general elections, the promulgation of a general amnesty, that concerned all kinds of offences, terrorist ones included[193], and, lastly, the adoption of a new Constitution in 1978, year during which, nevertheless, terrorist violence registered a peak, with 27 people dying in attacks carried out during first nine months of the year[194]. Therefore, in order to respond to the harshening of the threat, the Spanish new-born democracy adopted Decree 21/1978, the first piece of exceptional legislation of the state, as stated by Aranda Ocaña[195], on "measures in relation to crimes committed by armed groups and gangs" which established, among other measures, the *incommunicado* detention of detainees for an unlimited period of time[196].

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[191] Dolphin. 2022.
[192] Carmona. n.d.
[193] Ibid.
[194] Congreso de los Diputados. 1978. "Diario de Sesiones Del Congreso de Los Diputados Núm. 133. Debate General Sobre Orden Público de 8 de Noviembre 1978." https://www.congreso.es/public_oficiales/L0/CONG/DS/C_1978_133.PDF.
[195] Aranda Ocaña, Mónica. 2005. "La Política Criminal En Materia de Terrorismo." In Política Criminal Y Sistema Penal: Viejas Y Nuevas Racionalidades Punitivas. Barcelona: Anthropos.
[196] BOE (Spanish Official Journal). 1978c. *Real Decreto-Ley 21/1978, de 30 de Junio, Sobre Medidas En Relación Con Los Delitos Cometidos Por Grupos O Bandas Armados.* https://www.boe.es/boe/dias/1978/07/01/pdfs/A15670-15671.pdf.

During the transition to democracy, a pivotal shift occurred through the enactment of Decree 2/1976 on February 18th, which effectively removed terrorist crimes from the realm of military jurisdiction. Another significant transformation unfolded on January 4th, 1977, regarding the legal authority, wherein three decrees (1/1977, 2/1977, and 3/1977) were introduced. These decrees led to the establishment of a new central tribunal, the *Audiencia Nacional*, tasked with addressing organised crime and acts of terrorism. Concurrently, the Public Order Tribunals were abolished as part of this process[197]. The main trait of this period was characterised by the attempt to distinguish terrorism from political offences, by executing the latter as common criminal offences[198]. In fact, terrorist offences were treated, during the Franco era, as equivalent to any form of political opposition and, therefore, were subject to trials conducted by military tribunals. However, this approach started to change during the 1960s. Specifically, to curtail the extension of military jurisdiction, the Law of December 2, 1963, establishing a Public Order Tribunal, was enacted and as a result, a significant number of actions deemed threats to both internal and external security were placed under the jurisdiction of the newly established "Public Order" Tribunals. In essence, this jurisdiction effectively transformed into a standard jurisdiction for matters of political justice[199].

2.3. The 1978 Constitution and the regime of derogatory states

It is important to consider that, differently from the majority of European constitutions, the Spanish Fundamental Charter, which was ratified on the 6th of December 1978[200], foresaw the provision of derogatory legal regimes for state of exception, and also for the specific hypothesis of terrorism. As a matter of facts, there was one main provision within the Spanish Constitution dedicated to regulating states of emergency: Article 116. The latter disciplined the three existing regimes for the state of exception: firstly, the constitution foresaw the so-called *estado de alarma*, authorised by the Congress of Deputies for no longer than 15 days: secondly, the fundamental charter established the conditions for the *estado de exception*, that could last for a maximum of 30 days. Lastly, the *estado de sitio* provided for the most serious conditions of application in the scale

[197] Oehmichen, Anna. 2009.
[198] Rueda and Boldova. 2015
[199] Oehmichen, Anna. 2009.
[200] Oehmichen, Anna. 2009

of the derogatory regimes, since it needed, after being requested directly by the Government, the approval by the majority in the Congress, which would be in charge of determining the scope of application, the duration and the conditions of the measure[201].

The conditions for the application of these derogatory states were laid out by Organic Law 4/1981 on the States of Alarm, Emergency and Siege. Differently from the state of alarm, that could be invoked in cases of natural disasters, the state of emergency could be declared when "the free exercise of the rights and liberties of citizens, the normal functioning of democratic institutions, that of public services essential to the community, or any other aspect of public order is so seriously disturbed that the exercise of ordinary powers is insufficient to re-establish and maintain it"[202]. Similarly, the state of siege could be declared "when an insurrection or act of force against the sovereignty or independence of Spain, its territorial integrity or the constitutional order takes place or threatens to take place, which cannot be resolved by other means"[203]. For the latter two derogatory states, the Spanish legislator further envisioned, within the Constitution, a provision dedicated to the rights which were suspended in the course of the two. The provision in question is Article 55.1, which provided for the suspension of the right to personal freedom, inviolability of the home, secrecy of private communications, freedom of movement and residence, freedom of thought and information, freedom of assembly, right to strike and collective conflict[204]. In the only case of the state of siege, the Spanish Constitution additionally foresaw the suspension of the right of defence and information of detainees, as provided by Article 17[205].

On the other hand, as far as Article 55.2 of the Constitution is concerned, the Spanish legislator established that:

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[201] Lo Presti, Isabella M. 2017. "L'esperienza Spagnola Dal Terrorismo Interno Alla Minaccia Globale. Strumenti Di Difesa Di Una Democrazia 'Banco Di Prova.'" *Democrazia E Sicurezza – Democracy and Security Review* 1 (7).
[202] BOE (Spanish Official Journal). 1981. "Ley Orgánica 4/1981, de 1 de Junio, de Los Estados de Alarma, Excepción Y Sitio." Www.boe.es. June 1, 1981. https://www.boe.es/buscar/act.php?id=BOE-A-1981-12774#acuao.
[203] Ibid.
[204] BOE (Spanish Official Journal). 1978a. *The Spanish Constitution*. Agencia Estatal Boletín Oficial del Estado. https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf.
[205] Ibid.

> "An organic law may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the Courts and proper Parliamentary control, the rights recognised in Articles 17, clause 2[206], and 18, clauses 2[207] and 3[208], may be suspended as regards specific persons in connection with investigations of the activities of armed bands or terrorist groups"[209].

Therefore, the Constitution directly provided for the suspension of certain fundamental rights, such as the inviolability of the home, the secrecy of communications and the extension of preventive detention, only if the abovementioned circumstances were mentioned[210]. The Article represented a peculiar instrument in the anti-terror legislation of the country and, by carefully reading its wording, one could note that the latter did not define an emergency regime in the strict sense, but rather a regulation of the derogations that may be applied to people who were discovered, during investigations, to be connected to a terrorist action that had already occurred or was about to occur[211].

2.4. The fragmentation of the legislative framework during the 1980s

As already anticipated above, the late 1970s' corresponded to a peak of violence of terrorist organisations in the Spanish territory, and in fact, in response to it, the Spanish legislator adopted one of the most controversial pieces of anti-terror legislation: *Real Decreto-Ley 3/1979 sobre protección de la seguridad ciudadana*[212]. According to the latter, the law represented a proper response to the terrorist menace and other forms of *delincuencia*, which posed a danger to the security of citizens and their right to live in peace. Aside from extending the scope of previously mentioned Law of December

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[206] "Preventive detention may last no longer than the time strictly required in order to carry out the necessary investigations aimed at establishing the facts; in any case the person arrested must be set free or handed over to the judicial authorities within a maximum period of seventy-two hours".
[207] "The home is inviolable. No entry or search may be made without the consent of the occupant or a legal warrant, except in cases of flagrante delicto".
[208] "Secrecy of communications is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to the contrary."
[209] BOE (Spanish Official Journal). 1978a. *The Spanish Constitution*.
[210] Glos, George E. 1979. "The New Spanish Constitution, Comments and Full Text." *Hastings Constitutional Law Quarterly* 7 (1). https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1177&context=hastings_constitutional_law_quaterly.
[211] Lo Presti, Isabella M. 2017.
[212] Ibid.

1978, the Decree recognised terrorism as an autonomous conduct, distinct from other forms of crime[213], and criminalised new types of offences, such as preparation and other forms of facilitation of terrorist acts and *apología*. According to Article 1 of the Decree, the *apología*, meaning public glorification, through means of communication, both oral and written, or by means of print or other broadcasting media, of the activities and behaviours of those who commit crimes or belong to an armed gang, could be punished by imprisonment for a term raging from six months to three years[214]. The latter offences, which was urged under the Decree to be included in the Criminal Code, was, nevertheless, already put into words in Article 268 of the latter, despite only referring to crimes against the internal security of the state[215].

The Decree further extended the competence of the *Audiencia Nacional*, by empowering it to prosecute the commission, the facilitation, the glorification, among others (Article 4). This instrument was particularly criticised since, not only it introduced new offences, at Article 1 and 2, and new administrative measures, at Article 8 and 9, therefore interfering with some fundamental rights and liberties, the Decree also violated the principle of non-retroactivity, since it controversially annulled the release of some detainees whose release had been already approved before its entry into force, by establishing at Article 6 that "prisoners or detainees whose release has been ordered shall not be released until the decision has become final, where the appellant is the Public Prosecutor's Office and the offences referred to in Article 3(1)[216] are concerned"[217]. Later on, the controversy that this Decree created was clarified through the judgement of the *Tribunal Constitucional*, which, by means of a *recurso de amparo*[218], ruled on the constitutionality of the content of the Decree of 1979. In fact,

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[213] Aranda Ocaña. 2005.
[214] Called *pena de prisión menor.* BOE (Spanish Official Journal). 1979. *Real Decreto-Ley 3/1979, de 26 de Enero, Sobre Protección de La Seguridad Ciudadana. ("B.O.E." de 1 de Febrero de 1978)*. https://boe.es/biblioteca_juridica/anuarios_derecho/articulo.php?id=ANU-P-1979-10027400276.
[215] Aranda Ocaña. 2005.
[216] "Offences committed by a person or persons belonging to organised or armed groups or gangs and related offences"
[217] BOE (Spanish Official Journal). 1979.
[218] "The *amparo* appeal is one of the main powers attributed by the Constitution to the Constitutional Court, the purpose of this process being to protect against violations of the rights and freedoms recognised in Articles 14 to 29 and 30.2 of the Constitution caused by provisions, legal acts, omissions or simple acts of the public authorities of the State, the Autonomous Communities and other public bodies of a territorial, corporate or institutional nature, as well as their officials or agents. The only claim that can be asserted through an *amparo* action is the restoration or preservation of the rights or freedoms on account of which the action is brought." For more visit

through a judgement of December 1986 the Spanish Constitutional Tribunal ruled that "the sentence for crimes foreseen and punishable in art. 1 of Royal Decree-Law 3/1979, of January 26, would imply a violation of the aforementioned constitutional precept[219] since said norm does not meet the constitutionally required conditions, that is, the character of Organic Law"[220].

However, despite the conjunctural character of the abovementioned legislation, that was supposed to implement Article 55.2, soon after the adoption of the Constitutional charter, a variety of norms were adopted to react to the historical and political events of that time. The inevitable consequence was a fragmented regulatory framework, characterised by legal dispersion and uncertainty. In strict terms, the first anti-terror legislation, adopted soon after the entry into force of the Constitution, was the *Ley* 56/1978 *sobre medidas en relación con los delitos cometidos por grupos organizados y armados*, shortly followed by Organic Law 11/1980 and Organic Law 2/1981, later amended by Organic Law 9/1984 *contra la actuación de bandas armadas y elementos terrorirstas*, which, in turn, was amended by *Ley Orgánica* 4/1988[221], all of which will be explained in more depth in the following paragraphs.

These anti-terror provisions showed a clear intention of the Spanish legislator of treating the terrorist menace as a "common" offence, that needed to be faced legislatively but without attaching to it the political meaning that it previously held in the past[222]. As a matter of facts, with Law 82/1978 of 28 December, terrorist offences were rendered ordinary offences by modifying the Criminal Code in terrorist matters[223].

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https://www.tribunalconstitucional.es/es/tribunal/Composicion-Organizacion/competencias/paginas/04-recurso-de-amparo.aspx

[219] That is to say Article 17.1 of the Spanish Constitution, that recites "Every person has a right to freedom and security. No one may be deprived of his or her freedom except in accordance with the provisions of this article and in the cases and in the manner provided by the law." For more visit https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf

[220] Tribunal Constitucional. 1986. "Resolución: SENTENCIA 159/1986." Hj.tribunalconstitucional.es. December 16, 1986. https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/722.

[221] Ibid., Reforma de la Ley de Enjuiciamento Criminal.

[222] Oehmichen, Anna. 2009

[223] BOE (Spanish Official Journal). 1978d. *Ley 82/1978, de 28 de Diciembre, de Modificación Del Código Penal En Materia de Terrorismo.* https://www.boe.es/buscar/doc.php?id=BOE-A-1979-865.

Therefore, terrorism was defined by the *objective*[224] criminal activity rather than by the *subjective*[225] intention behind it[226].

During this period, some other very important pieces of legislation were adopted in the counter-terrorism field, some of which were already mentioned in the previous paragraphs. These instruments included Organic Law 4/1980 of 21 May, modifying the Criminal Code in the area of freedom of expression, meeting and association; Organic Law 11/1980 of 1 December, on the Suspension of Constitutional Rights provided for in Art. 55(2) CE; and lastly Organic Law 2/1981, of 4 May on the Protection of the Spanish Constitution and Terrorist Matters[227]. As far as the *Ley Orgánica* 4/1980 is concerned, the concept of illicit associations was rewritten, dividing it into three categories: associations that aim to commit crimes or promote their commission, associations that, despite pursuing legal aims, employ violent means to achieve the latter, and, lastly, paramilitary or clandestine organisations.

Additionally, the Law expanded the scope of punishment of the crime of glorification, by extending it to all acts committed by the organised group[228]. Whereas, as far as Organic Law 11/1980 is concerned, the latter caused great parliamentary debate prior to its approval. In fact, the leaders of the PSOE[229] and PCE[230] allegedly threated their representatives with expelling them from the party in order to force the latter to vote for the approval of the abovementioned Law, therefore showing their strong position against terrorist activities[231]. The Law mainly aimed at putting into effect the provision of Article 55.2 of the Constitution, extending the scope of crimes putting into risk the external security of the state for which fundamental rights could be

[224] Emphasis added.
[225] Emphasis added.
[226] Oehmichen. 2009
[227] Oehmichen. 2009
[228] BOE (Spanish Official Journal). 1980a. *Ley Orgánica 4/1980, de 21 de Mayo, de Reforma Del Código Penal En Materia de Delitos Relativos a Las Libertades de Expresión, Reunión Y Asociación (BOE 13-VI-80)*. https://www.boe.es/buscar/doc.php?id=BOE-A-1980-11880.
[229] Partido Socialista Obrero Español.
[230] Partido Comunista de España.
[231] Aranda Ocaña. 2005.

suspended, aside from providing for the suspension of the rights of the individuals suspected of participating or collaborating with terrorist or armed groups[232].

Lastly, Organic Law 2/1981 was adopted as a response to the 23 February 1981 coup d'état, when a group of paramilitary civil guards forcefully entered the lower house of the *Cortes*[233] with the intention of toppling the civilian government[234]. Therefore, it is comprehensible why this Law is most commonly known as *Ley de Defensa de la Democracia*[235], given that it was adopted through emergency proceedings in less than a month, according to Articles 3 to 5 of the *Reglamento Provisional del Congreso*, which is no longer into force[236]. The Organic Law intended to modify the Penal Code, particularly Article 214 and 217, by adjourning the definition of the crimes of rebellion and by clarifying the penalties related to those identified as rebels[237]. The legislation additionally established shared provisions addressing terrorism and rebellion, encompassing conspiracy, instigation, incitement, and endorsement, while also incorporating safeguards for press-related issues.

This Law introduced new offences pertaining to involvement in armed organisations, encompassing engagement in terrorist training camps or collaboration with foreign armed groups involved in terrorism[238]. Additionally, several doubts on the compliance of certain provisions of the Law with the principle of certainty of law were raised, especially with regards to Article 174bis, according to which anyone who "obtains, collects or provides information, allocation, arms or explosives […]" in order to facilitate the formation or organisation of armed gangs, as referred by the *Ley Orgánica* 11/1980, will be punished with imprisonment for a term ranging from three

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[232] BOE (Spanish Official Journal). 1980b. *Ley Orgánica 11/1980, de 1 de Diciembre, Sobre Los Supuestos Previstos En El Artículo 55, 2, de La Constitución*. https://www.boe.es/eli/es/lo/1980/12/01/11.
[233] Meaning the Parliament.
[234] Cemlyn-Jones, Bill. 2021. "Archive, 1981: Civil Guards Seize Spain's Parliament in Attempted Coup." The Guardian. February 24, 2021. https://www.theguardian.com/world/from-the-archive-blog/2021/feb/24/civil-guards-seize-spains-parliament-in-attempted-coup-archive-1981.
[235] Aranda Ocaña. 2005.
[236] BOE (Spanish Official Journal). 1977. *Reglamento Provisional Del Congreso de Los Diputados, Aprobado El Día 13 de Octubre de 1977*. https://www.boe.es/buscar/doc.php?id=BOE-A-1977-25701.
[237] BOE (Spanish Official Journal). 1981. *Ley Orgánica 2/1981, de 4 de Mayo, Que Modifica Y Adiciona Determinados Artículos Del Código Penal Y El de Justicia Militar*. https://www.boe.es/buscar/doc.php?id=BOE-A-1981-9983.
[238] Oehmichen. 2009

to eight years[239]. What represents a challenge for the abovementioned principle is represented by the formula "any other form of collaboration" outlined just few lines below, in Article 174bis, subparagraph b[240].

