Public security derogations to the free movement of EU citizens and preventive criminal law: a collision between ever-expanding concepts?

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Abstract

The threat of foreign terrorist fighters has led to the development of preventive criminal law on an international and European level. The EU Directive on combating terrorism can have two impacts on the free movement of EU citizens. It directly calls upon Member States to criminalise the act of travelling, as well as other conduct that may be connected to a terrorist offence. In addition, ECJ case law accepts EU criminal law as a basis for public security derogations against free movement. Therefore, the commission of any of the acts criminalised in the EU Directive on combating terrorism could be used as a reason to restrict the exercise of free movement by EU citizens. When Member States begin to adopt these measures, litigation on the balance between preventive criminal justice and free movement of EU citizens will increase.

Keywords

Terrorism - preventive criminal justice - free movement - public security.

1. Introduction

In 1989, professor Cassese made a suggestive comparison between securitarian tendencies in the fight against terrorism and the Poe's story of Prince Prospero[1]. Trying to flee from the 'red death', the prince and his court built a wall around an abbey, leaving the external world to take care of itself. Nonetheless, the 'red death' sneaked into a masked ball dressed as a ghost and spread the plague to every member of the court who thought of the abbey as a safe sanctuary. As we shall see below, the securitization tendency of the EU and other international organizations against foreign terrorist fighters

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[1] A. Cassese., *Terrorism, Politics and Law* (Cambridge: Polity Press 1989), p. 17.

has been equated by many in the academic and non-academic sectors with the attitude of Prince Prospero.

Among other impacts of the shift towards securitization in our daily lives, the link between the free movement of persons and criminal law has been the object of many studies, mostly because of the highly criticised convergence of criminal measures and migration law (also known as 'crimmigration')[2]. Some authors have even analysed, in general terms, how the phenomenon of foreign terrorist fighters has triggered citizenship-stripping laws[3].

However, the nexus between the EU criminal law framework and the right to free movement of EU citizens is still an underdeveloped field of research. The right to free movement of EU citizens is not absolute and can be restricted on public security grounds by secondary law[4]. To justify restricting free movement of persons for the purpose of responding to a security threat, the European Court of Justice (ECJ) has accepted the existence of EU criminal law related to particular conduct. The recent approval by the EU legislature of criminal measures focused on the prevention of terrorism, and the subsequent criminalisation of preparatory acts at a very early stage, justifies in-depth analyses in this field.

In a few words, how does the preventive criminal framework against terrorism impacts on the right to free movement of EU citizens? In order give a reasoned answer, we will

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[2] In international and European law, free movement of persons is protected under article 45 of the EU Charter of Fundamental Rights, article 2 of Protocol 4 to the European Convention of Human Rights, article 12 of the International Covenant on Civil and Political Rights and article 13 of the Universal Declaration of Human Rights. See among others I. Marin and A. Spena, 'The Criminalization of Migration and European (Dis)Integration', 18 (2) *European Journal of Migration and Law* (2016), 147-156; J. Stumpf., 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power', 56 *American University Law Review* (2006), 367-419; A. Baldaccini. and E. Guild., eds., *Terrorism and the Foreigner: A Decade of Tension around the rule of law in Europe*, (Leiden: Martinus Nijhoff 2007); R.D. Saenz, 'Another sort of wall-building: how crimmigration affects latino perceptions of immigration law', 28 *Georgetown immigration law journal* (2014), 477-506; H. Margaret, 'Crimmigration-Counterterrorism', *Wisconsin Law Review* (2017), 955-1006; A.J. Aliverti, 'Criminal immigration law and human rights in Europe', in S. Pickering and J. Ham, eds., *The Routledge Handbook on Crime and International Migration*, (Oxford: Routledge, 2015), pp. 250-264; J. Waasdorp. and A. Pahladsingh, 'Expulsion or Imprisonment? Criminal Law Sanctions for Breaching an Entry Ban in the Light of Crimmigration Law', 4 *Bergen Journal of Criminal Law and Criminal Justice* (2017), 247-266; J. Parkin, 'The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research', 61 *CEPS Paper in Liberty and Security in Europe*. Available on: https://www.ceps.eu/system/files/Criminalisation%20of%20Migration%20in%20Europe%20J%20Parkin%20FIDUCIA%20final.pdf (last visited 15 January 2019)

