Articles

Alejandro Sánchez Frías[*]

The EU Directive on Combating Terrorism and the Criminalisation of Travelling

Abstract

Over the past few years, the phenomenon of foreign terrorist fighters has deeply influenced European criminal law. The United Nations, the Council of Europe and the European Union have called upon States to criminalise certain conducts linked to the behaviour of these criminals, such as travelling abroad for terrorist purposes. These measures have been considered by many as an unjustified restriction on the free movement of persons guaranteed by several human rights instruments. Taking into account that the development of EU criminal law is based on the assumption that every Member State has an adequate system of protection of fundamental rights, this criticism cannot be ignored. In this sense, an analysis of relevant case law on the restrictions of freedom of movement is highly useful to understanding the position of judiciaries on the matter, and to identify possible difficulties in implementing these restrictions of free movement in the domestic systems.

I. Introduction

Shortly after the Paris attacks of November 2015, the international community began to accept the need to review criminal law instruments to address the phenomenon of foreign terrorist fighters. Just one year before these attacks, the United Nations Securi-

* Doctoral Research Fellow, Universidad de Málaga, Spain. LLM in European Law (College of Europe, Bruges) and Master in EU Studies (Universidad de Salamanca). This research has been supported by the research scholarship FPU/2015 from the Spanish Ministry of Education, Culture and Sport and by the research project "Los muros y el derecho internacional contemporáneo: implicaciones para la seguridad, la dignidad de la persona y el desarrollo sostenible (DER2015-65486-R)", from the Spanish Ministry of Economy, Industry and Competitiveness. This paper was presented at the International conference: "Freedom Under Pressure", at the occasion of the 200 year anniversary of Ghent University. It was discussed during the panel session "Free movement and cross-border crime and criminal justice" organized by Prof. dr. Wendy De Bondt.

DOI: 10.5771/2193-5505-2018-2-201

ty Council (UNSC) adopted the first international step in this direction. Resolution 2178 compels all States to criminalise certain conducts related to foreign terrorist fighters, such as travelling abroad for terrorist purposes or financing terrorism[1]. Following this pathway, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism was adopted in Riga one year later (Riga Protocol)[2]. In 2017, the European Union (EU) decided to incorporate these measures against foreign terrorist fighters through the EU Directive on combating terrorism[3].

All these instruments share a common feature: the use of criminal measures to prevent and punish conducts associated with foreign terrorist fighters. They also share one main criticism: the lack of respect for certain fundamental rights and freedoms. For instance, the Meijers Committee has declared that the EU Directive on combating terrorism "creates a far-reaching extension of the scope of Member States' criminal law obligations in the field of terrorism that takes these obligations even further into the preparatory phase of possible harmful conduct"[4].

This article is dedicated to one of the measures adopted by the international community -including the EU- against foreign terrorist fighters: the criminalisation of travelling abroad introduced by UNSC Resolution 2178, which has been considered as a self-evident restriction to the right to free movement of persons. Although there is a clear difference between the free movement of persons within the EU and the act of travelling beyond the EU borders, we will analyse both dimensions here for two reasons. The first one is that some EU Member States have used these international instruments as a basis to criminalize the act of travelling not only beyond the EU borders, but also beyond their national borders[5]. The second one is that under interna-

1 UNSC, Resolution 2178 of 24th September 2014, Doc. S/RES/2178. Available on: http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf (Last visit: 06/05/2018)

2 See Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217), adopted 22 October 2015 (entered into force 1 July 2017).

3 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, OJ 2017 L 88/6.

4 Meijers Committee, Note on a Proposal for a Directive on combating terrorism, 16 March 2016. Available on: http://www.commissie-meijers.nl/sites/all/files/cm1603_note_on_a_proposal_for_a_directive_on_combating_terrorism_.pdf (Last visit: 06/05/2018)

5 In the case of Germany, for example, the criminal law provisions of 2015 make traveling outside Germany with the intent to receive terrorist training a criminal offense punishable according to section 89a. Under this new legislation, national identity cards and passports of German citizens who constitute a threat to the internal or external security or to other significant interests of Germany may also be revoked. Instead of national identity cards they will be issued substitute identity cards, accompanied by the words "not valid for travel outside of Germany." (Identity Card Act, § 6a.) According to the German Minister of the Interior, this will prevent foreign fighters from traveling to Syria or other countries by way of third (Schengen) countries for which they only require a national identity card. See Law Library of Congress, Global Law Monitor, "Germany: New Anti-Terrorism Legislation Entered Into Force". Available on: http://statewatch.org/news/2015/jul/germany-implementation-of-unsc-2178.pdf (Last visit 06/05/2018).

tional law, freedom of movement also grants everyone the right to leave any country, including their own[6].

Therefore, the first part of this study introduces the phenomenon of foreign fighters in Europe and provides a review of international measures that have influenced the content of the EU Directive on combating terrorism. Then, this study examines the relationship between freedom of movement and EU criminal law. The research paper concludes with an analysis of relevant case law on how criminal measures against foreign terrorist fighters should be applied in order to respect fundamental rights and freedoms and, in particular, the freedom of movement.

II. The phenomenon of foreign terrorist fighters in Europe

The departure of European citizens to join conflicts in the territories of other states is not a new phenomenon. The motivation of foreign fighters, however, is in constant evolution and differs from one case to another[7]. During the Spanish Civil War or, more recently, during the current conflict between Ukraine and the Russian Federation, the predominant motivation has been political or ideological[8]. Religion has also motivated thousands of European Muslims to leave their countries to join conflicts in the Middle East[9].

After the Paris attacks of November 2015, Europe became completely aware of the link between European foreign fighters and terrorism. The intention to perpetrate terrorist attacks includes not only the places of conflict abroad but also their countries of nationality and residence upon their return[10]. In 2016, Europe was positioned as the third region sending more foreign terrorist fighters to Syria and Iraq[11]. Even so, Mus-

6 See, among others, article 13 of the Universal Declaration of Human rights and article 12 of the International Covenant of Civil and Political Rights,

7 For a comprehensive study see *A. Reed, J. Pohl* and *M. Jegerings*, The Four Dimensions of the Foreign Fighter Threat: Making Sense of an Evolving Phenomenon, International Centre for Counter-Terrorism, June 2017. Available on: https://icct.nl/wp-content/uploads/2017/06/ICCT-Reed-Pohl-The-Four-Dimensions-of-the-Foreign-Fighters-Threat-June-2017.pdf (Last visit: 06/05/2018)

8 *B. Johnstons,* Legions of Babel: The International Brigades in the Spanish Civil War, Penn State University Press, 1967; *K. Rekawek,* Neither NATO'S Foreign Legion Nor the Donbass International Brigades: (Where Are All the) Foreign Fighters in Ukraine?", The Polish Institute for International Affairs, No. 6, March 2015. Available online on: https://www.pism.pl/files/?id_plik=19434 (Last visit: 06/05/2018)

9 *A. Rustamova*, Archipielago SYRAQ: Jihadist Foreign Fighters from A to Z, Teknur, 2012.