2.5. The controversial emergence of anti-terror police units

The first years of the Spanish democracy also saw the creation of some police units entirely devoted to the fight against the terrorist threat, these being the GAL (*Grupos Antiterroristas de Liberación*) and the GAR (*Grupos Antiterroristas Rurales*). Between 1983 and 1986, these two units carried out a so-called "dirty war" against ETA[241]. This happened in parallel to the "war of attrition" that ETA launched during those years against the Spanish Government, in order to force it to negotiate the principles of the "KAS alternative"[242]. This was the agenda put forth by the Basque Party *Herri Batasuna* during the 1982 electoral campaign. The coalition advocated for amnesty and the official recognition of independence parties, the removal of State Security Forces, the acknowledgement of the Basque language, the grant of an autonomy statute that encompassed the right to self-determination, and the jurisdiction over Armed Forces within the Basque country's territory[243]. It is also important to note that by this time ETA had disaggregated into two main branches: ETA *militar* and ETA *politico-militar*. While the latter ceased to exist in 1982, effectively marking the conclusion of its political objectives, the former persisted with its campaign of violence and took over the name of ETA. The first part of this war of attrition started by ETA brought some concrete results in terms of peace negotiations, but, on the other hand, caused the intensification of the fight against it on the part of the Government[244], hence the creation of the GAR and the GAL.

According to Statewatch[245] database, these two groups were responsible for the killings of 28 individuals from 1983 to 1987, with a significant number of them having

[239] BOE (Spanish Official Journal). 1981.
[240] Ibid. and Oehmichen. 2009
[241] Ibid.
[242] Muro, Diego. 2016. "ETA during Democracy, 1975-2011." In *ETA's Terrorist Campaign*. Routledge.
[243] Unzueta, Patxo. 1982. "La 'Alternativa Kas', Único Programa de Herri Batasuna." *El País*, October 6, 1982, sec. España. https://elpais.com/diario/1982/10/06/espana/402706824_850215.html.
[244] Muro, Diego. 2016.
[245] Statewatch is a UK registered charity that conducts and promotes critical research, policy analysis, and investigative journalism. For more visit https://www.statewatch.org/about/

no affiliation to ETA[246]. Later on, former interior minister Jose Barrionuevo and a number of his former senior officials and policemen were confronted with charges of being part of an armed organisation, engaging in abduction, and embezzling public funds[247], and were subsequently founded guilty of the charges by the Spanish *Tribunal Supremo*[248]. Nevertheless, according to the judgement of the *Audiencia Nacional* 30/91, the members of the GAL could not be classified as terrorists mainly since their operating purpose was not the subversion of the constitutional order or the disruption of public peace, as enshrined in the Penal Code, according to which the terrorist conduct must be accompanied by the abovementioned aim. On the opposite, according to the judgement, the activity of the founders of the GAL was aimed at saving and safeguarding the integrity of the State, despite by employing "legally reprehensible means"[249]. Thus, the judgement asserted that a political motive could be legally significant in criminal cases only when the objective was the alteration or significant transformation of the state's structure, namely, the replacement of the existing political system[250].

2.6. The 1995 Penal Code

Among the other legislative instruments that the Spanish State has used to update the fight against the terrorist threat, and in particular ETA, it is important to mention the *Ley Orgánica* 8/1984, against the activities of armed gangs and terrorist elements[251]. Together with the tightening of penalties and the extraterritoriality of Spanish jurisdiction to prosecute terrorism, the Law rendered a crime collaboration and support of armed gangs, and introduced a special procedural regime, according to which police units were empowered to carry out warrantless searches, aside from extending police custody up to ten days. The Law additionally established pre-trial detention and the

[246] Statewatch. 1998. "Spain: Gonzalez Questioned on GAL." Www.statewatch.org. May 1, 1998. https://www.statewatch.org/statewatch-database/spain-gonzalez-questioned-on-gal/.
[247] Ibid.
[248] Tribunal Supremo. 1998. STS 2-1998, 29 de Julio de 1998 vLex. Sala de lo Penal.
[249] Lamarca Pérez, Carmen. 2007. "La Regulación Del Terrorismo En El Código Penal Español." *Homaje a Ruperto Núñez Barbero*, January, 359–72.
[250] Audiencia Nacional. 1990. "Sentencia No. 30/91." Www.poderjudicial.es. September 20, 1990. https://www.poderjudicial.es/search/indexAN.jsp?org=an&comunidad=13.
[251] BOE (Spanish Official Journal). 1984. *Ley Orgánica 8-1984, de 26 de Diciembre, Contra La Actuación de Bandas Armadas Y Elementos Terroristas Y de Desarrollo Del Artículo 55.2 de La Constitución. VLex*. https://vlex.es/vid/bandas-armadas-elementos-terroristas-230579663.

closure of establishments, activities and media, and the dissolution of associations as a rule[252].

When the new Penal Code was enacted in 1995, this was the fragmented legislative framework which the Code had to surpass, posing an end to the system of special laws. Due to the challenge of establishing a universally acknowledged doctrinal description of terrorism, the basic offence of belonging to a terrorist organisation, categorised as a distinct form of criminal organisation (as stipulated in Articles 515 and 516 of the Penal Code), was delineated on the basis of an objective criterion, that was adhering to the organisation itself and its particular intent: disrupting the constitutional order or substantially destabilise public tranquillity. This foundational offence of affiliation with an armed or terrorist gang was rendered punishable if committed in conjunction with the specific acts perpetrated, such as homicide, destruction, vandalism, and threats[253]. Since the entrance into force of Organic Law 10/1995, Articles 571 to 580 of the Penal Code have been dedicated exclusively to terrorist and related offences[254].

The 1995 Penal Code provided for a list of offences ranging from "crimes against the public order", "possession, trafficking and storage of arms, ammunitions and explosives" and "terrorist crimes"[255]. The Spanish anti-terror provisions within the 1995 Penal Code could be divided into three main groups. The first one concerns offences committed individually or in groups, causing harm to a multitude of legal goods, from life and physical integrity and liberty to the environment, health and other macro-interests deserving of criminal protection, all of which are aggravated by the existence of the purpose of terrorism[256]. The latter purpose of terrorism is defined by Article 573 of the Penal Code by combining an objective and a subjective element. The objective element corresponds to

> "the commission of any serious criminal offence against the life or physical integrity, liberty, moral integrity, sexual freedom and indemnity, the heritage, natural resources, or the environment, public health, of catastrophic risk, arson,

[252] Carmona, Miguel. n.d.
[253] Ibid.
[254] Oehmichen. 2009.
[255] Rueda and Boldova. 2015.
[256] Rossi. 2022.

against the Crown, of attack with a weapon or the holding, trafficking and depositing of weapons, ammunition or explosives, foreseen in this Code, and the seizure of aircraft, ships or other means of collective transport of persons or goods"[257].

On the other hand, the subjective element relates to the intent behind the acts enlisted in the first part of the Article, that is to say:

"subverting the constitutional order, or suppressing or seriously upsetting the functioning of the political institutions or the State's social or economic structures or of obliging the public authorities to carry out a deed or to abstain therefrom, gravely altering the public peace; seriously upsetting the functioning of an international organisation; provoking a state of terror amongst the population or part thereof"[258].

The second group of norms comprehends all the aspects related to the activity of a terrorist organisation, that is to say the direction or participation to a terrorist group, the transfer to territories controlled by such organisations or groups, and the indirect and negligent financing of terrorism. Lastly, the third group of offences relates to individual offences, that cannot be categorised within the first two groups of crimes and refers to preparatory or even pre-preparatory offences such as self-training and passive recruitment with a terrorist purpose, incitement to terrorist itself, glorification of terrorism and the discrediting, disdain and humiliation of victims of terrorism[259].

Later on, certain provisions of the 1995 Penal Code were modified by *Ley Orgánica* 7/2000 of 23 December 2000, through which, additionally, the offence of glorification of terrorism and humiliation of terrorism victims, in its modern form, was introduced. In fact, Article 578 was modified in order to include a new offence of glorification of terrorist acts and is aimed at punishing those who glorify or justify, by any means of public expression or dissemination, crimes of terrorism or those who participate in their execution, or the carrying out of acts that bring discredit, contempt for humiliation of the victims of terrorist offences or their families. Among the updated

[257] Spanish Government. 2017. *Criminal Code of Spain*.
[258] Ibid.
[259] Rossi. 2022.

provisions, one can find also Article 577 concerning the so-called *terrorismo urbáno*, which is a term used to encompass all the actions carried out by individuals that, despite not pertaining to armed gangs, aim at subverting the constitutional order or at seriously disturbing the public peace [260].

As it can be noted, the wording of Article 578 resembles the letters of the *Real Decreto-Ley 3/1979 sobre protección de la seguridad ciudadana*, mentioned in the previous paragraphs, by punishing those who publicly glorified the acts of armed gangs. The wording of the amendment to the Penal Code took some space to clarify that by punishing the glorification of terrorist acts, the Spanish legislator did not intend to sanction the defence of ideas, despite them being completely at the opposite from the constitutional framework. On the contrary, the provision aimed at prosecuting the exaltation of terrorist methods, which are radically illegitimate from any constitutional perspective, or the perpetrators of these crimes, as well as the particularly perverse conduct of those who slander or humiliate the victims while increasing the horror of their relatives[261]. Nevertheless, as it will be explained the in following sections of this chapter, the interpretation of this norm did not go without ambiguity and controversies, as well as its application to concrete cases of apology of terrorism.

For the purposes of the focus of this chapter on the offence enshrined in Article 578 of the Penal Code, concentrating on the so-called terrorist speech offences, contained in the Spanish criminal legislation, represents a priority before deepening into additional measures taken in order to counter the terrorist threat. Lawmakers in Spain have established extensive provisions regarding the expression of terrorism that encompass a broad spectrum of communicative actions. These provisions run the risk of merging and confusing types of terrorist expression, such as genuinely punishable terrorist actions, with discussions about terrorism, meaning the expression of opinions

[260] BOE (Spanish Official Journal). 2000. *Ley Orgánica 7/2000, de 22 de Diciembre, de Modificación de La Ley Orgánica 10/1995, de 23 de Noviembre, Del Código Penal, Y de La Ley Orgánica 5/2000, de 12 de Enero, Reguladora de La Responsabilidad Penal de Los Menores, En Relación Con Los Delitos de Terrorismo*. https://www.boe.es/buscar/doc.php?id=BOE-A-2000-23659.
[261] Ibid.

that are hard to accept. More often than not, these measures falter when confronted with the difficulty of distinguishing between these categories[262].

2.7. The banning of political parties and the amendments to the Penal Code

An additional peculiarity of the Spanish anti-terror legislation relates to the possibility of banning political parties in case the latter are found guild of violating the provisions of the Constitution. In particular, such measure was adopted in the early 2000s with the passing of *Ley Orgánica* 6/2002, which brought to the illegalisation and dissolution of the *Batasuna* party and other political associations belonging to the *entorno* ETA[263]. This was not a novelty in absolute terms for the Spanish legal system, which previously had ad hoc rules for political parties that, in addition to regulating their constitution, provided for a judicial dissolution procedure in cases identified by the legislature. The reference is to Organic Law 54/1978, which, in any case, was never applied. The latter foresaw the dissolution of political parties in two specific cases: firstly, in case the conduct of the parties was deemed to be criminally relevant, or when their organisation or activity was contrary to the democratic principles enshrined in the constitutional text[264]. The latter provision raised many doubts concerning its interpretation and implementation, such as the uncertainty as to which judicial authority was competent to exercise control over political parties, and the failure to identify the conduct that would legitimise the dissolution of the party[265].

Nevertheless, despite 2002 *Ley* on political parties does not explicitly mention the terrorist phenomenon, the wording of some of its provisions clearly made reference to the latter. For instance, at Article 9 paragraph 2, the Spanish legislator provided that the reasons behind the *ilegalización* of a political party may be due to the latter "systematically violating of fundamental rights and freedoms, promoting, justifying or condoning attacks on the life or integrity of persons, or the exclusion or persecution of persons" or, as stated at letter b) of the same paragraph, in case they have been found

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[262] Cancio Meliá, Manuel, and Anneke Petzsche. 2018. "Speaking of Terrorism and Terrorist Speech: Defining Limits of Terrorist Speech Offences." In *Counter-Terrorism, Constitutionalism and Miscarriages of Justice: A Festschrift for Professor Clive Walker*. London: Bloomsbury Publishing PLC.
[263] Meaning to the environment of the terrorist organisation. BOE (Spanish Offical Journal). 2002. *Ley Orgánica 6/2002, de 27 de Junio, de Partidos Políticos*. https://www.boe.es/buscar/act.php?id=BOE-A-2002-12756.
[264] BOE (Spanish Offical Journal). 1978b. *Ley 54/1978, de 4 de Diciembre, de Partidos Políticos*. https://www.boe.es/buscar/doc.php?id=BOE-A-1978-29843.
[265] Lo Presti, Isabella M. 2017.

responsible for "encouraging, promoting or legitimising violence as a method of achieving political objectives or removing the conditions necessary for the exercise of democracy, pluralism and political freedoms"[266].

As mentioned in the previous paragraphs, the 1995 Penal Code and its later amendments did not foresee the definition of what a terrorist organisation actually was. Therefore, in 2010, the Spanish legislator felt the urge to address this unclarity by passing Organic Law 5/2010 of 22 June. Through this additional legislative instrument, the Spanish legislator incorporated in Articles 571 and 572 the explicit meaning of terrorist organisation or group, that is to say "those groupings that, fulfilling the characteristics respectively established in the second paragraph of Section 1 of Article 570bis[267] and in the second paragraph of Section 1 of Article 570ter[268], have the purpose or object committing any of the criminal offences foreseen in the following Section"[269].

With the 2010 measure the previous system was amended and a specific section under the heading "*delitos de terrorismo*" was introduced, in which, following Framework Decision 2008/919/JHA, new forms of terrorism were included[270]. Author Manuel Cancio Meliá has argued that the Spanish legislator has used the excuse of adapting to the standards set by the 2008 Framework Decision to justify a further advancement of the incrimination barriers, given that the application of the European norm in the Spanish anti-terror legislation went much further than requested[271]. In terms of the structure of the legislation, membership to groups or organisations, and carrying out terrorist acts, have been grouped together in the same chapter. The concept of collaboration with a terrorist organisation or group encompassed conducts such as recruitment, indoctrination, training or coaching for terrorist purposes and the

[266] BOE (Spanish Offical Journal). 2002
[267] "A criminal organisation is construed to be a group formed by more than two persons, on a stable basis or for an indefinite term, in collusion and co-ordination to distribute diverse tasks or duties in order to commit criminal offences."
[268] "A criminal group shall be construed as the collusion of more than two persons who, without fulfilling any or a number of the characteristics of a criminal organisation defined in the preceding Section, has the purpose or object of perpetrating criminal offences in collusion."
[269] Spanish Government. 2017. *Criminal Code of Spain*. See Article 571.
[270] Carmona, Miguel. n.d.
[271] Cancio Meliá, Manuel. 2013. "El Derecho Penal Antiterrorista Español Y La Armonización Penal En La Unión Europea," January, 304–25.

distribution to the public or dissemination of messages or slogans of these organisations or groups[272].

Later, in 2015, the Spanish legislator passed two Organic Laws, namely *Ley Orgánica* 1/2015 and *Ley Orgánica* 2/2015, which, especially in the case of the latter, anticipated the content of Directive 2017/541 of the European Union, analysed in the previous chapter. While the reform brought by *Ley Orgánica* 1/2015 introduced changes to the 1995 Penal Code mainly concerning the review of the penalty regime and the introduction of so-called minor crimes[273], the reform introduced by Organic Law 2/2015 has focused on the criminalisation of pre-preparatory terrorist acts carried out individually[274]. The explanatory rationale behind Organic Law 2/2015 highlighted the significance of United Nations Security Council Resolution 2178, adopted under the framework of Chapter VII of the United Nations Charter. This Resolution, as already explained in the first chapter, represented an essential precedent guiding the new framework for addressing terrorism-related offences. Therefore, the Spanish legislator felt the necessity to adapt to the international legislative framework by adopting L.O. 2/2015[275].

The main changes introduced by the latter concerned the broadening of the scope of terrorist "intent" in order to include actions that not only aim to undermine the constitutional order, but also intend to disrupt or destabilise the functioning of political institutions, economic structures, or social systems of the State. This includes compelling public authorities to act or refrain from acting, destabilising international organisations, or inducing a state of terror among the population. In addition to that, the amended version of Article 575 foresaw also that engaging in indoctrination or training in military techniques, combat, weaponry preparation, or the development of explosives, chemical, biological, incendiary, or explosive materials is considered a

[272] Carmona, Miguel. n.d.
[273] Ius Aequitas. 2015. "¿Cuáles Son Las Novedades de La Reforma Del Código Penal?" Ius Aequitas. April 10, 2015. https://iusaequitas.net/cuales-son-las-novedades-de-la-reforma-del-codigo-penal/.
[274] Vedaschi, Arianna. 2021. "Humiliation of Terrorism Victims: Is Human Dignity Becoming a 'National Security Tool'?" In *Human Dignity and Human Security in Times of Terrorism*. Den Haag T.M.C. Asser Press.
[275] BOE (Spanish Official Journal). 2015. *Ley Orgánica 2/2015, de 30 de Marzo, Por La Que Se Modifica La Ley Orgánica 10/1995, de 23 de Noviembre, Del Código Penal, En Materia de Delitos de Terrorismo.*

terrorism offence, including both receiving external training and self-training[276]. In addition to this, criminalisation expanded towards actions devoid of materiality and even less offensive, such as habitual access to internet sites that incite affiliation or collaboration with a terrorist organisation, as well as the acquisition or possession of documents intended or capable of exerting similar instigating effect[277].

An important change was made in order to criminalise travelling for the purpose of terrorism; therefore, the Spanish legislator introduced the offence of travelling to a foreign country or area located under the control of a terrorist organisation for training or collaboration purposes[278]. Additionally, Organic Law 2/2015 increased penalties from one to three years of prison, and a fine between five to eighteen months[279], in cases where *enaltecimiento* and *humillación* occurred through electronic communication services or the Internet[280]. Hence, the reform corresponded to a significant step forward in tackling the incitement of jihadist terrorism via social networks, electronic communication, or the establishment of web pages or forums. It addresses both the propagation of provocative concepts and instruction in techniques for carrying out any form of terrorism-related offence[281]. However, these amendments to the Spanish Penal Code did not go without criticism, as symptomised by the statement issued by Julia Hall, Amnesty International's expert on counter-terrorism and human rights. In fact, according to her 2015 statement on the matter

> "Anything from certain forms of expression and association to hacking and travelling could be labelled and prosecuted as terrorism. The suggested definition is overly broad and some elements so vague that even a seasoned lawyer would have trouble knowing for certain what would constitute a terrorist act"[282].

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[276] Grupo de Estudios en Seguridad Internacional. 2015. "La Reforma de Los Delitos de Terrorismo Mediante La Ley Orgánica 2/2015 | GESI." Seguridadinternacional.es. 2015. https://www.seguridadinternacional.es/?q=es/content/la-reforma-de-los-delitos-de-terrorismo-mediante-la-ley-org%C3%A1nica-22015.
[277] Rossi. 2022.
[278] Grupo de Estudios en Seguridad Internacional. 2015.
[279] Aguerri, Jesús C., Fernando Miró-Llinares, and David Vila-Viñas. 2022. "When Social Media Feeds Classic Punitivism on Media: The Coverage of the Glorification of Terrorism on XXI." *Criminology & Criminal Justice*, October, 174889582211334. https://doi.org/10.1177/17488958221133467.
[280] Vedaschi, Arianna. 2021.
[281] Grupo de Estudios en Seguridad Internacional. 2015.
[282] Amnesty International. 2015. "Spain: New Counter-Terrorism Proposals Would Infringe Basic Human Rights." Amnesty International. February 10, 2015.

Quite significant changes were introduced in the Spanish anti-terror legislation with *Ley Orgánica* 1/2019. Explicitly aimed at transposing various supranational acts of criminal harmonisation, including Directive 2017/541, this Law introduced some adjustments to the codified provisions as an extension of the aforementioned L.O. 2/2015[283]. Article 15.3 of Directive 2017/541/EU, in fact, imposed a higher maximum penalty for leaders of a terrorist organisation or group compared to the Spanish regulation, necessitating an amendment to Article 572 of the Penal Code. Likewise, a modification was introduced regarding the penalty of disqualification, which became absolute, in order to avoid inconsistency with Article 55 of the Penal Code and to align with Article 579 bis, introduced by Organic Law 2/2015. Similarly, the Directive, at Article 12(c), compelled the inclusion of forgery of documents among terrorist offenses, which was not foreseen in Article 573 of the Penal Code. On the other hand, the travel for terrorist purposes is governed more extensively in Directive 2017/541/EU than in United Nations Security Council Resolution 2178 (2014), which inspired Organic Law 2/2015, as it did not require the travel to be destined to a territory controlled by terrorists. Lastly, the criminal liability of legal entities was expanded to encompass the commission of any type of terrorism offence, which was previously only stipulated for terrorism financing offences[284].

3. The *enaltecimiento* of terrorism and *humillación* of terrorism victims

3.1. Speaking of terrorism or terrorist speech?

Particularly criticised by legal scholars was the offence of public incitement to commit acts of terrorism provided by Directive 2017/541 which, as explained in the second chapter, required that, in order to qualify under this category, behaviours have to directly or indirectly promote the commission of such offences, creating a danger to collective security. Directive's Recital (10) stated that:

https://www.amnesty.org/en/latest/news/2015/02/spain-new-counter-terrorism-proposals-would-infringe-basic-human-rights/.

[283] Rossi. 2022.

[284] BOE (Spanish Official Journal). 2019. *Ley Orgánica 1/2019, de 20 de Febrero, Por La Que Se Modifica La Ley Orgánica 10/1995, de 23 de Noviembre, Del Código Penal, Para Transponer Directivas de La Unión Europea En Los Ámbitos Financiero Y de Terrorismo, Y Abordar Cuestiones de Índole Internacional*. https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-2363.

> "The offence of public provocation to commit a terrorist offence act comprises, inter alia, the *glorification*[285] and *justification*[286] of terrorism or the dissemination of messages or images online and offline, including those related to the victims of terrorism as a way to gather support for terrorist causes or to seriously intimidate the population"[287].

The terrorist danger seems to be included even in the most absurd capacity, such as the dissemination of *apologetic*[288] messages, to increase the risk that other individuals adhere to the ideology characterising international terrorism. Additionally, as already explained, considering Directive 2017/541, the potential lack of connection between the inciting conduct and the subsequent commission of a specific terrorist offence is irrelevant for the inciter's liability. It is clear how the scope of application of the offence of public incitement to commit acts of terrorism can become exceedingly wide[289].

Nevertheless, as it can be deduced from what was previously stated, the European framework in matters of anti-terror legislation was in some way preceded by single Member State's initiatives, also based on their internal relation with the terrorist counterpart, irrespective of its nature. Hence, since the Spanish Kingdom has been said to have "one of the vastest and harshest anti-terror legislation in Western Europe"[290] and it additionally "boasts" an extensive legislation and caselaw on the question of glorification of terrorist acts, even before the European legislator put it black and white. In fact, as highlighted previously, already in 2000, the Spanish legislator introduced, under the scope of Article 578 of the Penal Code, the offence of *enaltecimiento* or *justificación* of terrorist acts and *humillación* of terrorist victims. The reason why the provision specified the offence of *humilliación* was to address a quite common practice

[285] Emphasis added.
[286] Emphasis added.
[287] European Parliament and Council of the European Union. 2017. *Council Directive 2017/541/EU of the European Parliament and of the Council of 15 March [2017] on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA [2017] OJ L88/6.*
[288] Emphasis added.
[289] Rossi. 2022.
[290] E. Garro Carrera as cited in Rossi. 2022.

carried out by subjects linked to ETA. In fact, the latter were used to, as strange and cruel as it might seem, harass the victims or families of the victims of ETA[291].

Furthermore, prior to the legislative revision undertaken through L.O. 7/2000, the prevailing perspective was that acts involving the justification and glorification of terrorism committed by individuals affiliated with terrorist groups were subject to penal consequences solely if they entailed expressions of apology conforming to the description delineated in Article 18 of Spanish Penal Code. This essentially implied that only instances of *explicit* and *direct* glorification or justification, explicitly intended to incite the execution of a particular, well-defined terrorist offence, could be subject to legal sanctions[292].

Following the legislative amendment in 2000, there remained a divergence of viewpoints. Some contended that this provision still predominantly targeted acts that glorified, justified, or humiliated victims while displaying an apologetic stance towards terrorism. Such acts were deemed to inherently provoke and explicitly incite specific offences of this nature. However, a more accurate perspective emerged, asserting that this definition did not align well with the updated textual formulation of this offence since none of the constituent elements shaping the latter necessitated confining its potential scope exclusively to instances featuring overt or direct incitement to engage in such acts[293].

Nevertheless, ever since the inception of the offence of glorification, a significant portion of experts have raised doubts about its constitutionality. They have questioned whether it aligns with the principles of law and justice, or whether it is suitable within the context of politics and crime. The prevailing view is that the criminalisation of glorification essentially targets the dissemination of ideas. While these ideas are undoubtedly abhorrent, they are rooted in political beliefs, and as such, are argued to be safeguarded by fundamental rights. Such doubts arose not only because

[291] Cancio Meliá, Manuel. 2019. "Discurso Terrorista Y Delito de Enaltecimiento/Humillación: (Art. 578 CP)." *Revista Peruana de Ciencias Penales* 33 (January): 925–46.
[292] Galán Muñoz, Alfonso. 2018. "El Delito de Enaltecimiento Terrorista. ¿Instrumento de Lucha Contra El Peligroso Discurso Del Odio Terrorista O Mecanismo Represor de Repudiables Mensajes de Raperos, Twitteros Y Titiriteros?" *Estudios Penales Y Criminológicos* 38 (9). https://doi.org/10.15304/epc.38.5127.
[293] Ibid.

the literal wording of the law made it difficult to incorporate elements of incitement through exegesis, but also because the legislator's intent expressed in the preamble of the mentioned Law seemed to actually assume that the criminal reproach was directed against those[294] "[...] acts that produce bewilderment and indignation in society"[295].

This offence has also been labelled as "peculiar" by Manuel Cancio Meliá[296] given that, within one provision, the Penal Code punished two different communication behaviours, leaving aside their rationale and their different and possible ramifications[297]. The confusion surrounding the scope of the precept has presented itself more often in the past few years due to the practice according to which it has become common to connect the offence with hate speech crimes, and in particular to Article 510 of the Penal Code. This could be linked to the fact that most of the existing doctrine has considered that, according to social sciences and from the legal-penal standpoint, terrorism consists mainly in a communication strategy[298]. Nevertheless, it was not until the reform of 2015 of the Penal Code[299] that, as reported by Amnesty International, "the prosecutions and convictions under Article 578 have sharply risen"[300].

3.2. Communicative behaviours and terrorist speech offences

Before deepening into the question of *why*, from 2015 onwards, the number of cases regarding glorification of terrorism before the *Audiencia Nacional* (National Audience) and the *Tribunal Supremo* (Supreme Court) skyrocketed, it is important to understand the conceptualisation of terrorist offences and communicative behaviours in the Spanish Penal Code. In fact, the latter has long since opted to punish, specifically and in relation to terrorist offences, the mere communication or public transmission of

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[294] Alcácer Guirao, Rafael. 2022. "Enaltecimiento Del Terrorismo, Incitación a La Violencia Y Climas de Opinión." *Teorder* 32: 44–67. https://doi.org/10.36151/td.2022.037.
[295] BOE (Spanish Official Journal). 2000. *Ley Orgánica 7/2000, de 22 de Diciembre.*
[296] Cancio Meliá, Manuel. 2019.
[297] Serrano Maillo, Isabella. 2021. "Anti-Terrorism Regulations and Freedom of Speech in Spain." In *Counter-Terrorism Laws and Freedom of Expression Global Perspectives*. Lanham, Maryland Lexington Books, An Imprint of The Rowman & Littlefield Publishing Group, Inc.
[298] Cancio Meliá, Manuel. 2019.
[299] Which, as already stated previously, rendered the *online* distribution of messages glorifying terrorist acts an aggravating factor, and increased the maximum penalty from two to three years of prison. In addition to this, the impact of this measure causes individuals prosecuted according to it to be disqualified from the public sector for a long period of time, aside from being prevented from pursuing several professions and being excluded from seeking public office.
[300] Amnesty International. 2018. *Tweet... If You Dare*. Amnesty International.

messages tending to incite the commission of a specific terrorist offence, without requiring that the offence had actually begun to be carried out[301]. For the purposes of the Spanish Criminal Code, Article 18 states that:

> "*Provocation*[302] exists when one directly incites, through the use of printing, broadcasting, or any other similarly effective means that facilitate publicity, or in the presence of a gathering of people, the commission of a crime. *Apology*[303], for the purposes of this Code, is the exposition, before a gathering of people or through any means of dissemination, of ideas or doctrines that extol a crime or glorify its perpetrator. Apology will only be criminal if it takes the form of provocation and, due to its nature and circumstances, constitutes a direct incitement to commit a crime"[304].

Analysing terrorist speech offences, one can argue that they can be classified into different categories. Within the first category one can find the acts of communication that involve the typical behaviour of collaborating with a terrorist organisation or, in the aftermath of the L.O. 2/2015, with an individual[305]. As an example of the first category of terrorist speech offences, one can take into consideration the broad scope of application offered by Article 577(1)[306] of the Penal Code, according to which a number of actions of collaboration are criminalised. Within the category of collaboration, surely communicative acts play an important role, being at the basis of every interaction. Furthermore, at paragraph 2 of Article 577, the Spanish legislator has included more specifically the offence of "indoctrination", which corresponds to an incitation towards joining a terrorist group or committing a terrorist act[307].

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[301] Galán Muñoz, Alfonso. 2018.
[302] Emphasis added.
[303] Emphasis added.
[304] BOE (Spanish Official Journal). 2020. *Código Penal*.
[305] Cancio Meliá, Manuel. 2019.
[306] "Deeds of collaboration include information on or surveillance of persons, property or installations; construction, conditioning, assignment or use of accommodation or storage facilities; concealment, hosting or transport of individuals related to terrorist organisations or groups; organisation of training practices or attending them, the provision of technological services and, in general, any other equivalent form of co-operation or assistance with the activities of terrorist organisations or groups or with persons".

[307] Spanish Government. 2017. *Criminal Code of Spain*.

The second category implies the presence of a collaboration logic concerning material support in the lead-up to nuclear terrorist offences. The latter correspond to actions that occur before actual collaboration takes place and are attributed to an individual. These early-stage actions involve receiving communications, either for the material preparation of nuclear terrorist crimes or for preparing to prepare through the formation of a suitable mental disposition, often termed "self-indoctrination" or "self-radicalisation". These actions are explicitly categorised by Organic Law 2/2015, encompassing both online and offline variations[308]. For instance, providing or receiving, online or via other means, written material containing instructions for carrying out a terrorist act falls within this category[309].

However, disseminating or acquiring such material could also have legitimate purposes, such as journalistic or academic objectives, thereby prompting the ongoing question of distinguishing between legitimate criminal activities and safeguarded communication actions. Within this category, one can find the widely criticised offences of habitually accessing communication services whose content is aimed at inciting to join a terrorist organisation or to collaborate with the latter[310]. This particular offence, enshrined in Article 575.2[311], was introduced in 2015 and was considered highly controversial given that the punishment established for this behaviour, imprisonment ranging from two to five years, is perplexingly identical to penalties for other individual preparatory actions that are more explicitly associated with terrorist violence, such as acquiring military or combat expertise or gaining knowledge on constructing explosive devices[312].

The third classification pertains to instances of terrorist rhetoric that are intentionally directed towards an unspecified group of recipients, with the objective of enlisting their participation in the perpetration of distinct nuclear-based terrorist transgressions. Alternatively, these conducts aim to induce their affiliation with, or support for, a terrorist organisation or individuals, who are potentially engaged in acts constituting terrorism-related violations. Within this context, it is appropriate to

[308] Cancio Meliá, Manuel. 2019.
[309] Cancio Meliá, Manuel, and Anneke Petzsche. 2018.
[310] Ibid.
[311] BOE (Spanish Official Journal). 2020. *Código Penal.*
[312] Cancio Meliá, Manuel, and Anneke Petzsche. 2018.

characterise such behaviours as acts of provocation[313]. This category is the broadest and most complex, as it encompasses public expressions of admiration or justification for terrorist actions[314]. In this domain, the inadequately deliberated legislative policy pursued in Spain since the year 2000 has resulted in the accumulation of disparate layers of uncoordinated legislative measures[315].