10 *I. Marrero Rocha*, Los Combatientes Terroristas Extranjeros de la Unión Europea a la Luz de la Resolución 2178 (2014) del Consejo de Seguridad de las Naciones Unidas, Revista de Derecho Comunitario Europeo, No. 54, 2016, pp. 555-592.

11 Munich Security Conference, Munich Security Report 2016: Boundless Crises, Reckless Spoilers, Helpless Guardians, p. 21. Available on: https://www.securityconference.de/filadmin/MunichSecurityReport/MunichSecurityReport_2016.pdf (Last visit: 06/05/2018)

lim communities in the countries of destination continue to be the main victims of terrorist attacks worldwide[12].

Nowadays, the loss of territories by Daesh in Syria and Iraq is causing a "terrorist diaspora" of foreign fighters[13]. In consequence, the return of foreign fighters to their countries of residence is a primary concern for the international community and, in particular, for the EU and its Members States. Julian King, the EU Commissioner for the Security of the Union, has declared that "the retaking of Isis's northern Iraq stronghold, Mosul, may lead to the return to Europe of violent ISIS-fighters"[14]. Recent studies show that an estimated 30 percent of EU foreign terrorist fighters, around 1,200 persons, have already returned to their countries of origin[15].

Despite the reality of this threat, we cannot ignore recent studies about the different itineraries followed by foreign terrorist fighters after they leave their country of origin to join the conflict in countries like Syria or Iraq. These options include indeed the participation in terrorist activities, but also disappointment in the actions of terrorist groups and the surrender of weapons in order to participate in humanitarian missions[16]. Furthermore, their return to their home countries does not necessarily imply a re-engagement in terrorist activities in a majority of cases, although the impact of these few exceptions is tremendously high[17].

12 *M. Farivar*, Most Terrorism Victims are in Muslim majority Countries, Voice of America News, 25 August 2016. Available on: https://www.voanews.com/a/most-terrorism-victims-are-in-mulim-majority-countires/3478905.html (Last visit: 06/05/2018)

13 *C.P. Clarke*, The Terrorist Diaspora: After the Fall of the Caliphate, The RAND Corporation, Testimony Before the Committee of Homeland Security of the United States, 13 July 2017. Available on: https://www.rand.org/content/dam/rand/pubs/testimonies/CT400/CT480/RAND_CT480.pdf (Last visit: 06/05/2018)

14 *B. Mckernan*, EU faces influx of Isis fighters as they flee Mosul offensive, top official warns, *The Independent*, 18 October 2016. Available online on: http://www.independent.co.uk/news/world/middle-east/mosul-offensive-isis-eu-warning-iraq-syria-terrorism-a7367721.html (Last visit: 06/05/2018)

15 *B. Van Ginkel* and *E. Entrenmann* (Eds.), The Foreign Fighters Phenomenon in the European Union: Profiles, Threats & Policies, International Centre for Counter-Terrorism, April 2016, p. 3. Available online on: https://icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf (Last visit: 06/05/2018)

16 *A. Reed, J. R. Van Zuijdewijn* and *E. Bakker*, Pathways of Foreign Fighters: Policy Options and Their (Un)Intended Consequences, International Centre for Counter-Terrorism, April 2015. Available on: https://www.icct.nl/wp-content/uploads/2015/05/ICCT-Reed-De-Roy-Van-Zuijdewijn-Bakker-Pathways-Of-Foreign-Fighters-Policy-Options-And-Their-Un-Intended-Consequences-April2015.pdf (Last visit: 06/05/2018)

17 *E. Bakker* and *J.R. Van Zuijdewijn*, Jihadist Foreign Fighter Phenomenon in Western Europe: A Low-Probability, High-Impact Threat, International Centre for Counter-Terrorism, October 2015. Available on: https://www.icct.nl/wp-content/uploads/2015/11/ICCT-Bakker-DeRoyvanZuijdewijn-Jihadist-Foreign-Fighter-Phenomenon-in-Western-Europe-October2015.pdf (Last visit: 06/05/2018)

III. Previous international measures against foreign terrorist fighters

A. UNSC Resolution 2178

The International Criminal Police Organization (INTERPOL) was the first international organization to address the issue of foreign fighters joining terrorist organizations[18]. However, the term "foreign terrorist fighters" only became widespread after UNSC Resolution 2178 which defines foreign terrorist fighters as "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 conflicts"[19].

In its Resolution 2178, the UNSC expressed its concerns about the fact that "foreign terrorist fighters increase the intensity, duration and intractability of conflicts, and also may pose a serious threat to their States of origin, the States they transit and the States to which they travel, as well as States neighbouring zones of armed conflict in which foreign terrorist fighters are active and that are affected by serious security burdens", as well as it noted that "the threat of foreign terrorist fighters may affect all regions and Member States, even those far from conflict zones"[20].

As a result, the UNSC called upon all Member States to adopt measures to combat this phenomenon. Among the State's different obligations, some make specific references to the "travel" and "movement" of foreign terrorist fighters:

- Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents (paragraph 2).
- Intensify and accelerate the exchange of operational information regarding actions or movements of terrorists or terrorist networks (paragraph 3).
- Cooperate in efforts to address the threat posed by foreign terrorist fighters, including by preventing the radicalization to terrorism and recruitment of foreign terrorist fighters, and preventing financial support to foreign terrorist fighters (paragraph 4).
- Prevent and suppress the recruiting, organizing, transporting or equipping 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,

18 INTERPOL, Foreign fighters threat focus on INTERPOL counterterrorism meeting. Available on: https://www.interpol.int/en/Internet/News-and-media/News/2013/N20130712 (Last visit: 06/05/2018)
19 UNSC, Resolution 2178 of 24th September 2014, Doc. S/RES/2178, pp. 4-5.
20 Idem, p. 2.

terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities (paragraph 5).

- Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense (paragraph 6):
  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) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance 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; and,
  c) The wilful organization, 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;
- Prevent the entry into or transit through their territories of any individual about whom that State has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit through their territory for the purpose of participating in the acts described in paragraph 6 (paragraph 8).