Consequently, the acts of provocation towards the commission of terrorism-related offences have become disjointedly scattered across two distinct sectors within the framework of positive regulation governing terrorism-related crimes. Thus, on the one hand, the communicative behaviour of "recruitment and indoctrination" (Article 577.2) aimed at inciting individuals to join a terrorist organisation or group, or to commit any of terrorist offences[316] formally emerges as a mode of collaboration with a terrorist organisation or an individual. Additionally, there also exists, on the other hand, the act of provocation, solicitation, and conspiracy as defined in Articles 17 and 18 of the Penal Code and delineated in Article 579.3 of the Penal Code. This is accompanied by a mode of "incitement" carried out "publicly or before a gathering of people"[317] (Article 579.2 of the Penal Code). Furthermore, a behaviour of pre-provocation or diffused provocation exists, involving the dissemination of "messages or slogans that have the purpose or content suitable for inciting others to commit any of the offenses within this chapter"[318] (Article 579.1 of the Penal Code). In contraposition to provisions on direct incitement to commit terrorist offences, the wording of Article 578 has been labelled as "broad and vague" since it confers to the authorities "the power to criminalise a wide range of expression that does not meet the high threshold of incitement"[319].

[313] Cancio Meliá, Manuel. 2019.
[314] Cancio Meliá, Manuel, and Anneke Petzsche. 2018.
[315] Cancio Meliá, Manuel. 2019.
[316] Spanish Government. 2017. *Criminal Code of Spain*.
[317] Ibid.
[318] Ibid.
[319] Amnesty International. 2017. "Europe: Dangerously Disproportionate: The Ever-Expanding National Security State in Europe." Amnesty International. January 17, 2017. https://www.amnesty.org/en/documents/eur01/5342/2017/en/. And Amnesty International. 2018. *Tweet... If You Dare*. Amnesty International.

3.3. The application of Article 578 of the Penal Code

The glorification of terrorism has been subject to increasingly fluctuating interpretations. To further elaborate on the existing jurisprudence on the matter, labelled "schizophrenic" by some legal scholars, in judgement 177/2015 the Spanish Constitutional Court ruled that restrictions on freedom of expression imposed by the offence of glorification of terrorism are deemed legitimate when the conduct gives rise to an atmosphere of hostility that exclusively influences the sentiments of the community[320]. The conception of the offence of glorification of terrorism as merely an offensive act has been embraced by the majority of jurisprudence until recent times. Well-known judicial rulings, such as the conviction of César Strawberry (Supreme Court Judgment 4/2017, January 18), are examples of that conception of the crime of glorification of terrorism and humiliation of its victims[321].

Nevertheless, both the doctrine and the existing jurisprudence on the matter of *enaltecimiento* of terrorism have been "confused" given that on the one hand, as it can be seen in the *Cassandra Vera* case (STS[322] 95/2018), a portion of the doctrinal and jurisprudential current of thought affirmed that the different offences in matters of provocative terrorist speech must show a certain suitability in terms of *success*[323] of their communication, i.e. they must be capable of *generating a risk*[324] of further acts of terrorism. It seems clear that this, however, is the narrative that the minority of the caselaw on the matter brings forward, which does not stem from neither the literal wording of Article 578, nor from the one used by the legislators in 2000. Conversely, the other option of interpretation of the norm affirms that the *mere typified expression*[325] is sufficient, without reference to the future scenarios or context, as exemplified particularly clearly by the abovementioned Supreme Court Judgment 4/2017 (Strawberry case)[326].

[320] Rossi. 2022. And Tribunal Constitucional. 2015. Sentencia N° 177/2015, ECLI:ES:TC:2015:177. Tribunal Constitucional.
[321] Alcácer Guirao, Rafael. 2022.
[322] Meaning *Sentencia del Tribunal Supremo*.
[323] Emphasis added.
[324] Emphasis added.
[325] Emphasis added.
[326] Cancio Meliá, Manuel. 2019.

The former perspective argues, therefore, that messages which justify or glorify terrorism and terrorists, as well as those that demean or belittle their victims, irrespective of their reprehensibility to the majority of society, should not be subject to prohibitions or criminal penalties unless their potential to incite future offences against third parties can be demonstrated. Only through this assessment the harm that would legitimise the prohibition and criminal punishment of their dissemination can be identified, along with the resulting curtailment of the fundamental right to freedom of expression that these prohibitions would entail. Conversely, the latter perspective contends that these categories of offences are intended to address and combat specific instances of intolerant or hate-driven discourse that elicit a prevailing societal response of aversion or social rejection[327].

Consequently, according to this point of view, these offences are thought to generate a collective sense of unease, impacting a vital collective legal interest, namely public peace. This interpretation positions the safeguarding of public tranquillity as the primary legal interest upheld by these legal provisions. This viewpoint implies categorising these offences as acts that penalise the expression of specific messages, which do not inherently harm individual legal interests. Instead, they are proscribed and condemned for constituting an offence against collective sentiments, moral standards, and fundamental values of democratic societies, such as tolerance and equality. Consequently, the dissemination of such messages is fundamentally illegitimate and could appropriately be prohibited and sanctioned, even utilising criminal law. In contrast, the opposing viewpoint maintains that the legitimacy and application of these offences should be contingent on their capacity to penalise the dissemination of discourses that function as effective instruments, fostering or indirectly inciting future, albeit unspecified, terrorist acts among their potential recipients[328].

4. The Erkizia Almandoz case: a landmark decision that raised the question to the European Level

In order to better understand this duality of thought present in the existing jurisprudence, it is important to start from a judgement that was widely considered as a

[327] Galán Muñoz, Alfonso. 2018.
[328] Ibid.

landmark decision, also because of its resonance at the European level. In fact, the paragraphs below will present an analysis of the STC[329] 112/2016 of 20 June regarding the case of Erkizia Almandoz. The latter was a former Basque separatist politician who was convicted because of his participation as a keynote speaker at a demonstration organised to pay tribute to José Miguel Beñaran Ordeñana (better known as Argala), a former member of ETA, who had been murdered thirty years earlier by the far-right terrorist organisation *Batallón Vasco Español* (BVE). At the time of the events, the applicant did not hold any political office, although he was nevertheless a leading figure of one of the currents of the pro-independence movement in the Basque Country, known as *Izquierda Abertzale*[330], and, at the commemorative event, he did not speak as an elected representative of a parliamentary group or a political party, because he had not held that status for several years[331].

The conduct of Erkizia Almandoz was considered by the *Audiencia Nacional* as constituting an act of glorification of terrorism, something that was then confirmed in the cassation judgement by the Supreme Court. In fact, in judgement 180/2012, after assuring the constitutional legitimacy of the offence foreseen at Article 578, the *Tribunal Supremo* asserted that the offence in question pertained to the category of hate speech offences, of which prohibitions and penalties are deemed legitimate by the ECtHR and the Supreme Court itself. The cassation judgement underlined that the aim of the offence of glorification was

> "Inciting acts aimed at the public promotion of those who cause serious damage to the regime of freedoms and the peace of the community through their criminal acts, thwarting all kinds of justification and support for what are nothing but perpetrated attacks against the deepest meaning of the democratic system itself"[332].

[329] Meaning *Sentencia del Tribunal Constitucional*.
[330] The latter is a Basque expression meaning "patriotic left" used to refer to Basque and nationalist parties that have served in the past as the political wing of ETA. For more visit https://covite.org/izquierda-abertzales-referentes/
[331] Buffon, Chiara, Alessandro Dinisi, and Emilio Bufano. 2019. "Sentenze Di Giugno 2021." Www.questionegiustizia.it. Questione Gisutizia. 2019. https://www.questionegiustizia.it/articolo/sentenze-di-giugno-2021.
[332] Tribunal Supremo. 2012. Sentencia Nº 180/2012. Sala de lo Penal.

More specifically, according to the Supreme Court, even if in principle the criminalisation of offences relating to terrorism can, in abstract, enter into conflict with the right to freedom of expression, in the case at hand, the literal meaning of the expressions used by the appellant, as well as the intent used in pronouncing them, translated into a praise of terrorist acts and, therefore, should not be covered by the scope of freedom of expression. Among the incriminated expressions, the concluding speech read by Erkizia Almandoz assumed particular relevance in the analysis of the Supreme Court since he requested his audience to make a reflection in order to "choose the most suitable path, the path that inflicts the most damage to the State, that leads this people to a new democratic scenario" and then he concluded, by shouting slogans of "Long live a free Basque Country", "Long live *Euskal Herria*!", "Long live Argala!", chants that were responded to by the public"[333].

The appellant then brought an *amparo* appeal before the Constitutional Court, alleging the violation of his right to ideological freedom (Article 16.1 of the Spanish Constitution) and his right to freedom of expression (Article 20.1 of the Spanish Constitution) due to his conviction for the offence of Article 578 of the Penal Code. The Constitutional Court, in its reasoning, asserted that, in order for the messages contemplated by the provision of Article 578 of the Penal Code to be considered as a form of hate speech not protected by freedom of expression, it was necessary that their issuances reflected "a situation of danger to individuals' rights, rights of third parties or for the overall system of liberties"[334]. Subsequently, the Court ratified the judgement of the Supreme Court and dismissed the petitioner's request as it considered that, taking into consideration the content of the speech, the tools used to deliver it, and the social context within which it was pronounced, there was a clear incitement to the use of violence in order to achieve certain political objectives[335].

Following the dismissal of the *amparo*, the defendant brought the question to the European Court of Human Rights (ECtHR), which immediately placed the case under the scope of Article 10 of the European Convention on Human Rights, given that

[333] Ibid.
[334] Tribunal Constitucional. 2016. Sentencia N° 112/2016, ECLI:ES:TC:2016:112. Tribunal Constitucional.
[335] Ibid. and Galán Muñoz, Alfonso. 2018.

the conviction in question amounted to an interreference with Almandoz's freedom of expression. The interference undoubtedly pursued the legitimate aims of public safety, prevention of disorder and crime, and protection of the reputation or rights of others[336]. The focus of the judgment therefore shifted towards determining whether the interference was "necessary in a democratic society", and whether the sanction imposed on the petitioner could be considered proportionate to the legitimate aim pursued[337]. According to the Court, "the comments in question had concerned a subject of general interest in the context of Spanish society, particularly in the Basque Country. However, the fact that a given subject was of general interest did not mean that the right to freedom of expression in that sphere was unlimited"[338].

The Court then investigated on whether the content of the speech, and the modalities through which it was delivered, could represent a basis for violence to the extent that it could be categorised as hate speech. According to the Strasbourg Court's previous jurisprudence, in order to do so, it is necessary to verify:

(i) whether the speech was delivered in a tense social or political context;
(ii) whether the words used, properly interpreted and contextualised, could be seen as direct or indirect incitement to violence, hatred or intolerance; and
(iii) the manner in which the statements were made and their direct or indirect capacity to cause harm[339].

As far as the first criterion is concerned, the Court found that the speech was delivered in tense social and political context.

Concerning the second criterion, on the other hand, the Court found that, although the applicant had participated to an event paying tribute to a former member of ETA, he did not advocate, at any time during the speech, neither the use of violence

[336] Buffon, Dinisi, and Bufano. 2019.
[337] In fact, according to paragraph 2 of Article 10 "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."
[338] Registrar of the Court. 2021. Press Release - Erkizia Almondoz v. Spain, 197. European Court of Human Rights.
[339] Buffon, Dinisi, and Bufano. 2019.

nor armed resistance. On the opposite, he encouraged the audience to start a path towards a democratic scenario.

Finally, as far as the third criterion is concerned, the Court held that given the circumstances in which the speech of the appellant was delivered, that is to say during an event attended by supporters of the Basque separatist movement, and the manner in which he had formulated his speech, there was no aim towards originating negative consequence with his words[340].

Therefore, taking into account all the mentioned considerations, the Strasbourg Court did not share the judgement reached by the national courts and the consequent sentencing of the applicant. Indeed, according to the Court's assessment, the context in which the challenged speech took place was not related to hate speech. On the contrary, in *Erkizia Almandoz v. Spain* the ECtHR found that the applicant was not glorifying terrorist acts not humiliating terrorist victims. Despite the fact that terrorist violence carried out by ETA was still a significant concern during that period, the applicant's conviction, which held him accountable for all the actions made during the tribute to Argala, was entirely unjustified. As there was no evidence of either direct or indirect incitement to terrorist violence, and the applicant's speech actually urged the audience to pursue a democratic path towards the political goals of the *Izquierda Abertzale*, the interference with the applicant's freedom of expression could not be considered as "necessary in a democratic society" and, consequently, there was a breach of Article 10 of the Convention on the part of the Supreme Court and Nacional Audience that had infringed upon the appellant's right to freedom of expression by sentencing him under the offence of Article 578[341].

5. The impact of Erkizia Almandoz in the national caselaw: the Strawberry case

Most of the sentences concerning Article 578 of the Penal Code concerned the glorification of acts perpetrated by domestic terrorist groups, such as ETA and GRAPO (First of October Anti-Fascist Resistance Groups). Of course, the threat posed by these

[340] Registrar of the Court. 2021. Press Release - Erkizia Almondoz v. Spain, 197. European Court of Human Rights.

[341] Cour Européenne des Droits de l'Homme. 2021. Affaire Erkizia Almondoz c. Espagne (Requête no 5869/17). Troisième Section.

movements has been quite high as already discussed, given the more than 800 deaths caused by ETA taken singularly. Nevertheless, domestic terrorist groups did not pose a threat when the majority of the convictions under Article 578 were pronounced. In fact, both ETA and GRAPO had abandoned their activity by 2015, given that the former declared a ceasefire in 2011 before declaring its disarmament in 2017, while the latter seemed to have abandoned its activity already in 2007[342].

The reason why there was such a sharp increase in the convictions for glorification of terrorist acts and humiliation of terrorism victims is that, in late 2014, the Spanish law enforcement started the *operación Araña*[343], a four-stages operation in order to convict people suspected of being responsible for the two aforementioned offences while using social media platforms, such as Twitter and Facebook. During the first two operations law, carried out in November 2014 enforcement authorities arrested over forty people, and other sixteen were detained during the third phase. In particular, in the last phase, during which the *Guardia Civil* arrested rapper and leader of Def Con Dos, César Montaña Lehmann, better known as César Strawberry, the main target of the authorities was to "identify and track down people with public profiles and thousands of followers who know what they are doing and feel unpunished"[344].

In the Strawberry case (STS 4/2017), the *Tribunal Supremo* reviewed the judgement issued by the *Audiencia Nacional* in July 2016[345]. In fact, although initially acquitted by the First Criminal Chamber of the National Audience, César Strawberry's case took a turn when the Prosecution Ministry[346] lodged a cassation appeal to the Supreme Court of Spain[347]. The rapper had, in fact, posted on his Twitter account, between November 2013 and January 2014 a series of tweets, some of which stating

[342] Amnesty International. 2018. *Tweet... If You Dare*. Amnesty International.
[343] Meaning "Spider Operations", the latter was carried out in several regions of Spain by the *Guardia Civil*.
[344] El País. 2016. "Nueva Operación Contra El Enaltecimiento Del Terrorismo En Las Redes." *El País*, April 13, 2016, sec. Política. https://elpais.com/politica/2016/04/13/actualidad/1460539496_502477.html?event=regonetap&event_log=regonetap&prod=REGONETAP&o=regonetap.
[345] Audiencia Nacional. 2016. Sentencia N° 20/2016, ECLI:ES:AN:2016:2767. Sala de lo Penal.
[346] The Public Prosecutor's Office or *Ministerio Fiscal* is a constitutional body integrated in the judiciary of Spain that nevertheless has full autonomy. For more visit https://www.lamoncloa.gob.es/lang/en/espana/stpv/spaintoday2015/justice/Paginas/index.aspx
[347] Global Freedom of Expression, Columbia University. n.d. "The Case of César Strawberry." Global Freedom of Expression. Accessed August 25, 2023. https://globalfreedomofexpression.columbia.edu/cases/the-case-of-cesar-strawberry/.