UNSC Resolution 2178 has been, along with UNSC Resolutions 1373 and 2249, one of the most commented texts by the literature specialized on terrorism and international law. In order to avoid an excessive expansion of the scope of this study, we will focus exclusively on issues concerning the free movement of persons. In this regard, the first and most basic obligation imposed of States is the prevention of entry and departure of foreign terrorist fighters from and to their territories. The problem here stands out by itself: "how can it be determined whether a person is travelling to Turkey as a tourist or is only using Turkey as a transit country to join IS in Iraq or Syria?"[21]. The Resolution relies on "credible information" as the basis for "reasonable grounds to believe" (paragraph 8) that the person in question is pursuing a terrorist

21 See *K. Ambos*, Our terrorists, your terrorists? The United Nations Security Council urges states to combat 'foreign terrorist fighters', but does not define 'terrorism', EJIL Talk, 2014.

purpose, an assessment which must not be "based on stereotypes founded on grounds of discrimination prohibited by international law" (paragraph 2).

In addition to this general obligation of controlling the movement of foreign terrorist fighters, paragraph 6 contains the duty to criminalize certain conducts, in what Scheinin has defined as the "most alarming provision" of this Resolution[22]. For this author and many others, this expansion of criminal law responses and the lack of definition of 'terrorism' act as an "open door" for "oppressive regimes that choose to stigmatize as 'terrorism' whatever they do not like – for instance political opposition, trade unions, religious movements, minority groups, etc"[23].

In particular, the criminalization of conducts such as "the travel or attempt to travel" for terrorist purposes, as well as its financing, organization or facilitation, raises important concerns about its impact on the freedom of movement, the right to return to one's country of nationality and the freedom of entry into a State[24]. The wording of this obligation can even lead to a *de facto* prohibition to travel to countries affected by terrorist violence. And this is not a mere hypothesis: the last amendment to the Australian counter-terrorism law (the "Foreign Fighter Bill") establishes that "a person commits an offence if enters, or remains, in an area of a foreign country" that has been declared by the Ministry of Foreign Affairs as an area in which "a listed terrorist organization is engaging in terrorist activity", with the exception of entering or remaining solely for the legitimate purposes enlisted in the amendment[25].

B. The Riga Protocol

Two months after the approval of UNSC Resolution 2178, the Committee of Experts on Terrorism of the Council of Europe (CODEXTER) included in its agenda the study of the phenomenon of foreign terrorist fighters. Following the instructions of the Secretary General of this organization, they proposed to the Council of Ministers the creation of a new *ad hoc* committee with the mission of elaborating a Draft Protocol to the Council of Europe Convention on the Prevention on Terrorism[26]. The

Available on: https://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/ (Last visit: 06/05/2018)

22 See *M. Scheinin*, Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters, Just Security, 2014. Available on: https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/ (Last visit: 06/05/2018)

23 *I. Marrero Rocha*, cit. supra., p. 587; *Scheinin*, cit. supra.

24 *A. Conte*, States' Prevention and Responses to the Phenomenon of Foreign Fighters against the Backdrop of International Human Rights Obligations, in *A. De Guttry, F. Capone* and *C. Paulussen*, Foreign Fighters under International Law and Beyond, 2016, Springer, p. 286.

25 Counter-Terrorism Legislation Amendment (Foreign Fighter) Act 2014, Núm. 116. Available on: https://www.legislation.gov.au/Details/C2014A00116/Download (Last visit: 06/05/2018)

26 See Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), adopted 16 May 2005 (entered into force 1 June 2007).

project was accepted and on 21 January 2015, the Council set up the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE)[27].

As a result of nine months of work at the COD-CTE, the Riga Protocol was adopted. This instrument calls upon State Parties to criminalize the conducts of: participating in an association or group for the purpose of terrorism (article 2); receiving training for terrorism (art. 3); travelling abroad for the purpose of terrorism (article 4); funding travelling abroad for the purpose of terrorism (article 5); and organizing or otherwise facilitating travelling abroad for the purpose of terrorism (article 6).

Taking into account that the content of the Riga Protocol is quite similar to the provisions of UNSC Resolution 2178, the criticism against it follows the same pathway. For Scheinin, "Council of Europe member states have a legal obligation to implement UNSC Res. 2178 (despite the problems in the drafting of that resolution), but sloppy drafting of implementing legislation at the European level will only aggravate the problems inherent in the resolution itself"[28]. And these problems are especially grave if we consider that the Riga Protocol "seeks to address form of conduct, such as foreign travel, that are routinely exercised by law-abiding people for legitimate reasons"[29].

Several NGOs such as Amnesty International and the International Commission of Jurists have focused precisely on issues regarding the criminalization on travelling. Article 4 of the Riga Protocol engages "the right to freedom of movement, which includes the freedom to leave any country, including one's own. Under article 2 of Protocol 4 ECHR, and article 12 ICCPR, the right to leave one's country may be limited only where strictly necessary and proportionate"[30]. In order to ensure the necessity and proportionality of these measures, they would have to comply with the principle of legality and, at the same time, to avoid arbitrary and discriminatory application in practice. In this sense, the offence of "travelling abroad for the purpose of terrorism" should require a clearly demonstrated intent to commit or otherwise participate in the commission of a criminal act.

Fully aware of the previous criticism, the drafters decided that every act criminalized according to the Riga Protocol should be committed "unlawfully and intentionally". These two concepts are not defined in the Protocol but in its Explanatory Re-

27 Council of Europe action against radicalisation leading to terrorism, Doc. SG/Inf (2015) 4, CM (2015) 19-rev, DD (2015) 95, 21 January 2015. Available on: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c4600 (Last visit: 06/05/2018)

28 *M. Scheinin*, The Council of Europe's Protocol on Foreign Terrorist Fighters is Fundamentally Flawed, Just Security, 2015. Available on: https://www.justsecurity.org/21207/council-europe-draft-protocol-foreign-terrorist-fighters-fundamentally-flawed/ (Last visit: 06/05/2018)

29 *Scheinin*, "The Council of Europe", cit. supra.

30 Submission of Amnesty International and the International Commission of Jurists to the Council of Europe Committee of Experts on Terrorism (CODEXTER): Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, AI Index: IOR 60/1393/2015, 7 de abril de 2015, p. 2.

port[31]. A report which clarifies, first of all, "that the obligation to adopt, where necessary, criminal offences for certain conduct does not require the Parties to establish self-standing offences to the extent that under the relevant legal system these acts may be considered as preparatory acts to the commission of terrorist offences or are criminalised under other provisions, including those related to attempt"[32].

On the one hand, "unlawfully" refers to a "conduct undertaken without authority (whether legislative, executive, administrative, judicial, contractual or consensual) or conduct that is otherwise not covered by established legal defences or relevant principles under domestic law"[33]. In consequence, the Protocol "leaves unaffected conduct which is otherwise lawful under the domestic law of the Parties, such as conduct undertaken pursuant to lawful government authority"[34].

On the other hand, the criminal offence should be committed "intentionally". According to the Explanatory Report, the "exact meaning of 'intentionally' in accordance with established practice of the Council of Europe in the drafting of legally binding criminal law instruments should be left to interpretation under domestic law"[35]. In addition to this general requirement, "the offences in Articles 2 to 6 require a further subjective element, being either a terrorist purpose (as defined in Articles 2 to 4) or the knowledge about the terrorist purpose (as defined in Articles 5 and 6)"[36]. These precisions can be easily identified with the general scheme of international criminal law which distinguishes, within the subjective element (*mens rea*), between the general intent (*dolus generalis*) and the specific intent of the author (*dolus specialis*)[37]. And last but not least, the Report highlights that States "shall take into account that Articles 2 to 6 criminalise behaviour at a stage preceding the actual commission of a terrorist offence but already having the potential to lead to the commission of such acts. The conditions under which the conduct in question is criminalised need to be foreseeable with legal certainty […]. As always, the principle of the presumption of innocence should be respected, and the burden of proof lies with the State"[38].

Along with these requirements, which are applicable to all conducts, the Explanatory Report gives special attention to the offence of travelling abroad for terrorist purposes and its impact on the free movement of persons. As some NGOs did before them, the drafters "took due note of the fact that the right to freedom of movement is enshrined in Article 2 of Protocol No. 4 to the Convention for the Protection of Hu-

31 Council of Europe, Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217), of 22 October 2015. Available on: https://rm.coe.int/168047c5ec (Last visit: 06/05/2018)
32 Explanatory Report, paragraph 21.
33 Idem, margin no. 26.
34 Idem, margin no. 27.
35 Idem, margin no 28.
36 Idem.
37 See *E. Wilmshurst*, Transnational Crimes, Terrorism and Torture, in *R. Cryer, H. Friman, D. Robinson and E. Wilmshurst*, (Eds.), An Introduction to International Criminal Law and Procedure, 2010, Cambridge University Press, p. 347.
38 Explanatory Report, cit. supra., margin no. 30.

man Rights and Fundamental Freedoms of the Council of Europe, as well as in Article 12 of the International Covenant on Civil and Political Rights of the United Nations"[39].

However, the Explanatory Report points out something that will be further analysed in the context of the EU Directive on combating terrorism: "both of the aforesaid international human rights instruments allow for the right to freedom of movement to be restricted under certain conditions, including the protection of national security, and (as regards Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms) for the prevention of crime"[40]. In this sense, the drafters of the Riga Protocol considered "that the seriousness of the threat posed by foreign terrorist fighters warrants a robust response which, on the other hand, should be fully compatible with human rights and the rule of law"[41].

In order to be fully compatible with human rights and the rule of law, the Explanatory Report makes several remarks. First at all, it emphasised that "Article 4 does not contain an obligation for Parties to introduce a blanket ban on, or criminalisation of, all travels to certain destinations"[42]. In addition, two requirements must be fulfilled: "firstly, the real purpose of the travel must be for the perpetrator to commit or participate in terrorist offences, or to receive or provide training for terrorism, in a State other than that of nationality or residence […]; secondly, the perpetrator must commit the crime intentionally and unlawfully"[43].

IV. Freedom of movement vs the effectiveness of EU criminal law: general considerations

Because of different legal and political reasons, EU criminal law has been one of the most controversial elements of the EU design since its formal creation[44]. One of the main reasons is the inherent and, at the same time, difficult link with human rights, given that "the penal instrument has both the power to protect and to compress fundamental rights"[45]. In order to determine how is the relationship between free movement of persons (fundamental freedoms) and the EU Directive on combating terrorism (EU criminal justice measures) we should commence by referring, at least briefly, to the system of protection of fundamental rights in the EU and the actors involved.

39 Idem, margin no. 45.
40 Idem.
41 Idem, margin no. 46.
42 Idem, margin no. 48.
43 Idem.
44 See *S. Peers*, Mission accomplished? EU Justice and Home Affairs law after the Treaty of Lisbon, Common Market Law Review, Vol. 48, No. 3, 2011, pp. 661-693.
45 *P. De Hert*, EU criminal law and fundamental rights, in *V. Mitsilegas, M. Bergström* and *T. Konstadinides*, Research Handbook on EU Criminal Law, 2016, Edward Elgar, p. 105.

According to article 6 of the Treaty of the European Union[46], we can distinguish three sources of protection of fundamental rights: the Charter of Fundamental Rights of the European Union (EU Charter), which shall have the same legal value as the Treaties; fundamental rights as general principles of EU law as guaranteed by the European Convention of Human Rights and Fundamental Freedoms and the constitutional traditions common to the Member States; and the ECHR as an independent source once the EU will accede to the Convention[47].

The complexity coming from this plurality of sources is enhanced by the plurality of actors involved[48]. The Court of Justice of the European Union (CJEU) "shall ensure that in the interpretation and application of the Treaties the law is observed"[49], so this actor is entrusted with interpreting and ruling on the EU Charter. The European Court of Human Rights (ECtHR) is crucial for the interpretation of fundamental rights as general principles of EU law[50]. And, finally, national courts have the obligation to apply EU fundamental rights law[51], expanding the scope of such rights in certain occasions thanks to the mechanism of the preliminary ruling[52]. The role of these three actors in the field of counter-terrorism measures and its impact on free movement will be analysed in the next section.

As we have mentioned above, the main instrument for the protection of fundamental rights and freedoms in the EU is the EU Charter. Freedom of movement is protected under article 45 of the EU Charter: "every citizen of the Union has the right to move and reside freely within the territory of the Member States". The Explanations relating to the EU Charter elaborate that "the right guaranteed by paragraph 1 is the

46 See Consolidated Version of the Treaty of the European Union and the Treaty on the Functioning of the European Union, OJ C 2012 326.