"*el fascismo sin complejos de Aguirre me hace añorar hasta los GRAPO*"[348], "*a Ortega Lara habría que secuestrarle ahora*"[349], "*Cuántos deberían seguir el vuelo de Carrero Blanco*"[350]. In the impugning speech, the Prosecutor of the National Audience argued that

> "[...] the seriousness of these expressions, their direct connection with terrible crimes actually committed in recent years in our history, and the use of a computer network, manifestly exclude the naivety, frivolity or lack of significance or lack of transcendence that the national Chamber attributes to them, trivialising an action that seriously jeopardises our political coexistence and social peace, as well as our most precious legal assets of citizens, life and liberty, both of which are directly and brutally affected by the actions of terrorism [...]"[351].

Furthermore, according to the *Sala de lo Penal*[352] "[...] Not every verbal excess, nor every message that goes beyond constitutional protection, can be considered to be included in the portion of the offence covered by art. 578 of the Penal Code [...]"[353]. Then, in order to provide a basis for its reasoning, the Supreme Court made reference to some precedents before the European Court of Human Rights[354], such as *Sürek v. Türkiye* of 8th July 1999, and *Müslüm v. Türkiye* of 4th December 2003, aside from highly relevant national jurisprudence, that is to say the STC 235/2007 through which the *Tribunal Constitucional* declared the unconstitutionality of the offence of genocide denial (Article 607.2 Penal Code)[355]. These cases are relevant for the Court in order to make reference to the concept of *discurso del odio*, arguing that:

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[348] "The unabashed fascism of Aguirre makes me desire for even the GRAPO".
[349] "Ortega Lara should be kidnapped now".
[350] "How many should follow in the flight of Carrero Blanco".
[351] Tribunal Supremo. 2017. Sentencia N° 4/2017, ECLI:ES:TS:2017:31. Sala de lo Penal.
[352] According to Article 57 of the L.O. 6/1985 on the *Poder Judicial* "the Criminal Chamber of the Supreme Court will hear appeals, review and other extraordinary appeals in criminal matters established by law." https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666&p=20151028&tn=1#acincuentaysiete
[353] Ibid.
[354] The European Court of Human Rights (ECtHR) is the judicial body of the Council of Europe (CoE). Set up in 1959, it serves the function of international court where State Parties or individuals can apply for the violation of civil and political rights enshrined in the European Convention on Human Rights. For more visit https://www.echr.coe.int/documents/d/echr/Court_in_brief_ENG
[355] In this judgement the Constitutional Court of Spain declared the offence of genocide denial contrary to Article 20.1 a) of the Spanish constitution which enshrined the freedom of expression. According to the reasoning of the Court the mere negation of genocide, which does not include glorification of the latter practice or incitement towards its commission, represents a legitimate exercise of the freedom of expression. In order to further support its argument, the Court added that the provision in question did

> "Praising or justifying terrorist acts cannot be considered within the scope of the protection granted by the right to freedom of expression or ideology, given that terrorism constitutes the most serious violation of Human Rights for the community that suffers from it. This is because the discourse of terrorism is founded on the extermination of the different, on absolute intolerance, on the loss of political pluralism, and ultimately on collective terrorisation as a means to achieve these objectives"[356].

The Supreme Court then continued by asserting that:

> "the fact that the defendant is described as a '... singer and lyricist of the rap-metal groups Def Con Dos and Strawberry Hardcore', as an artistic contributor to various media, or that the lyrics of his songs have '... a markedly provocative, ironic and sarcastic tone, employing resources typical of horror and action stories to envelop the underlying message', does not create, by any means, a ground for exclusion the typicality[357] of the offence"[358].

The *Tribunal* proceeded to collocate the words and expressions used by the defendant under the scope of the *discurso del odio*, since they corresponded to a legitimation of the terrorist phenomenon as a solution to social conflicts, and most importantly, they "obliged the victims to recall the painful experience of threat, kidnapping, or murder of a close family member"[359]. Therefore, the Court did not engage in an exercise aimed at assessing whether the diffused messages possessed any inciting capacity in order to justify the punishment. The judgement merely proceeded to state that as long the person responsible for the emission of those messages was aware that the latter possessed the characteristics of glorifying terrorism and humiliating

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not make an explicit reference to the intentional element, so that in order to commit the offence, the intention to incite racial hatred or to disparage a specific social group would not be necessary. For more see https://indret.com/wp-content/themes/indret/pdf/524_es.pdf

[356] Tribunal Constitucional. 2011. STC 812/2011, ES:TS:2011:5176. Sala de lo Penal.

[357] The typicality of an offence is the result of an examination verifying whether a conduct matches what is described in the type. In case the judgement of typicality is affirmative then the conduct is defined typical, in the opposite case, the conduct is classified as atypical. For more visit https://lpderecho.pe/elementos-tipo-penal/

[358] Tribunal Supremo. 2017. Sentencia N° 4/2017, ECLI:ES:TS:2017:31. Sala de lo Penal.

[359] Ibid.

terrorism victims, the emitter should be held liable for committing the offence enshrined in Article 578 of the Penal Code[360].

As a result of these factors, the Spanish Supreme Court concluded that the statements made by César Strawberry were not covered by the constitutional right to freedom of expression, thus justifying their legitimate prosecution under the provisions of Article 578 of the Penal Code. The penalty applied to the defendant corresponded to the minimum penalty provided for in the precept. The fact that the messages were posted on a social media, where the defendant had around 8,000 followers, ruled out, according to the Court, considering the actions less serious. The penalty of absolute disqualification[361], provided for in Article 579.2 of the Penal Code, was applied to the defendant. So, according to the final verdict of the Tribunal Supremo the defendant was sentenced to 1 year of prison, and 6 years and 6 months of absolute disqualification[362].

It seems clear that the reasoning behind the judgement of the Spanish Supreme Court pertains to the stream of thought of the majority of the rulings in the cases of glorification of terrorism and humiliation of terrorist victims. The prevailing viewpoint, in fact, was primarily focused on the symbolic significance of speeches that promote glorification. According to this perspective, such behaviour is deemed unacceptable because it violates collective feelings or, in simpler terms, breaches a social norm. However, from the standpoint of the penal law in relation to adversaries, it is evident that the prominent symbolic element in this discourse involves declaring a mere social taboo against expressing certain opinions, which is obviously inconsistent with the principle of harm[363].

Nevertheless, the defendant decided to lodge a *recurso de amparo* before the *Tribunal Constitucional*, alleging that the judgement of the *Tribunal Supremo* violated his freedom of expression, enshrined by Article 20.1 a) of the Constitution. The

[360] Galán Muñoz, Alfonso. 2018.
[361] The penalty of absolute disqualification, as stated in Article 41 of the Criminal Code, results in the permanent loss of all honors, positions, and public offices held by the convicted person, even if they were elective. Furthermore, it entails the inability to obtain such positions or any others and the disqualification from being elected to public offices during the period of the sentence. For more visit http://www.enciclopedia-juridica.com/d/inhabilitacion-absoluta/inhabilitacion-absoluta.htm
[362] Tribunal Supremo. 2017. Sentencia N° 4/2017, ECLI:ES:TS:2017:31. Sala de lo Penal.
[363] Cancio Meliá, Manuel. 2019.

appellant additionally based his claim on the violation of the freedom of expression by stating that

> "the cassation judgement deemed the offence to exist solely based on a literal analysis of the tweets written by the appellant, without examining or considering the exercise of the right to freedom of expression. It is emphasised that these tweets were not threatening in content, […], and did not show practical connection with any actors or actions that could be deemed terrorist, thereby deviating from both constitutional jurisprudence and that of the European Court of Human Rights"[364].

The plaintiff requested that the *amparo* be granted also for the violation of the right to a fair trial, Article 24.2 of the Constitution, and that the nullity of the contested rulings be declared.[365] This last violation was claimed by the plaintiff on the basis that there had been

> "a conviction in the second instance where, […], the factual basis has been reevaluated concerning the interpretation attributed to the literal wording of the tweets under trial. However, this reevaluation did not adhere to the guarantees of publicity, immediacy, and contradiction, […], as required by the constitutional jurisprudence established in STC 167/2002, of September 18th"[366].

The *amparo* appeal was admitted by the Constitutional Court, which started its reasoning by stating that it was evident that, among the claims of the appellant, the cassation judgement failed to respect the requirement set out in STC 112/2016 of 20 June, the landmark decision analysed in the paragraphs above, where the Constitutional Court stipulated a criterion according to which the judicial body, before encompassing the conduct under the criminal offence, must weigh whether the behavior constitutes a legitimate exercise of the right to freedom of expression[367].

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[364] Ibid.
[365] Tribunal Constitucional. 2020. Sentencia N° 35/2020 Recurso de Amparo 2476/2017, ES:TC:2020:35. Tribunal Constitucional.
[366] Ibid.
[367] Tribunal Constitucional. 2016. Sentencia N° 112/2016, ECLI:ES:TC:2016:112. Tribunal Constitucional.

As far as the claim under Article 24.2, the Court made reference to already existing jurisprudence on the matter, arguing that the adherence to the principles of publicity, immediacy, and contradiction requires that any conviction based on personal evidence must be rooted in evidentiary proceedings that the judicial body has directly and personally assessed within a public discourse, ensuring the opportunity for counterarguments[368]. Nevertheless, the *Tribunal Constitucional* found that the conviction of the appellant in the cassation ruling did not infringe upon their right to a fair trial, as the dispute arose from a strictly legal matter concerning the content and definition of the subjective element[369] of the offence. The resolution of this matter by the second-instance judicial body "did not jeopardise the guarantees governing evidentiary evaluation or the right to a hearing"[370].

Concerning the claim for the violation of his right to freedom of expression, Strawberry underlined that those tweets did not have any practical connection with to actors or actions that could be classified as terrorist. The Constitutional Court, in order to conduct its reasoning on the alleged violation, made reference both to national jurisprudence, and specifically to STC 235/2007, to the previously analysed STC 112/2016 and to STC 177/2015, and also to the parameters set by the ECtHR[371]. As far as STC 112/2016 and STC 177/2015, the Court highlighted their importance in light of the "institutional nature of freedom of expression". In fact, in these two previous judgements the Constitutional Court had assessed the "peculiar institutional dimension of freedom of expression" that represents a guarantee for the "formation and existence of a free and public opinion"[372].

Nevertheless, the nature of this right is not absolute and therefore, according to the standards set by the ECtHR, every form of expression that incite, justify or promote the hate and intolerance must be punished in democratic societies. Then the Court made reference to STC 235/2007, on the unconstitutionality of the offence of genocide denial,

[368] Tribunal Constitucional. 2020. Sentencia N° 35/2020 Recurso de Amparo 2476/2017, ES:TC:2020:35. Tribunal Constitucional.
[369] In this case subjective element corresponds to the voluntary and deliberate manner through which the appellant committed the crime.
[370] Tribunal Constitucional. 2020. Sentencia N° 35/2020 Recurso de Amparo 2476/2017, ES:TC:2020:35. Tribunal Constitucional.
[371] Ibid.
[372] Tribunal Constitucional. 2015. Sentencia N° 177/2015, ECLI:ES:TC:2015:177. Tribunal Constitucional.

where it was asserted that the "the special dangerousness of such heinous crimes that jeopardise the very essence of our society exceptionally allows the penal legislator, without constitutional breach, to punish the public justification of that crime, as long as such justification operates as an *indirect*[373] incitement to its commission"[374].

In addition to national judgements, the ECtHR also had the possibility to express itself on the duality between the criminal sanctions of these behaviuors and the right to freedom of expression. In fact, according to Article 10 of the European Convention on Human Rights the right to freedom of expression is not unlimited and its exercise "may be subject to certain formalities, conditions, restrictions, or penalties as prescribed by law, which are necessary measures in a democratic society for national security, [...] the protection of health or morals, the protection of reputation or the rights of others, [...]"[375]. Additional restrictions on the exercise of this right are enshrined in Article 17 of the European Convention[376]. In its jurisprudence, the ECtHR has expressed itself specifically on the question of limitation of the right to freedom of expression in cases related to the incitement or apology of terrorism. In fact, in *Leroy v. France*, of 2 October 2008, the ECtHR held that the limitation to the freedom of expression was justified in the light of the incriminated conducts (glorification of the perpetrators of terrorist acts) representing a threat for national security, national integrity or public defence[377].

As far as the caselaw of the ECtHR is concerned, the *Tribunal Constitucional* highlighted that the factors employed in the assessment carried out in *Erkizia Almandoz v. Spain* regarding the nature of the behaviour, the personal circumstances of the perpetrator, the temporal alignment of the behaviour with acts of terrorism, the presence of a violent context influencing the expression, and the specific content of the

[373] Emphasis added.
[374] Tribunal Constitucional. 2007. Sentencia N° 235/2007, ECLI:ES:TC:2007:235. Tribunal Constitucional.
[375] Council of Europe. 1950. *European Convention on Human Rights*. https://www.echr.coe.int/documents/d/echr/convention_ENG.
[376] Article on the Prohibition of abuse of rights. "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." Ibid.
[377] European Court of Human Rights. 2008. Leroy v. France. Fifth Section of the Court.

utterances[378]. Then the Constitutional Court emphasised that the failure to preliminarily examine the potential legitimate exercise of constitutionally protected rights or freedoms in cases involving terrorism-related offences is deemed a violation of fundamental rights and warrants overturning the judicial decision[379]. Therefore, in light of all the above the Constitutional Court reached the conclusion that, in light of the established constitutional jurisprudence, the cassation judgement of the *Tribunal Supremo* had violated the appellant's right to freedom of expression since "despite the efforts made in the challenged rulings" the Supreme Court did not "adequately fulfill the requirement to preliminarily assess whether the conduct under trial constituted a legitimate expression of the fundamental right to freedom of expression"[380].

The motives behind this decision resided in the fact that, according to the Constitutional Court, not every unacceptable message should be treated as a crime solely because it does not find protection under freedom of expression. In addition, the amplificatory power of the new technologies should have been taken into account when assessing the impacts of the statements that were subject to legal and criminal evaluation. The Court then found both the examination of the content of the tweets and the amplificatory impact of the platform on which they were posted as insufficient since it lacked an assessment of the significance of the disputed messages in terms of shaping a free public opinion and fostering the exchange of ideas in line with the pluralism inherent to a democratic society, for instance[381].

Given the lack of consideration of these elements, the contested ruling unequivocally stated that it was irrelevant to assess the intention, whether ironic, provocative, or sarcastic, of the appellant when posting his messages, in relation to his professional trajectory as an artist and influential figure, the context in which the messages were conveyed, and the consistent personal stance against violence as a means of conflict resolution. The challenged ruling, by omitting any argumentation on this particular aspect and explicitly rejecting the assessment of intentional, circumstantial, contextual, and even pragmatic-linguistic elements that guided the

[378] Tribunal Constitucional. 2020. Sentencia N° 35/2020 Recurso de Amparo 2476/2017, ES:TC:2020:35. Tribunal Constitucional.
[379] Ibid.
[380] Ibid.
[381] Ibid.

issuance of the messages subject to accusation, disregarded elements that, given the circumstances, were essential in the prior assessment that the criminal judge should have undertaken in matters of protecting freedom of expression as a fundamental right[382].

Hence, the Court determined that the verdict of conviction failed to meet the essential criterion of prior examination concerning whether the prosecuted behaviour constituted an expression of the fundamental right to freedom of speech, as it disregarded the necessity to assess, alongside other factors, the petitioner's communicative intent in connection with the origin, context, and conditions of the communicated messages. This omission, in isolation, played a crucial role in establishing that a breach of the petitioner's right to freedom of expression had occurred. By stating this judgement, the Constitutional Court declared the nullity of the rulings pronounced by the *Tribunal Supremo* and required the restoration of the rights of the appellant[383].

This reasoning of the Constitutional Court can be defined as more in line with the standards set in the framework of the Council of Europe and of the European Union, especially given the wording of the Article 5 of Directive 2017/541 on combating terrorism. In fact, according to this latter provision

> "Member States shall take the necessary measures to ensure that the distribution […] of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (i) of Article 3(1), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences […] is punishable as a criminal offence when committed *intentionally*[384]"[385].

Therefore, this line of thought claims that, in order for a glorification offence to be considered a form of incitement, even if indirect, it must be demonstrated that the

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[382] Ibid.
[383] Ibid.
[384] Emphasis added.
[385] European Parliament and Council of the European Union. 2017. *Council Directive 2017/541/EU of the European Parliament and of the Council of 15 March [2017] on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA [2017] OJ L88/6.*

conduct under examination created a specific risk that future terrorist acts may be conducted. The offence of glorification, consequently, presupposes for its application that the individual carrying out the conduct act must act with the intent of inciting the commission of illicit acts. Conversely, when the conduct is driven by an ironic, provocative, or sarcastic intent, or, when it can be concluded that the actor's main intention is to engage in political or ideological debate, the typicity of the conduct must be excluded, lest it undermines the protected content of the right or generate a discouragement effect resulting in disproportionate punishment[386].