47 For an analysis of the Opinion 2/13 and the non-accession of the EU to the ECHR, see *J.P. Jacqué*, Pride and/or Prejudice? Les lectures Possibles de l'avis 2/13 de la Court de Justice, Cahiers de droit europeen, Vol. 51, No. 1, 2015, pp. 19-45; *K. Lenaerts*, La Vie Après l'Avis: The Principle of Mutual (Yet not Blind) Trust, Common Market Law Review, Vol. 54, 2017, pp. 805-840; *T. Ackermann et al*., The EU'S Accession to the ECHR – a 'NO' from the ECJ", Common Market Law Review, Vol. 52, 2015, pp. 1-16; *D. Halberstam*, It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, German Journal of International Law, Vol. 16, No. 1, 2015, pp. 105-146; *S. Peers*, The EU's Accession to the ECHR: The Dream Becomes a Nightmare, German Journal of International Law, Vol 16, No. 1, 2015, pp. 213-222; *B. De Witte* and *S. Imamovi*, Opinion 2/13 on accession to the ECHR: defending the EU legal order against a foreign human rights court, European Law Review, Vol. 40, No. 5, 2015, pp. 683-705.

48 De Hert, cit. supra., p. 108.

49 Article 19 TEU.

50 For a study of the influence of the ECtHR in the EU legal order see *D. Appanah*, Charte des Droits Fondamentaux de l'Union Européenne des Droits de l'Homme: entre cohérence et légitimation, Revue général de droit international public, 2014, p. 343; *T. Lock*, The European Court of Justice and International Courts, 2015, Oxford University Press, pp. 182-183; *K. Lenaerts* and *E. De* Smitjer, The Charter and the Role of the European Courts, Maastricht Journal of European and Comparative Law, Vol. 8, 2001, p. 99.

51 See Court of Justice of the European Union, 24.3.1994, case 2/92 (*Bostock)*, margin no. 16.

52 See Court of Justice of the European Union, 16.6.2005, case 105/03 (*Criminal proceedings against Maria Pupina).*

right guaranteed by Article 20(2)(a) of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties"[53]. In consequence, this right is a fundamental part of the EU citizenship.

Regarding the conditions and limitations, article 52 of the EU Charter recognises possible restrictions to the rights enshrined by the same text, but they "must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". The Explanations refer to the concept of "general interest" as including "both the objectives mentioned in Article 3 of the Treaty on European Union and other interests protected by specific provisions of the Treaties such as Article 4(1) of the Treaty on European Union and Articles 35(3), 36 and 346 of the Treaty on the Functioning of the European Union"[54].

Initially, it was the existence of terrorism, aggravated by the lack of satisfactory means of control and punishment, what was considered as a deterrent to the exercise of the right of free movement[55]. Nowadays, the means of control of terrorism can be considered as a deterrent itself. The main derogations to the right of free movement of persons can be found in the Directive on the Rights of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States (Citizens' Rights Directive)[56]. One of them allows Member States to restrict this right on grounds of "public security"[57]. According to the CJEU, this concept covers "a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests"[58]. This derogation "must be based exclusively on the personal conduct of the individual concerned"[59]. In the case of counterterrorism, the CJEU has accepted that prevention of terrorism can be regarded as falling within the maintenance of public security for the purpose of limiting the freedom of movement for persons[60].

Although it is not exclusively related to counterterrorism measures, we can notice a very similar approach in the case law concerning the expulsion of EU citizens from the

53 Explanations Relating to the Charter of Fundamental Rights, of 14 December 2007, OJ 303, p. 29.
54 Idem, p. 32.
55 European Parliament, Report drawn up on behalf of the Legal Affairs Committee on the European Judicial areas (Tyrell Report), 1982, Doc. 1-318/82, p. 16.
56 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158.
57 Citizen's Rights Directive, cit. supra., article 27 (1).
58 Court of Justice of the European Union, 23.10.2010, case 145/09 (*Tsakouridis)*, margin no. 44.
59 Citizen's Rights Directive, cit. supra., article 27(2).
60 Court of Justice of the European Union, 26.11.2002, case 100/01 (*Olazabal)*, margin no. 35.

host Member State on ground of public policy and public security. Despite the fact that some judgments are previous to the Citizen's Rights Directive, their content is in general terms quite similar to the wording of article 28 of the Directive: protection against expulsion. In *Donatella Calfa*, the CJEU accepted that crimes such as drug trafficking can be considered as a basis for the expulsion of citizens[61]. However, the mere condemnation for a crime does not automatically justify this kind of response by the hosting State. The CJEU have insisted several times in the proportionality of the measure according to the seriousness of the threat, as well as in the analysis of the personal conduct of the individual concerned[62].

Apart from this general derogation based on public security, and terrorism as a threat to it, freedom of movement can be also limited by criminal measures. The EU Directive on combating terrorism is based on UNSC Resolution 2178 and the Riga Protocol. As we have seen in the previous pages, both instruments have been widely criticised for violating several rights, such as the freedom of movement as protected by article 2 of Protocol 4 ECHR and article 12 ICCPR. The EU instrument has been, therefore, criticised on the same grounds: "the directive requires states to criminalise a series of preparatory acts that may have a minimal or no direct link to a violent act of terrorism, and may never result in one being committed. For example, the offences of participating in a terrorist group, travelling or receiving training for terrorist purposes are not adequately defined. Unless these broadly outlined offences are subject to careful drafting and strong safeguards in national law, they are likely to lead to violations of rights, including the right to liberty and freedoms of expression, association, and movement"[63].

It would not be the first time that a piece of EU legislation has been declared invalid because of its impact on fundamental rights[64]. In the field of EU criminal measures and its implementation by Member States, the CJEU has established that there must be a due respect to EU fundamental rights[65]. However, the CJEU has "provided very restrictive interpretation of the range of fundamental rights, when they clash with the effective implementation of EU law, more specifically with EU criminal law"[66]. Two cases highlight this trend within the CJEU.

61 Court of Justice of the European Union, 19.1.1999, case 348/96 (*Donatella Calfa*).

62 See, among others, Court of Justice of the European Union, 18.5.1982, cases 115 and 116/81 (*Rezguia Adoui*); 12.12.1989, case 265/88 (*Lothar Messner*); 22.5.2012, case 348/09 (*P.I. v Oberbürgermeisterin der Stadt Remscheid*).

63 International Commission of Jurists, "European Union Directive on Counterterrorism is Seriously Flawed", Press Release, 30 November 2016. Available on: https://www.icj.org/wp-content/uploads/2016/11/EU-Press-Release-Flawed-Counterterrorism-Directive-2016-ENG.docx.pdf (Last visit: 06/05/2018)

64 See, for example, the famous judgment of the Court of Justice of the European Union, 8.04.2014, joined cases 293/12 and 594/12 (*Digital Rights Ireland)*, in which the ECJ declared that the Directive on retention of data was invalid on the ground of data protection and privacy.

65 Court of Justice of the European Union, 26.2.2013, case 617/10 (*Akerberg Fransson)*, margin no. 27.

66 *De Hert*, cit. supra., p. 111.

In the *Melloni* case, the CJEU faced a clash between the Spanish standard on the right to defence and the European Arrest Warrant (EAW)[67], an act of secondary legislation. Although national constitutional traditions are part of the EU system of protection of fundamental rights, the CJEU considered case that "national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised"[68]. As a result, the CJEU precluded the possibility of making the execution of an EAW conditional upon the respect of the right of defence as protected by the constitutional tradition of the executing Member States. An opposite view "would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision"[69].

The EAW was also the subject matter of the *Radu* case, this time because of a breach of the right to liberty and security, to the presumption of innocence and the right to defence. Advocate General Sharpston considered that "the decision does not affect the obligation to respect fundamental rights and fundamental principles. […]. The duty to respect those rights and principles permeates the Framework Decision. It is implicit that those rights may be taken into account in founding a decision not to execute a warrant. To interpret Article 1(3) otherwise would risk its having no meaning – otherwise, possibly, than as an elegant platitude"[70]. In consequence, she recommended that "the competent judicial authority of the State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of Community law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process"[71]. Contrary to this recommendation, the ECJ established again that "the European legislature has ensured that the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant system"[72].

67 Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ 2009 81.

68 Court of Justice of the European Union, 26.2.2013, case 399/11 (*Stefano Melloni)*, margin no. 60.

69 Idem, margin no. 63.

70 Opinion of Advocate General Sharpston, 18.10.2012, case 396/11 (*Ciprian Basile Radu)*, margin no. 70.

71 Idem, margin no. 97.

72 Court of Justice of the European Union, 29.1.2013, case 396/11 (*Ciprian Basile Radu),* margin no. 41.

V. The EU Directive on combating terrorism

A. Legal basis and content

In June 2013, the Justice and Home Affairs Council backed the package of 22 measures against foreign terrorist fighters proposed by the EU Counter-Terrorism coordinator[73]. This package was the basis of future actions such as the reinforcement of the Schengen Framework, the Passenger Name Record System (PNR), the prioritization of information sharing and operational cooperation and, in line with the two instruments analysed above, the criminalization of certain conducts usually associated with the activity of foreign terrorist fighters[74].

Regarding the harmonization of criminal law, the European Council asked the Commission to assess whether the EU Decision on combating terrorism[75] needed an update, following the reports of Eurojust about existing gaps in the prosecution of foreign terrorist fighters[76]. As a result, the EU Council and the Parliament approved on 15 March 2017 the EU Directive on combating terrorism[77]. According to its article 1, this new legal tool establishes "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".

The legal basis of this recent EU Directive is article 83.1 of the Treaty of Functioning of the European Union, 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 areas of crime are the following: terrorism […]"[78].

73 Council of the European Union, 3244th meeting in Justice and Home Affairs, 6 and 7 June 2013, Press Release p. 17. Available on: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/137407.pdf (Last visit: 06/05/2018)

74 See *G. De Kerchove* and *C. Höhn*, The Regional Answers and Governance Structure for Dealing with Foreign Fighters: The Case of the EU, in *A. De Guttry*, *F. Capone* and *C. Paulussen* (Eds.), Foreign Fighters under International Law and Beyond, 2016, Springer, pp. 305-319.

75 See Decision 2002/475/JHA of 13 June 2002 on combating terrorism as amended by Council Framework Decision 2008/919/JHA of 28 November 2008, OJ 2002 L 164.

76 Anti-terrorism: Eurojust in the European Parliament – Foreign Fighters in Focus, Press Release. Available on: http://www.eurojust.europa.eu/press/News/News/Pages/2014/2014-11-06_LIBE-Committee-debate.aspx (Last visit: 06/05/2018)

77 See EU Directive on combating terrorism, cit. supra.

78 For a critical assesment of the role of the EU in this field see *N. Corral-Maraver*, Irrationality as a Challenge to European Criminal Policy, European Criminal Law Review, Vol. 7, No. 2, 2017, pp. 123-150.

The Directive categorizes the offences in three groups: terrorist offences (article 3); offences relating a terrorist group (article 4) and offences related to terrorist activities (articles 5 to 12). We can find most of the new provisions against terrorism within the last category: receiving training for terrorism (article 8); travelling for the purpose of terrorism (article 9); organising or otherwise facilitating travelling for the purpose of terrorism (article 10) and the financing of such acts (article 11). In addition, there are specific mentions to the assistance and support to the victims of terrorism (article 24) in line with the EU Directive establishing minimum standards on the rights, support and protection of victims of crime[79].

B. Ex ante review: the impact assessment

During the legislative process that led to the adoption of this directive, one of criticism was the lack of an impact assessment of this legislation with respect to the EU Charter[80]. In the words of the European Commission, "the 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 the fundamental rights protected by the Charter. Properly assessing any impact on fundamental rights in the preparatory stages of new legislation will therefore not only contribute to finding the most appropriate solution to a given problem, but will also strengthen the defence of EU legislation against legal challenges before the European Court of Justice"[81].

However, in the case the EU Directive on combating terrorism, the European Commission (EC) considered that "given the urgent need to improve the 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"[82]. There will be an assessment, but not until the 8 September 2021, when the EC will have to "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".

This has been criticised by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs: "particularly striking is the lack of an Impact Assessment where the new Directive on Combating Terrorism that is to replace Framework Deci-

79 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L 315.

80 International Commission of Jurists, cit. supra.,

81 European Commission, Operation Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC (2011) 567 final, p. 5. For a study of this tool see *O. De Schutter*, Impact Assessments, in *S. Peers* (et al.), The EU Charter of Fundamental Rights: A Commentary, 2014, Hart Publishing, pp. 1645-1648.

82 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, COM (2015) 625 final, p. 12.

sion 2002/475 is concerned. None of the Council initiatives have been accompanied by an Impact Assessment. The lack of public consultations and ex ante assessments is not compensated by ex post reviews or evaluations"[83]. And, more specifically, the Meijers Committee has considered that "such a rushed procedure does not do justice to the importance of a balanced legal response to terrorism, especially since the proposal concerns far-reaching powers under criminal law that can be exercised at a very early stage and that can have a serious impact on people's lives"[84].

In line with the words of the EC, some authors have pointed out the importance that *ex ante* impact assessments can have for the CJEU: "When considering the impacts of a measure for the purpose of assessing its proportionality, the Court is investigating its legal impact. Thus, as any lawyer would do, the Court considers questions such as which changes to the pre-existing law resulted from the measure in question, whether those changes constitute a *prima facie* interference with fundamental rights, and if so whether that interference is proportionate"[85].