6. The impact of Erkizia Almandoz in the national caselaw: the Cassandra Vera case

Another important decision at the national level, which was particularly influenced by the STC 112/2016, concerned a case of a young student coming from Murcia, a region in the South-East of Spain, named Cassandra Vera, who was found guilty in the first instance of *enaltecimiento* of terrorism and *humillación* of terrorism victims. The appellant had in fact posted on Twitter a number of satirical tweets on the car explosion carried out by ETA to murder the Almirante Carrero Blanco[387] between November 2013 and January 2016, and for this the National Audience sentenced her one year in prison, with the accessory of special disqualification for the exercise of the right of passive suffrage for a period of one year, and absolute disqualification for seven years[388].

The incriminated tweets included "Kissinger gave Carrero Blanco a piece of the moon as a gift, ETA paid his ticket to it", "ETA promoted a policy against official cars, combined with a space program", and "Elections on the anniversary of Carrero Blanco's space flight. Interesting"[389]. The conviction of Cassandra Vera had a significant impact on the population, to the extent that the granddaughter of Carrero Blanco, Lucía Carrero Blanco, sent a letter to *El País* and to Cassandra's defence, expressing her concern about the latter's conviction. In the letter, the relative of the victim asserted that she was "fearful of a society where freedom of expression, however

[386] Alcácer Guirao, Rafael. 2022.
[387] Appointed as Prime Minister in June 1973 by dictator Francisco Franco, and notably considered as his successor, Admiral Luis Carrero Blanco died in a car bomb explosion operated by the terrorist group ETA. For more visit https://dbe.rah.es/biografias/10875/luis-carrero-blanco
[388] Audiencia Nacional. 2017. Sentencia N° 9/17, ES:AN:2017:514. Sala de lo Penal.
[389] Global Freedom of Expression Columbia University. n.d. "The State v. Cassandra Vera." Global Freedom of Expression. https://globalfreedomofexpression.columbia.edu/cases/state-v-cassandra-vera/.

regrettable it may be, could lead to imprisonment"[390]. Nevertheless, according to the Audiencia Nacional the letter did "not have the capacity to absolve the accused from the criminal liability for which they are being tried"[391].

After being sentenced by the *Audiencia Nacional*, the appellant brought a cassation appeal to the Supreme Court. It is striking to note that the first words of the *Tribunal Supremo* stated that the "not every message that is unacceptable or that causes the normal rejection of the vast majority of citizens should be treated as criminal because it is not covered by freedom of expression"[392]. Furthermore, the *Sala de lo Penal* of the Supreme Court highlighted that the tweets taken into consideration did not contain any negative comments against the victim of the attack, nor did they express hurtful, damaging, or offensive statements or comments about their person or any specific aspect of their public or private life. The focus of the messages was simply on making fun of or using sarcasm about the manner in which the attack occurred, with particular emphasis, as in most of the preceding jokes, on the already well-worn and exhausted detail that the car reached a significant height. In addition to this the Court held that "the tweets referred to something that happened 44 years ago, a time more than sufficient to consider it as a historical event, where a humorous comment in jest cannot hold the same significance as a recent occurrence"[393].

Therefore, by citing STC 112/2016, the Supreme Court made clear that, in order for Article 578 to be lawfully applicable to a certain conduct, the punished discourse was required to be "a manifestation of hate speech, of a situation of a danger for citizens, for the rights of third parties or for the entire system of liberties as a condition to justify its compatibility with the standard of freedom of expression"[394], a requirement that the Court found to be in line with the standards set by Directive 2017/541, and in particular with Recital (10), adding that

[390] Junquera, Natalia, and Reyes Rincón. 2017. "La Nieta de Carrero Blanco ve 'Un Disparate' Pedir Cárcel Por Unos Tuits Sobre Su Abuelo." *El País*, January 19, 2017, sec. Política. https://elpais.com/politica/2017/01/18/actualidad/1484771677_648133.html#?rel=listaapoyo.
[391] Audiencia Nacional. 2017. Sentencia N° 9/17, ES:AN:2017:514. Sala de lo Penal.
[392] Tribunal Supremo. 2018. Sentencia N° 95/2018, ES:TS:2018:493. Sala de lo Penal.
[393] Ibid.
[394] Tribunal Constitucional. 2016. Sentencia N° 112/2016, ECLI:ES:TC:2016:112. Tribunal Constitucional.

> "the conduct should be classified as an offence when it entails the risk of potential terrorist acts being committed. In each specific case, when examining whether this risk has materialised, the specific circumstances of the case must be taken into account, such as the author and recipient of the message, as well as the context in which the act was committed. The significance and likelihood of the risk should also be considered when applying the provision on public provocation according to national law"[395].

Therefore, the Supreme Court, in this case, contrary to what it stated in the judgement regarding César Strawberry, claimed that the offence enshrined in Article 578 of the Penal Code must be interpreted as a crime of danger[396], in the sense that it must be applied only in the cases in which the discourse in question generates a real risk of inciting future terrorist acts[397]. In the case under examination, the *Tribunal Supremo* did not find such criteria to correspond with the actions committed by Cassandra Vera, which then subsequently led to the acquittal of the defendant for the offence of *enaltecimiento* of terrorist acts and *humillación* of terrorism victims. The Court considered that the accused

> "did not show through her behaviour that she was attempting to incite violence by abusing the exercise of freedom of expression, nor was she promoting hatred towards specific groups, nor did she mock the assassination attempt against a former Prime Minister that occurred more than forty years ago with the intention of justifying or inciting new attacks"[398].

As it can be noted, there was a substantial change in the foundational basis of the offence typified at Article 578 of the Penal Code. This basis has shifted from one rooted in the mere disturbance of public peace or general societal sentiments to one based on the presence of a generation of a real danger of inciting the commission of new terrorist offences, that eventually led to a narrow interpretation of the messaged

[395] Tribunal Supremo. 2018. Sentencia N° 95-2018, ES:TS:2018:493. Sala de lo Penal.
[396] In European criminal law there is a distinction between "crimes of danger" and "crimes of harm". The latter distinction lies in the possible consequences that these crimes might have. Crimes of harm, for instance, require a real harm to a legal interest, on the other hand, crimes of danger do not require the actual harm for the completion of the offence. It suffices that the conduct generates a danger to the legally protected interest. For more see Binavincet, Emilio. 1969. "Crimes of Danger." *15 Wayne L. Rev* 683 (2): 683–708.
[397] Galán Muñoz, Alfonso. 2018.
[398] Tribunal Supremo. 2018. Sentencia N° 95/2018, ES:TS:2018:493. Sala de lo Penal.

that could qualify as legally relevant under the mentioned provision, particularly in the form of humiliating the victims[399].

7. A proposal for the amendment of Article 578 of the Spanish Penal Code

Recent developments have shown an attempt of Spanish political institutions to favour more clarity in the wording of Article 578 of the Penal Code and, specifically, to harden the system of penalties in case certain individuals commit the abovementioned crime. In May 2020, in fact, the Spanish Senate put forward a legislative proposal for the amendment of Article 578. The document started by recognising that, when the provision was first included in the Penal Code, it was introduced for reasons of criminal policy, primarily to combat tributes and other acts of glorification related to the terrorism carried out by the terrorist organisation ETA, as well as acts of humiliation towards the victims of terrorism and their families, carried out by the environment of the Basque nationalist left close to said terrorist organisation. However, the proposal stated that more recently, Article 578 of the Penal Code, as a result of the use of social media, has extended its scope to the prosecution of other forms of support and justification of terrorism, such as jihadist terrorism. The forms of commission have also evolved[400].

Up until around 2013, acts of glorification and humiliation related to terrorism were predominantly carried out in person, through the organisation of demonstrations, praises, tributes, or welcoming events for members of ETA during local festivals. However, starting in 2014, the commission of the offence of glorification and humiliation underwent a significant transformation thanks to, as already mentioned, the increased use of social media platforms. This technological explosion determined, in fact, the amendment of Organic Law 2/2015, modifying Organic Law 10/1995, on the Penal Code in matters of terrorism offences. Nevertheless, on numerous occasions, actions or expressions that constitute glorification or justification of terrorism or that involve humiliation or disdain towards victims of terrorism are carried out by authorities, public officials, or representatives of political parties. Due to their positions,

[399] Galán Muñoz, Alfonso. 2018.
[400] BOE de las Cortes Generales Senado. 2020. "Proposición de Ley Orgánica de Modificación Del Artículo 578 Del Código Penal. (622/000025) TEXTO de LA PROPOSICIÓN."

they possess a status and platform that allows their messages to reach a large number of people. These actions or expressions inherently bear a legitimising intent for terrorist actions conducted by a terrorist organisation and/or are hostile and humiliating towards victims of terrorism and their families[401].

For this reason, the Popular Parliamentary Group in the Senate introduced the idea of a new section within Article 578 of the Penal Code to penalise these acts of glorification or justification of terrorism or acts humiliating to victims of terrorism and their families, when carried out by the abovementioned authorities, in an aggravated manner compared to the basic offence. The draft of the proposal foresees a new version of Article 578.2 bis., with the following wording:

> "When the acts are committed by an authority, public official, or representative of a political party, they shall be punished with the penalties established in the preceding section, in its upper half, and a fine from three months and one day to twelve months, and in any case, special disqualification from holding public office or employment and the right to passive suffrage, for a period of one to five years"[402].

8. Conclusion

The present chapter has provided a case study on the Spanish legislative framework created in order to counter the terrorist threat. The reason behind the choice of this particular Member State of the EU resides in the fact that the latter has been characterised by a particularly troubled past of fighting endogenous terrorist groups of distinct natures. Nevertheless, as it was explained in the first section, the main enemy of both the Francoist regime and of democratic Spain was the Basque separatist terrorist organisation ETA. For this reason, Spain has always been on the same page with international and regional initiatives taken in order to step up the fight against terrorism, and it was even the scenario of one of the most terrible attacks that jihadist terrorism has perpetrated in the Union, namely the 4/11 Atocha bombings in 2004.

[401] Ibid.
[402] Ibid

Therefore, as the first section of the chapter has highlighted, the national instruments adopted by the Spanish legislator have anticipated and, in a certain sense, amplified the scope of application of the norms dictated by the European Union, as in the case of Directive 2017/541. This was particularly the case of the offence of glorification of terrorism, as provided for in Recital (10) and Article 5 of the Directive, which was already introduced by the Spanish legislator in 2000 and later modified in 2015 to anticipate the incrimination barriers. Surely the adoption of these instruments at the national level did not go uncriticised by both Spanish and international legal experts, aside from human rights representatives and the civil society. For this particular reason, an entire section has been dedicated to the blatant difficulty in the interpretation of certain provisions on terrorist offences of the Penal Code, namely Article 578 on the *enaltecimiento* of terrorism and *humillación* of terrorism victims.

This difficulty in the interpretation of the offence can be traced back to the confusing conception of terrorist speech offences, as provided for in the Spanish Penal Code, and has caused a disproportionate application of Article 578 to situations in which the incriminated individuals merely spoke at a Basque nationalist event or wrote a satirical tweet recalling the actions of ETA or other terrorist groups. As presented in the caselaw analysis of both national and European jurisprudence, there are two main streams of thought regarding the interpretation of the offence enshrined in Article 578: one, that the majority of the doctrine has adopted, which imposes a stricter scope of application of the provision and, therefore, necessarily exercises a higher impact, or restriction, on the right to freedom of expression.

Nevertheless, this tendency has started to slightly change in the aftermath of the case of Erkizia Almandoz, which surely determined a breaking point with the previous interpretation of Article 578. In fact, according to this second standpoint, the oral or written expressions, allegedly glorifying terrorist acts and humiliating terrorism victims, need to be punished only in case there is a clear danger that they will actually cause more terrorist acts. This kind of interpretation of the offence of *enaltecimiento* and *humillación* avoids restricting freedom of expression where is not indispensable for the sake of the security of the state. Nevertheless, this dual interpretation of Article 578 has caused the sentencing of conflicting judgements between the *Tribunal Supremo* and the *Tribunal Constitucional*, which is a symptom of the lack of clarity that this Article

has, accompanied by the tendency, especially on the part of lower courts and of the Supreme Court, to avert any possible apology of terrorism, however ironic it may be, omitting a proper exercise of balancing two different, but equally important, elements: the security of the state and the protection of freedom of expression.

In light of the vagueness of the wording of Article 578, which has caused these opposing views in its interpretation, the Spanish Senate has recently brought forward a proposal, especially in light of the increased use of social media, in order to impose higher penalties in case certain categories of individuals deliver statements which could be traced back under the scope of application of Article 578. This, of course, does not represent an attempt to clarify the broad wording of the general provision but, nevertheless, serves as a precise indication given by the lawmakers to delimit the right to freedom of expression of a certain category of individuals.

Hence, it can be asserted that when laws are characterised by broad and ambiguous language, such as Article 578 of the Spanish Penal Code and Directive 2017/541, they provide law enforcement authorities with the flexibility to apply them in various ways. This flexibility can result in interpretations that either impose greater restrictions on fundamental rights, potentially infringing upon them, or adhere more closely to the standards established by the European Court of Human Rights, thus being less invasive.

The Spanish case, in fact, reveals that even when certain vague pieces of anti-terror legislation are adopted and implemented in "fertile" Member States, that were already in line with the requests of the Directive in terms of punishing the offence of glorification of terrorism, it is possible to apply such norms, on the basis of certain standards, which result in a more liberal conceptualisation of the offence of *enaltecimiento*. This means that, following the guidance of the ECtHR, the focus being the offence has shifted from suppressing or censoring expressions that offend collective sensibilities to identifying and addressing expressions that, based on a set of discernible indicators, possess the potential to incite acts of terrorism.

CONCLUSION

The main aim behind the present thesis is to provide an answer to the research question outlined in the introductory section, that states: considering the minimum standards provided for by Directive 2017/541, are Member States able to guarantee a fair balance between the need to ensure the security of the state and protection of fundamental rights? In particular, the structure of the thesis has been developed in order to move from providing the "bigger picture", in terms of the status of anti-terror legislation in the European Union and its development, in order to understand the impact of norms such as Directive 2017/541 on fundamental rights and liberties of its citizens.

To provide a more detailed and precise response to the aforementioned research question, the study delved into the analysis of a specific case study, which examined the application of a particular provision of the Directive, namely Recital (10) and Article 5 concerning the public incitement to commit terrorist offences. Therefore, the scope of the research has focused on the attempt to provide an answer to a more restricted version of the initially stated research question: is the offence of glorification of terrorism, as mentioned in Article 5 of the Directive, framed in a way that avoids excessive interference with the freedom of expression?

The selection of a case study on the application of a particular provision of the Directive and the analysis of its implementation in a single Member State was motivated by the desire to provide an answer analysing the existing tendencies and stream of thoughts on the criminalisation of certain conducts of opinion, such as apology of terrorism. The research has, therefore, taken into consideration the shortcomings of the Directive, as a whole, highlighting its incompatibility with certain principles of criminal law, due mainly to its broad and vague terms. In addition to this, the research has strived to understand whether, in its national implementation, such extensive terms have led to a restrictive interpretation of the norm, and to a consequent intrusion of the authorities on the exercise of the right to freedom of expression, or not.

It is necessary to reiterate that the Member State selected for the case study did not embark on any further adjustments in order to align its criminal provisions with the standards set by the Parliament and the Council within the Directive, at least on the question of glorification of terrorist acts. In fact, already in 2015, so two years before

the Directive was approved, the Spanish lawmakers rephrased the wording of Article 578 of the Penal Code in order to criminalise the online spread of messages which praised terrorist acts and violent ideologies.

Despite this forefront of the Spanish ant-terror legislation, this Member State was considered appropriate for the purpose of answering to the research question as it boasts an extensive body of jurisprudence on the balance between the protection of freedom of expression, or more in general fundamental rights, and the need to avert any threat to the security of the state. In addition to this, it well known that, from the last century until 2011, the Spanish Kingdom has been subjected to the menace stemming from the Basque separatist terrorist organisation ETA, which in a certain sense has contributed to the shaping of the national anti-terror legislation. Therefore, no other case study would have fit better the role of helping to find a motivated and reasonable answer to the research question.