C. Ex post facto review: judicial responses to criminal measures against foreign terrorist fighters

Taking into account the lack of an *ex ante* review, the control that courts of justice exercise in specific cases grows in importance. Even if the youth of the Riga Protocol and the EU Directive makes it difficult to find case law in this field, it is not completely inexistent. In this sense, we will comment relevant case law of the CJEU, the ECtHR and the domestic courts (more specifically, the Spanish Supreme Court and the special jurisdiction over crimes of terrorism, *Audiencia Nacional*). This will help to identify a first set of reactions of the judiciary in front of these initiatives against foreign terrorist fighters.

In the recent *Lounani* case[86], the main question was whether an application for refugee protection (as regulated by the Qualification Directive[87]) could be excluded even when there was not a conviction for terrorist offences as such (like the organising travelling for the purpose of terrorism) in the sense of the previous Framework Decision on combating terrorism (which, at that time, did not contain the crime of the or-

83 Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, The European Union's Policies on Counter-Terrorism: Relevance, Coherence and Effectiveness, 2017, p. 17.

84 Meijers Committee, Note on a Proposal for a Directive on combating terrorism, CM1603, 16 March 2016. Available online on: http://www.commissie-meijers.nl/sites/all/files/cm1603_note_on_a_proposal_for_a_directive_on_combating_terrorism_.pdf (Last visit: 06/05/2018)

85 *F. de Londras*, Accounting for Rights in EU Counter-Terrorism: Towards Effective Review, Columbia Journal of European Law, Vol. 22, No. 2, 2016, p. 256.

86 *Court of Justice of the European Union*, 31.1.2017, case 573/14 (*Mostafa Lounani)*.

87 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337.

ganising or act of travelling for terrorist purposes). AG Sharpston considered that the Decision on combating terrorism and the Qualification Directive have different legal basis, and, therefore, exclusion under the latter is not dependent on the existence of a prior criminal conviction within the meaning of the Framework Decision[88]. However, she recognises the difficulty to interpret exclusions based on acts of terrorism: "But how far does that extension under Article 12(3) go? Where along the spectrum that stretches from a person who is merely shaking a collecting tin in the street to an individual who is directly involved in a terrorist attack as the driver of the getaway car should the line be drawn?"[89].

The CJEU accepted the outcome of the AG, though the reasoning is mostly based on UNSC Resolution 2178. From this international resolution it follows that the application of the ground of exclusion of refugee status "cannot be confined to the actual perpetrators of terrorist acts, but can also extend to those who engage in activities consisting in the recruitment, organisation, transportation or equipment of individuals who travel to a State other than their States of residence or nationality for the purpose of, inter alia, the perpetration, planning or preparation of terrorist acts"[90]. The judgment recalls, specifically, that UNSC Resolution 2178 identifies "among the activities to be combated by States as part of the fight against international terrorism, the wilful organisation of the travel of individuals who travel to a State other than their State of residence or nationality, for the purpose of the perpetration, planning or preparation of terrorist acts"[91]. Professor Peers correctly points out that this pronouncement aligns the interpretation of the exclusion clause to some extent with recent developments in criminal law, namely the Riga Protocol and the EU Directive on combating terrorism[92].

On the other hand, the ECtHR had the opportunity to analyse in *Tommaso v. Italy*[93], with specific references to the Riga Protocol, the issue of preventive measures and similar restrictions on the ground of public security and the right to move and reside freely. In this case, a new set of Italian legislation contained new terrorist offences, notably one relating to travel by foreign fighters for terrorist purposes. The provisions allowed for an extension of the scope of preventive measures concerning individuals and property[94]. This national legislation would be in line with the Riga Protocol that "lays down an obligation for States to make it a criminal offence to travel, or attempt to travel, to a State other than the State of residence or nationality for the purpose of

88 Opinion of Advocate General Sharpston, 31.1.2017, case 573/14 (*Mostafa Lounani)*, margin no. 55-56.
89 Idem, margin no. 73.
90 *Court of Justice of the European Union*, *Mostafa Lounani*, cit. supra., margin no. 69.
91 Idem, magin no. 76.
92 *S. Peers*, Foreign fighters' helpers excluded from refugee status: the ECJ clarifies the law, EU Law Analysis, 31 January 2017. Available online on: http://eulawanalysis.blogspot.com.es/2017/01/foreign-fighters-helpers-excluded-from.html (Last visit: 06/05/2018) (Last visit: 06/05/2018)
93 *Tommaso v. Italy,* Application no. 43395/09, Judgment of 23 February 2017.
94 Idem, margin no. 66.

perpetrating, planning, preparing or participating in terrorist acts"[95]. In any case, the ECtHR recalls that the Citizens' Rights Directive establishes on restrictions of the freedom of movement and residence on grounds of public security the obligation to "comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned, which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society"[96].

According to ECtHR's settled case-law, "any measure restricting the right to liberty of movement must be in accordance with law, pursue one of the legitimate aims referred to in the third paragraph of Article 2 of Protocol No. 4 and strike a fair balance between the public interest and the individual's rights"[97]. The expression "in accordance with law" requires not only that "impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects"[98].

But, what is the meaning of "foreseeable to its effects"? A question of extreme importance that, in a certain way, was posed by AG Sharpston when she asked what activities should be considered terrorists under recent developments in the field of counterterrorism law. In general terms, the ECtHR reiterates that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail"[99]. The judges of Strasbourg accept, however, that "such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice […]. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed"[100].

Are the new legal developments against foreign terrorist fighters able to fulfil the guarantees established by the ECtHR? In *Tomasso v. Italy*, the judgment found a violation of freedom of movement because of the lack of proportionality of the measures imposed in that specific case. We can also find some interesting reflections in the separate opinion of judge Pinto de Albuquerque. For him, these preventive measures are applied *ante* or *praeter delictum*, "being based on a highly indeterminate, probabilistic

95 Idem, margin no. 73.
96 Idem, margin no. 72.
97 Idem, margin no. 104.
98 Idem, margin no. 106.
99 Idem, margin no. 107.
100 Idem, margin no. 107 and 108.

judgment on the future conduct of the suspected person"[101]. His conclusion about them is clear: "the Convention does not provide a ground for *ante o praeter delictum* deprivation of the right to liberty for the purposes of crime prevention"[102].

The spirit of recent international instruments against foreign terrorist fighters (the UNSC Resolution 2178, the Riga Protocol and the EU Directive on combating terrorism) consists precisely in taking what before was a *praetor delictum* and transforming it into an actual crime[103]. This has been one of the ways of addressing the issue of, in words of Paulussen, "foreign fighters wannabes"[104]. The Spanish Criminal Code is a good example of national legislation amended in order to include crimes such as self-indoctrination or the attempt of travelling for terrorist purposes[105]. What has been the attitude of Spanish courts, with long experience in dealing with terrorism (ETA), in front of these new criminal measures?