It is evident that a definitive answer could not be provided through the mere analysis of the Directive since, as highlighted, it presents a number of critical aspects that could, in practice, pose a risk to infringing upon freedoms and fundamental rights. In fact, the second chapter of thesis highlighted some disconcerting element of the document, namely the vagueness of the provisions and the subsequent broad interpretation of the apology of terrorism which could lead to a limitation of the freedom of expression. Nevertheless, in the third chapter it was shown that, a national anti-terror legislation, which already included the requirements of the Directive, was somehow first interpreted in a restrictive manner, and then was has understood according to a completely different logic, mainly derived from the judgement issued by the ECtHR in *Erkizia Almandoz v. Spain*, thanks to which the legislation on the glorification of terrorism in Spain has been converted into more liberal terms. This meant that the scope of the offence no longer comprehended the expression of ideas that offended shared sentiments, but rather punished statements or messages that, according to a series of indexes, had the possibility of provoking a terrorist act in the future.

Therefore, when EU lawmakers issue directives or any other binding provision which are vague in their wording and therefore leave a wide margin of discretion, in

their interpretation and implementation, to the Member States, there is a high risk that some of the latter, particularly those accustomed to imposing strict anti-terror legislation, such as Spain, may experience a setback where anti-terror laws are used to suppress or limit certain fundamental rights. However, the case of Spain has demonstrated that in countries which are used to having high convictions for terrorism, thanks to the guidance offered by standards of the Strasbourg court, the main streams of interpretation of offences such as *enaltecimiento* of terrorism may gradually soften in order to reduce the impact on the freedom of expression.

Spain is, therefore, a perfect example from a negative perspective, as its penal law system is traditionally harsh on terrorist convictions, and in fact, in 2014, it registered the highest number of terrorism sentences pronounced in the EU, but it also represents a positive example because, through the caselaw analysis, it was highlighted that now the Spanish jurisprudence aligns with the standards of the European Court of Human Rights, which are certainly more protective of individual rights. In fact, the appeal made in the case of Erkizia Almandoz represented the occasion for EU Member States, which are all subject to the jurisdiction of the ECtHR, to acquire some guidelines for the implementation of vague provisions imposed according to Directive 2017/541, or more in general for the proper application of national norms.

Regardless of the nature of the provisions that the judgment of the ECtHR in *Erkizia Almandoz v. Spain* sought to clarify, the purpose of the standards imposed by the Court in cases of convictions for glorification of terrorism aimed at significantly reducing the impact and restriction of the right to freedom of expression, which could be compromised when lower standards of application of anti-terrorism provisions are applied, as was done in the judgment of the Spanish Supreme Court STS 4/2017. In the latter case, in fact, the reasoning of the highest national court opted for considering the mere insult towards collective feelings sufficient enough to rule out the possibility to conduct these satirical expressions, recalling tragic events carried out by ETA, under the scope of freedom of expression covered by Article 20.1 of the Spanish Constitution.

So, in conclusion it can be deduced that a great deal of importance needs to be attached to sentences similar to *Erkizia Almandoz v. Spain*, since this supranational judgement issued by the one of the highest guarantors of fundamental rights and

liberties at the European level has provided a benchmark against which national courts need to make reference when confronted with cases of glorification of terrorism. Through the framework created by the criteria laid out in the *Erkizia* case, that consist in assessing the context, the expressions used, and the manner in which the latter can generate, either directly or indirectly, further violence, national courts must avoid penalising the exercise of freedom of expression when there is no evidence that the security of the state could be put at risk. Therefore, the answer to the research question can be nothing but positive, since the minimum standards imposed by Directive 2017/541 do actually guarantee a fair balance between the need to ensure the security of the state and protection of fundamental rights, and in particular of freedom of expression in cases regarding glorification of terrorist acts, when implemented in accordance with the standards set by the Strasbourg Court. This compliance ensures that European and national legislations, that are inherently ambiguous and open to a freedom-infringing interpretation, can be implemented in a manner more respectful of fundamental rights.

In fact, according to the very same guidelines on the matter of the Council of Europe, the principles established by the Strasbourg Court in cases where freedom of expression clashed with the imperative of safeguarding national security serve as the framework to be adhered to at the domestic level. Even in cases where a country's legal system does not explicitly incorporate the "necessity" test, the principle of proportionality, and the consideration of public interest, national courts are obliged to integrate these principles into their legal deliberations and formulate a balancing test that addresses the question of "necessity" of the measures taken, which limited free exercise of the right to freedom of expression[1].

In conclusion, a final consideration needs to be added. In fact, in the present thesis the issue regarding the vague and unclear provisions contained in Directive 2017/541 was highlighted since they potentially lend themselves to problematic implementations but also to non-problematic implementations. Therefore, the

[1] Bychawska-Siniarska, Dominika. 2017. "Protecting the Right to Freedom of Expression under the European Convention on Human Rights." https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814.

concluding consideration of the thesis is: should the respect for fundamental rights be already guaranteed at the EU level or can it be left to the Member States? That is to say, is it acceptable for a European Union Directive to be vague in a manner that Member States need to address the vagueness of its terms, or should the Directive itself provide for some guarantees excluding implementations contrary to fundamental rights?

It is clear that the abovementioned standards set by the European Court of Human Rights are useful for a correct implementation, one that is in line with fundamental rights, and that no issue of impacting with the right to freedom of expression may arise if Member States abide by those standards. These same standards of the Strasbourg Court also provide the Court of Justice of the European Union with an additional tool for interpreting the Directive, that guarantees an implementation, at EU level, in accordance with fundamental rights and enables the Court to react to any restrictive implementation by the Member States. Therefore, these standards set by the Strasbourg Court could also be used by the Court of Justice of the European Union as an interpretative guide for the implementation of the Directive, in order to ensure that Member States fully respects fundamental rights.

Lastly, in cases regarding the implementation of vague provisions at the EU level, it is useful to cite the reasoning of the Grand Chamber of the Court of Justice of the European Union in Case C-817/19, where the latter held that

> "it is settled case-law that, when a directive allows the Member States discretion to define transposition measures adapted to the various situations possible, they must, when implementing those measures, not only interpret their national law in a manner consistent with the directive in question but also ensure that they do not rely on an interpretation of the directive that would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles recognised by EU law"[2].

[2] Court of Justice of the European Union. 2022. Case C-817/19. Grand Chamber.

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EXECUTIVE SUMMARY

Introduction

Freedom of expression is a fundamental right for all individuals, essential for personal dignity and self-fulfilment, and serves as the bedrock for democracy, the rule of law, peace, and stability. The ability to express oneself, including through artistic means, plays a pivotal role in how individuals shape and convey their identities within society. In any community, having open, diverse, and independent media is crucial for safeguarding and promoting the right to express opinions and ideas, as well as other human rights. Advancements in information and communication technology have created new avenues for individuals to disseminate information to a wide audience. Consequently, there has been an increasing need to address the rapid dissemination of terrorist propaganda and messages that glorify or justify terrorism within the field of counter-terrorism in the European Union. It is important to note that freedom of expression, while a fundamental right, can be subject to legal restrictions in cases involving incitement to terrorism. Such state interventions entail limitations on an individual's ability to express their ideas without restraint. The fear of being labelled as a security threat or an “extremist” has had a chilling effect, constraining the exercise of freedom of expression.

The present thesis has decided to address the issue surrounding the protection of fundamental freedoms and rights in the fight against terrorism, and in particular it chose to analyse the contrast between the exercise of freedom of expression and the protection of national security, in cases of apology or glorification of terrorism. In order to do this, the research has to provide an answer to the following research question: considering the minimum standards provided for by Directive 2017/541, are Member States able to guarantee a fair balance between the need to ensure the security of the state and protection of fundamental rights? In particular, is the offence of glorification of terrorism, as mentioned in Article 5 of the Directive, punished to avoid an excessive interfere with the freedom of expression?

Chapter 1

Terrorism has gained significant prominence and is widely discussed in our contemporary era, with its influence evident in European Union policies. The field of

counter-terrorism has emerged as a swiftly evolving policy domain within the EU. In recent years, there has been a substantial escalation in both the extent and efficacy of initiatives aimed at countering terrorism within the EU. This has led to a noteworthy increase in both the quantity and quality of efforts aimed at addressing and alleviating the terrorism threat. The first chapter of this thesis will delve into the following topics in the following order: the diversification of the terrorist menace, the instruments created at the EU level in order to counter the terrorist, and the analysis of specific counter-terrorism measures, followed by an assessment of their effectiveness and shortcomings. As far as the first section is concerned, defining terrorism has proven to be a challenging task due to the absence of a clear consensus among scholars and policy analysts regarding its precise definition. Authors such as Walter Laqueur have argued, in fact, that this lack of agreement stems from the ever-evolving nature of terrorism, encompassing changes in tactics, motives, methods, and actors, whether it is religious or traditional in nature. Nevertheless, a first important distinction was drawn between religiously motivated extremism and traditional terrorist organisations, the latter being additionally categorised into: ethno-separatist terrorism, right-wing extremism and left-anarchist movements.

Religious terrorism has been mainly perpetrated through the activities of two terrorist organisations: Al-Qaeda and the Islamic State or Daesh. According to the definition provided by Europol TE-SAT 2023, jihadism has been described as a "militant offshoot of Salafism", which is a Sunni Muslim revivalist movement that opposes democracy and elected legislatures, contending that human-made laws contradict God's exclusive role as the sole legislator[3]. During the last two to three years, the activity of these groups has decreased, nevertheless during the period between 2014-2016 the EU registered peak numbers of foreign terrorist fighters or foreign fighters returning to their European country of origin, after spending time in Syria or Iraq where they were subject to military training and extremist indoctrination.

As far as the other components of the terrorist menace are concerned, left-anarchist terrorist groups have been defined as movements that base their actions on

[3] Europol. 2023a. "European Union Terrorism Situation and Trend Report 2023." https://www.europol.europa.eu/publication-events/main-reports/european-union-terrorism-situation-and-trend-report-2023-te-sat.

the use violence in order to dismantle democratic governance system and capitalist economic framework, advocating for either a communist or socialist system or a type of self-governing anarchy. While most of these organisations dissolved in the late 1980s-1990s with the fall of communist regimes in Europe, left-wing and anarchist violent extremism, in recent years, has increasingly focused on issues such as environmental causes, animal rights, major infrastructure projects, and government policies related to irregular migration.

On the other hand, regarding right-wing terrorism, the term describes organisations that are driven by fascist, racist, and nationalist motivations and objectives. Their objective is to reshape the current political, social, and economic structure into an authoritarian framework, opposing democratic principles, values, and basic rights. Finally, ethno-separatist movements are organisations that resort to violence and acts of terrorism to attain self-rule or freedom from a governing authority or occupying power. This last category comprehends separatist movements that employ different tactics in order to reach their goals, such as the Basque and Catalonian independence movements, the Kurdish Workers' Party (PKK) and the Dissident Republican (DR) groups. Despite their differences and acting as a common denominator among these different ramifications of the terrorist menace is the use of the digital platforms, or more in general of the internet, to spread propaganda.

The second section of the first chapter has concentrated on the analysis of the evolution of the terrorist threat in the territory of the European Union in order to provide a general overview of the response of the latter, since the early symptoms of the terrorist phenomenon, around the 1970s, with the creation of the TREVI framework, until more recent times, with the adoption of one of the latest instruments in the fight against terrorist, that is to say Directive 2017/541, and later developments occurred during present times. The main argument that lies at the basis of this section consists in the conceptualisation of EU counter-terrorism policies and initiatives, throughout this given period of time, as being pushed by the occurrence of so-called critical junctures happening in cyclical phases. The first critical juncture was identified in the tragic events of the 9/11 terrorist attacks. Following the World Trade Centre and Pentagon attacks, the Union embarked on a journey of harmonisation of counter-terrorism legislation at the national level and started to adopt a series of measures such as the

Anti-terrorist roadmap, a Plan of Action on the *European policy to combat terrorism* and the Council Framework Decision 2002/475/JHA on Combating Terrorism, later amended in 2008.

The 2004 Madrid train bombings posed the basis for an increased effort to prevent additional terrorist attacks on the EU soil, that brought to the adoption of the *EU Plan of Action on Combating Terrorism* and the introduction of a new character: the EU Counter-Terrorism Co-Ordinator, author of the *EU Counter-Terrorism Strategy*, approved by the Council in 2005. The latter instrument was based on four different pillars, called the PPPP (prevent, protect, pursue and respond), and aimed, among other things at, focusing on the importance of international cooperation with other countries and institutions, therefore recognising the terrorist phenomenon as a global menace. What emerged from the adoption of the first counter-terrorism instruments was that terrorism was conceptualised as a criminal offence that, consequently, needed to be addressed through the means of criminal justice. The overall proactive stance that characterised the provisions adopted by the EU was further increased in the wake of the abovementioned rising phenomenon of foreign terrorist fighters. Initial reports on the issue started to emerge as early as 2012 describing the concerning phenomenon of individuals departing from their native land or usual residence to become a member of an armed group outside their home country, primarily driven by ideology, religious beliefs, and/or familial ties.

An additional and important critical juncture was represented by the tragic *Charlie Hebdo* and *Bataclan* terrorist attacks, that took place in Paris between January and November 2015. Following these attacks, the European Commission put forth a directive proposal in December 2015 aimed at combating terrorism and a widespread increase in momentum within European Union institutions became the focal point to expedite the enforcement of more stringent counter-terrorism measures. In March 2017, both the Council and the Parliament approved the Directive on Combating Terrorism (Directive 2017/541 on Combating Terrorism OJ 88/6), widely considered the main criminal instrument at the EU level give that it provides for the minimum level of penal sanctions for terrorist offences. Its objective was to supersede the Council Framework Decision on combating terrorism 2002/475/JHA, as modified by the Council Framework Decision 2008/919/JHA, and to make adjustments to Council Decision

2005/671/JHA. The 2017 Directive, object of study of the second chapter, marked a significant departure from prior instruments, as it was enacted to address the increasing menace posed by foreign terrorist fighters within the Union and to enhance the safeguarding of terrorism victims.

Additional initiatives taken at the Union level, more recently, signal a shift towards improved information sharing and data handling for both investigative and preventive purposes. Specifically, in 2021, the European Commission initiated a fresh effort focused on aiding Member States in reporting terrorism-related cases to Eurojust and Europol. This initiative also aimed to improve the operations of the Counter-Terrorism Register, which was established in 2019 to bolster judicial collaboration and assist prosecutors in coordinating and identifying individuals or networks under investigation in certain cases that might have cross-border implications. Lastly, in 2021 the Council and the Parliament adopted Regulation 2021/784 on preventing the dissemination of terrorist content online and, in January 2023, Directive (EU) 2022/255 entered into force in order to replace Directive (EU) 2016/1148. The latter grants ENISA (European Union Agency for Cybersecurity) several fresh responsibilities, such as creating and sustaining a European strategy for managing vulnerabilities and establishing and maintaining a registry for organizations providing services across national borders.

The last section of the present chapter has focused on the main issues related to the adoption and impact of counter-terrorism measures on EU citizens. Firstly, the adoption of this instrument has created questions regarding the surrender of power to certain supranational authorities and their impact on the fundamental rights of individuals. In order to better understand the shortcomings and the effectiveness of certain counter-terrorist measures, this last section has focused on the analysis of terrorist blacklisting used to undermine the financial assets that could be used by terrorist organisations. This type of counter-terrorism measures does not exclusively represent a financial limitation, but also affects the freedom of movement of the individual subjected to the measure. An additional shortcoming in the adoption of this measure is represented by the fact that it primarily relies on confidential intelligence data that is inaccessible to both the affected party and the court responsible for evaluating the enforcement of the lists.

Counter-terrorism propaganda has also been used in order to limit the migratory phenomena, by nurturing nationalist and populist narratives according to which terrorists were hiding among the thousands of refugees arriving in Europe. In addition, anti-terror legislation was employed by certain European governments to crack down on the political dissent expressed by civil society organisations. A final critical aspect related to counter-terrorism measures regards the question of intelligence sharing in the EU, given Member States' reluctance to share information with supranational institutions such as Europol, associated with a general sense of resentment towards the latter and differences in organisational cultures.

Chapter 2

The adoption of Directive 2017/541, which addresses counter-terrorism measures in Europe, has significantly reshaped the landscape of European counter-terrorism legislation. The process leading to the adoption of this Directive was marked by prolonged periods of inactivity, punctuated by phases driven by a growing sense of fear and urgency, notably following the November 2015 Paris attacks. Many view this Directive as a political response to the increasing departure of foreign terrorist fighters from Europe to join armed conflicts in Syria and Iraq. The primary aim of the Directive was to expand the scope of criminal laws applicable in the territory of EU Member States, encompassing acts and threats related to terrorism occurring within the European Union. However, concerns arose due to the extensive and vague nature of numerous offences outlined in the Directive, raising significant questions about their alignment with fundamental legal principles such as legality, non-retroactivity, clarity, and foreseeability.

The adoption of this instrument was also pushed by the enactment of several international initiatives, such as the United Nations Security Council (UNSC) Resolution 2178, which served as a foundational document in the global effort to address the issue of foreign terrorist fighters. The international impetus for the adoption of Directive 2017/541 was also influenced by the adoption of the Additional Protocol to the Convention on the Prevention of Terrorism, by the Council of Europe, often referred to as the Riga Protocol. In fact, it was soon after the EU signed the Riga Protocol that the Commission issued a proposal, to the Council of the European Union,

for the adoption of a new directive on combating terrorism, that would eventually replace the Council Framework Decision 2002/475/JHA on combating terrorism, as amended by the Council Framework Decision 2008/919/JHA, and amend Council Decision 2005/671/JHA.

The main purpose behind the 2017 Directive, adopted on March 15th, 2017, was not only to adhere to international legal measures concerning terrorism, but it also to expand the scope of what could be criminalised in this context. Specifically, regarding offences related to travel, the Directive introduced minimum standards to criminalise not just departing from a Member State but also travelling to one. The Directive also extended the criminalisation of activities related to terrorist financing to include those carried out for the purpose of participating in a terrorist group's activities. Moreover, the obligation to criminalise receiving training for terrorism was not previously stipulated in any binding UN legal act. The wording of Directive 2017/541 stated that, to classify an offence as "terrorist", it requires considering two objective elements, which are intentional acts defined as criminal offences under national law that have the potential to cause significant harm to a country or an international organisation. These objective elements must also be interpreted alongside a subjective element that does not take into account religious or political motives. This subjective element pertains to offences carried out with the aim of achieving specific outcomes, such as seriously intimidating a population, coercing a government or international organisation into certain actions or inactions, or causing significant disruption or destruction to the fundamental structures of a country or international organisation. Article 3(1) of the 2017 Directive outlined ten categories of acts that qualify as terrorist offences.

In summary, the Directive divided offences into three distinct groups: terrorist offenses (Article 3), offences related to a terrorist group (Article 4), and offences associated with terrorist activities (Articles 5-12). The category of offences related to terrorist activities encompasses a wide range of provisions aimed at combating terrorism, including public provocation to commit a terrorist offence (Article 5), recruitment for terrorism (Article 6), providing training for terrorism (Article 7), receiving training for terrorism (Article 8), travelling for the purpose of terrorism (Article 9), organising or facilitating travel for the purpose of terrorism (Article 10), terrorist financing (Article 11), and other offenses related to terrorist activities (Article

12). Certain articles in the Directive raise contentious issues, and one such article is Article 13, which addresses the relationship with terrorist offences. According to this article, for offences related to a terrorist group or terrorist activities, it is not necessary to establish a direct link to another specific offence outlined in the Directive. This exception applies to all offences in Title III of the Directive, except for terrorist financing (Article 11).

The Directive covers various provisions, including those related to aiding, abetting, inciting, and attempting terrorist offences (Article 14), penalties for individuals (Article 15), mitigating circumstances (Article 16), legal liability (Article 17), sanctions for legal entities (Article 18), jurisdiction and prosecution (Article 19), investigative tools and asset confiscation (Article 20), measures concerning online content that incites terrorism (Article 21), and changes to Decision 2005/671/JHA (Article 22). Article 23 is dedicated to ensuring the protection of fundamental rights, and Title V introduces a novel aspect compared to the 2002 Council Framework Decision, focusing on the protection and rights of victims of terrorism.

This chapter also highlighted that the adoption process of Directive 2017/541 was compounded by the absence of civil society organisations' access to the drafting procedure, leading to apprehensions about the document's unclear and extensive language. The legislative procedure, according to July 2016 joint statement by Amnesty International, the International Commission of Jurists, and the Open Society Foundations, was characterised as hasty and shrouded in secrecy, involving confidential meetings and lacking an Impact Assessment. In addition, the last section of the chapter outlined some fundamental rights concerns emerging from the vague and broad wording of the directive that expanded the preventive role of criminal law. Issues concerned the letters of Article 2 and 4, regarding the definition of a "terrorist group", which provide for the punishment of offences related to a terrorist group and imply a limitation on the freedom of association. Additional issues arose particularly from Article 5, regarding the public provocation to commit a terrorist offence, which has faced substantial criticism for setting an unusually low threshold by defining an act as punishable if it merely carries the potential to lead to an offence, and for criminalising behaviours that either directly or indirectly endorse terrorist offences.

The adoption process of the Directive was accompanied by general criticism regarding the fact that the Commission did not carry out a preliminary Impact Assessment of the instrument concerning the EU Charter of Fundamental Rights. Despite this, the Commission did not mention issues arising from the absence of an ex-ante impact assessment in its report based on Article 29 (1) of the Directive, where it highlighted the main transposition issues reported by Member States. In general, the Commission determined that the process of transposing the directive was largely successful. However, some challenges emerged during this process, especially concerning: ensuring the accurate and comprehensive transposition of the offenses outlined in Article 3; the omission of the phrase "contribute to the commission" in Articles 6, 7, 8, 9, and 11; incomplete or inaccurate transposition of both Article 9 and Article 11; challenges related to the transposition of provisions concerning the protection of victims.

The legal foundation for the second report was derived from Article 29(2) of the Directive. This article mandated the Commission to evaluate the Directive contributions to counter-terrorism efforts and its effects on fundamental rights and freedoms, including the principle of non-discrimination and the rule of law. Additionally, the assessment was to assess the extent of protection and support provided to victims of terrorism. According to this second assessment, while the Directive achieved its objectives to a satisfactory extent, there were limitations in addressing right-wing extremism. The costs associated with its application were low, and it demonstrated internal coherence. Most importantly, the Directive provided added value beyond what individual Member States could achieve independently. The report additionally asserted that limitations placed on fundamental freedoms and rights largely conformed to the principles of necessity and proportionality.

The second chapter then presented a thorough analysis of the European Union Agency for Fundamental Rights (FRA) assessment of the Directive's impact on fundamental rights and freedoms. According to the recommendations made by the FRA, Member States should have guaranteed the clarity and predictability of criminal offences related to terrorism due to the Directive's reliance on broad definitions of terrorist offences, leading to potential ambiguity. Preparatory offences should not have unduly infringed on individual rights or deter their legitimate exercise. Then, states

should have implemented effective safeguards for the use of investigative tools and evidence. These tools should be targeted, proportionate, and subject to safeguards due to their invasive nature.

Additionally, mechanisms should have ensured that data the collected abroad was not obtained through torture or human rights violations. Then, Member States should have prevented discriminatory impacts of counter-terrorism measures on specific groups, particularly Muslims, and should have applied counter-terrorism measures only to activities strictly related to terrorism rather than extending their application to activities, ideologies, groups, and individuals categorised as non-desirable, potentially exceeding the legitimate scope of counter-terrorism efforts. And lastly, states should have ensured the proportionate use of administrative measures and access to effective remedies since they lack the same procedural safeguards as criminal law measures, raising concerns about transparency and the potential reversal of the burden of proof.

Chapter 3

The third and last chapter of the present thesis has focused on a case study regarding the anti-terror legislation of the Kingdom of Spain, specifically referring to the offence of glorification of terrorist acts and humiliation of terrorist victims, as provided for in Article 578 of the Spanish Penal Code. The first section of the chapter analysed the overall legislative framework concerning the fight against the terrorist menace in the territory of Spain. This framework is particularly sensible to the long-time presence of endogenous terrorist groups such as ETA, to the extent that the anti-terror legislation seemed to be tailored on these organisations and later adapted to the recent international developments of the terrorist phenomenon. During the Francoist regime, terrorist groups such as ETA acted as patriotic and independentist movements and were nationally and internationally recognised as the symbol of the struggle against the dictatorship. Nevertheless, after Franco died and the peaceful transition to the democratic regime started, it became clear that ETA had used the opposition to the dictatorship merely as a façade to hide its indiscriminate use of violence. On the opposite, during the early years of Spanish democracy, ETA conducted its most violent attacks because its leaders believed that escalating terrorist activities would destabilise the democratic system and promote autonomist ideologies.

Therefore, in the early stages of the Spanish democracy, the newly formed government introduced Decree 21/1978, focused on "measures concerning offences committed by armed groups and criminal organisations"[4] and included provisions such as the indefinite incommunicado detention of suspects. During this era, the primary distinguishing feature was the effort to separate terrorism from political crimes, treating the latter as regular criminal offences. Under Franco's rule, terrorist acts were considered on par with any form of political dissent and were consequently subjected to military tribunal trials. Most importantly during this transition period a new Constitution was adopted in 1978, introducing two important provisions: Article 116, regulating states of emergency, and Article 55. Paragraph 1 of the latter provided for the suspension of the right to personal freedom, inviolability of the home, secrecy of private communications, freedom of movement and residence, freedom of thought and information, amongst others; while paragraph 2 provided for the adoption of an organic law according to which the abovementioned rights may be suspended as regards to specific groups and individuals related to armed gangs or terrorist groups.

Alongside the new constitution, the 1970s-1980s were characterised by a high fragmentation of the anti-terror legislative field. In fact, in 1979 the *Decreto-Ley 3/1979 sobre protección de la seguridad ciudadana* was adopted to criminalise new types of offences, such as preparation and other forms of facilitation of terrorist acts and *apología*. The latter consisted in the public glorification, through means of communication, both oral and written, or by means of print or other broadcasting media, of the activities and behaviours of those who commit crimes or belong to an armed gang. In order to surpass this legislative fragmentation, in 1995 a new Penal Code was enacted and, since its implementation, Articles 571 to 580 of the Penal Code have been specifically designated for addressing offences related to terrorism and its associated activities.

Subsequently, specific provisions of the 1995 Penal Code underwent modifications through the enactment of *Ley Orgánica* 7/2000 on December 23, 2000.

[4] BOE (Spanish Official Journal). 1978c. *Real Decreto-Ley 21/1978, de 30 de Junio, Sobre Medidas En Relación Con Los Delitos Cometidos Por Grupos O Bandas Armados.* https://www.boe.es/boe/dias/1978/07/01/pdfs/A15670-15671.pdf.

This legislative update introduced the offence of glorification of terrorism and the humiliation of terrorism victims in its modern form. Notably, Article 578 was amended to include a new offence related to the glorification of terrorist acts. This amendment is designed to penalise individuals who, through various forms of public expression or dissemination, celebrate or justify acts of terrorism, including those who partake in their execution, or engage in activities that tarnish the reputation, show contempt for, or humiliate the victims of terrorist crimes or their families. Later on, the Penal Code was amended in 2010 by Organic Law 5/2010, through which the Spanish legislator incorporated in Articles 571 and 572 the explicit meaning of terrorist organisation or group and a specific section on terrorist offences was introduced, in which, following Framework Decision 2008/919/JHA, new forms of terrorism were included.

In 2015, the Spanish legislature enacted two Organic Laws, specifically Ley Orgánica 1/2015 and *Ley Orgánica* 2/2015. Particularly in the case of the latter, it anticipated the provisions of the European Union Directive 2017/541, while the reform introduced by *Ley Orgánica* 1/2015 primarily focused on modifying the 1995 Penal Code, primarily with regards to revising the penalty system and introducing what are referred to as lesser offences. The primary alterations brought about by the L.O. 2/2015 involved expanding the definition of terrorist "intent". This expansion encompassed actions not only directed at undermining the constitutional order but also those with the intention to disrupt or destabilise the functioning of political institutions, economic structures, or social systems within the State. An important change was made in order to criminalise travelling for the purpose of terrorism and, lastly, it raised the sanctions for instances of glorification and humiliation via electronic communication services or the Internet from one to three years of imprisonment and a fine ranging from five to eighteen months.

Then the chapter moved to the analysis of the specific crime of glorification of terrorist acts and humiliation of terrorist victims, given that, since its introduction in its modern form in 2000, the provision has been subject to different interpretations and raised doubts concerning its constitutionality. Nevertheless, the commonly held perspective is that when criminalising the act of glorification, the primary focus is on restricting the spread of certain ideologies. Although these ideologies are unquestionably repugnant, they are often based on political convictions, and therefore,

some argue that they should be protected by fundamental rights. Overall speaking the Spanish Penal Code provides for the prosecution of several terrorist speech offences, that can be divided into three main categories: acts of communication characterised by behaviours commonly associated with cooperating with a terrorist organisation or an individual; the second category includes communications for the tangible planning of nuclear terrorist acts or for the preliminary steps involving the development of a suitable mental state, often referred to as self-indoctrination; the third category, where the offence of glorification and humiliation is included, comprehends occurrences of terrorist rhetoric deliberately aimed at an unidentified audience, with the aim of recruiting them for involvement in specific nuclear-related terrorist activities, communicative behaviours that can called acts of provocation.

In order to provide a clear overview of the magnitude of the offence included in Article 578 of the Penal Code, and of its impact on fundamental rights, several sections were dedicated to the analysis of existing jurisprudence on the topic. This was particularly important in order to highlight how the different interpretations of the norm have generated distinct results. As a matter of facts, in the *Cassandra Vera* case (STS 95/2018), a portion of the doctrinal and jurisprudential current of thought affirmed that the different offences in matters of provocative terrorist speech must show a certain suitability in terms of *success* of their communication, i.e. they must be capable of *generating a risk* of further acts of terrorism. On the contrary, the alternative interpretation of the regulation asserts that the mere expression is adequate to be punished accordingly to Article 578, without consideration of future circumstances or context. This perspective is exemplified most notably in the previously mentioned Supreme Court Judgment 4/2017 (the Strawberry case).

These two judgements were particularly influenced by the landmark decision of the Constitutional Court (STC 112/2016) regarding the case of Erkizia Almandoz, according to which in order for acts of communication to fall within the provisions of Article 578, the incriminated messages must create a situation of danger to the rights of individuals, of third parties, or to the overall system of liberties. This judgement was often referred to in the existing jurisprudence on the matter, as a benchmark in order to establish if messages or comments on terrorists/terrorist organisations were merely an exercise of the right to freedom of expression, or consisted, even indirectly, in a proper

exaltation and incitement to the commission of terrorist acts in the future. Even more important was the judgement issued by the European Court of Human Rights on the appeal made by Erkizia Almandoz, for the alleged violation of Article 10 of the European Convention on Human Rights by the national courts. The Strasbourg Court issued a revealing judgment which aimed at reconciliating, on the one hand, provisions and rules interpreted in a restrictive manner with, on the other, the states' duty to protect fundamental freedoms and rights, even in situations of state peril. In examining the case, in fact, the Court found that the interpretation of the rule in question, for the purpose of that specific intent, the Spanish Courts had breached with the applicant's freedom of expression, since national courts did not carry out a proper "necessity test" and consequently unjustifiably convicted the applicant.

Conclusion

The Kingdom of Spain was chosen as an appropriate subject for addressing the research question due to its extensive jurisprudence concerning the delicate balance between safeguarding freedom of expression, and more broadly, fundamental rights, and the imperative to prevent threats to national security. Moreover, Spain has been confronted with the menace posed by the Basque separatist terrorist organisation ETA from the last century until 2011, which, to some extent, influenced the development of national anti-terrorism legislation. Therefore, no other case study could have been more suitable for aiding in finding a well-founded and reasonable response to the research question.

Irrespective of the nature of the provisions that the European Court of Human Rights judgment in *Erkizia Almandoz v. Spain* aimed to elucidate, the intention behind the standards set by the Court in cases of convictions for glorification of terrorism was to significantly mitigate the impact and restriction on the right to freedom of expression. This right could otherwise be compromised when lower standards are applied in the interpretation of anti-terrorism provisions, as was the case in the judgment of the Spanish Supreme Court, STS 4/2017. In the latter instance, the highest national court ruled that merely insulting collective sentiments was sufficient to categorically exclude the possibility of considering such satirical expressions, which referenced tragic events carried out by ETA, as protected under the freedom of expression guaranteed by Article 20.1 of the Spanish Constitution.

In conclusion, it can be inferred that judgments similar to *Erkizia Almandoz v. Spain* hold significant importance, as this supranational ruling issued by one of the highest guardians of fundamental rights and liberties at the European level has provided a reference point for national courts when dealing with cases of glorification of terrorism. Within the framework established by the criteria outlined in the Erkizia case, which involves assessing the context, the language used, and the potential of such expressions to incite violence, either directly or indirectly, national courts must refrain from penalizing the exercise of freedom of expression when there is no evidence that it poses a threat to national security. Therefore, the response to the research question can only be affirmative. This is because the minimum standards prescribed by Directive 2017/541 do indeed ensure a fair balance between the imperative of securing the state and safeguarding fundamental rights, particularly freedom of expression in cases related to glorifying terrorist acts, when implemented in accordance with the standards set by the Strasbourg Court. This compliance guarantees that European and national legislations, which may be inherently ambiguous and susceptible to interpretations that infringe upon freedom, can be executed in a manner that respects fundamental rights.