Both the *Audiencia Nacional* and the Spanish Supreme Court rely on Resolution 2178 to apply the domestic criminal code to specific cases, to an extent that makes one wonder about the direct effect of UNSC resolutions proposed by Peters[106]. While the *Audiencia Nacional* does not have excessive issues with applying these new crimes[107], the Supreme Court has annulled certain rulings of the *Audiencia Nacional*. The Supreme Court has pointed out that some of these crimes were not mentioned in the international instruments and, therefore, they must be applied restrictively. Taking into

101 *Tommaso v. Italy,* Application no. 43395/09, Judgment of 23 February 2017, partly dissenting opinion of Judge Pinto de Albuquerque, margin no. 8.

102 Idem, margin no. 31.

103 For a critical assessment of this new preventative focus of criminal law see *M. Aksenova*, Of Victims and Villains in the Fight Against International Terrorism, European Journal of Legal Studies, Vol. 10, No. 1, 2017, pp. 17-38.

104 *C. Paulussen*, Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe: Towards an Effective Response Based on Human Rights, ICCT Research Paper, 2016, p. 3. Available online on: https://icct.nl/wp-content/uploads/2016/11/ICCT-Paulussen-Rule-of-Law-Nov 2016-3.pdf (Last visit: 06/05/2018)

105 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 material de delitos de terrorismo, published in BOE Núm. 77, Sec. I, p. 27177. Available online on: https://www.boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3440.pdf
(Last visit: 06/05/2018)
For an overview of this legislation see *R.L. Ponce de León*, Foreign Fighters or Unlawful Civilians? An Overview of Foreign Fighters in Spanish Law, Military Law and the Law of War Review, Vol. 54, 2016, pp. 57-116.

106 See *A. Peters*, Security Council Resolution 2178 (2014): 'The Foreign Terrorist Fighter' as an International Legal Person, EJIL Talk, 2014. Available on: https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/ (Last visit: 06/05/2018)

107 See, among others, Sentencia 3/2017, de 17 de febrero de 2017, de la Audiencia Nacional, Sala de lo Penal, Sección 2ª, and Sentencia 11/2017, de 17 de marzo de 2017, de la Audiencia Nacional, Sala de lo Penal, Sección 1ª.

account the extreme "expansion of the barriers of protection" of criminal law done with these amendments[108], procedural safeguards must not be forgotten at any time.

VI. Final remarks

Foreign terrorist fighters are a real threat to Europe, especially after the loss of territories by Daesh in Syria and Iraq. Preventing terrorist attacks on both European and foreign soil is a matter of general interest that justifies the obligation imposed on States to criminalise certain conducts related to this phenomenon. However, general interest is not the only element that should be taken into account. The criminalisation of travelling is a restriction to the right of free movement protected by the EU Charter, the ECHR, the UNDH and the ICCPR. In consequence, any restriction based on criminal law must comply with the conditions to restrict a fundamental freedom as applied to the specific case of free movement of persons.

The commitment of the EU to the protection of fundamental rights in the development of criminal law requires "not only that rights are would be taken into *some* account, but also that they would be taken into substantial and adequate account so that measures introduced with fundamental rights to the least extent possible"[109]. This commitment also ensures the legitimacy of the EU counter-terrorism system: "the constitutional foundation of the of the EU […] perform the fundamental function of granting legitimacy to the EU counter-terrorism law and policy and ensuring its recognition as socially acceptable"[110].

As we have seen above, the *ex ante* review of the protection of human rights through impact assessments have manifestly failed in the case of the measures against foreign terrorist fighters. We can ask ourselves if this mechanism should not be compulsory in the context of EU criminal law, as it will not only strengthen the protection of fundamental rights but will also add legitimacy to the entire system.

In relation to the *ex post facto* review, both the CJEU and the ECtHR have established that law must provide such restrictions of fundamental freedoms. This refers not only to the quality of the law in question, but also in being able to foresee its effects: it should be formulated with sufficient precision to enable citizens to regulate their conduct. Furthermore, such restrictions must be subject to the principle of proportionality. The CJEU has also reiterated that limitations to the free movement of persons must take into account the personal conduct of the individual concerned.

The EU Directive on combating terrorism has the same problems as the previous international instruments in this field: ambiguity and sloppy drafting[111]. We cannot abso-

108 See Sentencia 354/2015 de 17 de mayo de 2017, del Tribunal Supremo, Sala de lo Penal, Sección Primera.

109 *F. de Londras*, cit. supra., p. 245.

110 *B. Oliveira Martins*, Social Appropriateness in the EU's Counter-Terrorism Law and Policy, in *F. De Londras* and *J. Doody* (eds.), The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism, Routledge, 2015, p. 136.

111 *Scheinin*, cit. supra.

lutely confirm or deny the validity of the Directive with the free movement of persons. But we can see it as an instrument for members States to justify abusive regimes, as highly intrusive supranational legislation use to be made even worse by its national implementation[112].

Unfortunately, as far as these international instruments are not challenged, national courts will have to find the right fit between individual rights and general interest in the case-by-case application of criminal measures. Indeed, they are the first ones to avoid these words from coming true: "the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these"[113]. Again, we can ask ourselves if it would not be better to guarantee the highest level of protection of fundamental rights during the legislative process and the ex-ante reviews rather than relying solely on its non-annulment by the CJEU and on a non-contested application by national courts.

The Council of Europe and the EU have clearly tried to address the concerns about fundamental rights by clarifying the elements of the crimes, mostly in their preambles and explanatory reports. But it is also clear that these efforts should have been included in the mandatory provisions and are, in consequence, far from enough. This line of action of the EU institutions will undoubtedly support the pessimistic view of those who think that "the law applicable to terrorism is not merely flawed, it is perverse […]. The law is ambivalent providing the basis for conflicting arguments as to its purposes […]. These deficiencies are not the product of negligence or mistake. They are intentional"[114].

112 *M. Bobek,* The Fight against Terror and the Space of Individual Freedom: A (Classic) Word of Caution, in *I. Govaere.* and *S. Poli*, EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises, 2014, Brill Nijhoff, p. 268.

113 Opinion of Lord Hoffmann of 16 December of 2004 for Judgment in the Cause *A v Secretary of State for the Home Department*, p. 53.

114 *A. D. Sofaer*, Terrorism and the Law, Foreign Affairs, 1986. Available on: https://www.foreignaffairs.com/articles/1986-06-01/terrorism-and-law (Last visit: 06/05/2018).