[3] D. Burchardt and R. Gulati., 'International Counter-terrorism Regulation and Citizenship-stripping Laws—Reinforcing Legal Exceptionalism', *Journal of Conflict and Security Law*, Vol. 23 (2), 2018, pp. 1-26; L. Zedner, 'Citizenship Deprivation, Security and Human Rights', 18 (2) *European Journal of Migration and Law* (2016), 222-242; S. Jayaraman, 'International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters', 17 *Chicago Journal of International Law* (2016), 178-216; S. Mantu, 'Terrorist citizens and the human right to nationality', 26 *Journal of Contemporary European Studies* (2018), 28-41; E. Cloots, 'The Legal Limits of Citizenship Deprivation as a Counterterror Strategy', 23 *European Public Law* (2017), 57-92.

[4] As far as we will not get into the substantive content of the right to free movement of EU citizens, we will not refer to the distinctions between the movement of the economically active citizens (articles 45, 49 and 56 TFEU) and the non-economically active (article 21 TFEU). See generally K. Kruma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*, (Leiden: Martinus Nijhoff, 2014); E. Guild, S. Peers and J. Tomkin, eds., *The EU citizenship directive: a commentary*, (Oxford: Oxford University Press, 2014).

first analyse the factual and legal background of the new counterterrorism measures and, afterwards, the link between EU criminal law and the concept of public security in the case law of the ECJ. Lastly, we will briefly examine how Member States have interpreted these provisions so far and what the future outcome could be.

2. Background

The participation of nationals from European States in conflicts abroad as foreign fighters is not a new phenomenon. Since the 1814 Congress of Vienna, European foreign fighters have participated in at least 90 conflicts[5]. We can track their participation from the Greek War of Independence, the Italian Risorgimento and the Spanish Civil war to the Yugoslav wars of the 1990s, the Kosovo Liberation, and the recent conflicts between the Russian Federation and Ukraine[6].

The recent focus on European foreign fighters is due to the evolution of their intentions: from perpetrating attacks not only on the places of conflict abroad but also on their countries of nationality or residence upon their return[7]. The first known terrorist attack committed by a European returnee was against the Jewish Museum in Brussels in 2014. The most well-known, and probably the origin of EU legislation in this area, was the terrorist attack against Paris in November 2015[8]. According to recent studies, Portuguese airports as well as the territories of Hungary, Poland and Romania have been common routes used by European terrorist fighters to or from Syria and Iraq[9].

The military operations against ISIS in Syria and Iraq have caused some sort of 'terrorist diaspora' of foreign terrorist fighters[10]. By 2018, ISIS had lost control of almost 98 per cent of the territory previously dominated in these two countries[11]. Several studies show

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[5] See D. Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford: Oxford University Press, 2017).

[6] See V.B. Johnston, *Legions of Babel: The International Brigades in the Spanish Civil War,* (University Park: 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?', 6 *The Polish Institute for International Affairs* (2015); M. Flores, 'Foreign Fighters Involvement in National and International War: A Historical Survey' in A. De Guttry, F. Capone and C. Paulussen, eds., *Foreign Fighters under International Law and Beyond*, (Heidelberg: Springer, 2016), pp. 27-48.

[7] L.L. Dawson and A. Amarasingam, 'Talking to Foreign Fighters: Insights into the Motivations for Hijrah to Syria and Iraq', 40 (3) *Studies in Conflict & Terrorism* (2016), 191-210; E. Pokalova, 'Driving Factors behind Foreign Fighters in Syria and Iraq', *Studies in Conflict and Terrorism* (2018), 1-21; 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', 54 *Revista de Derecho Comunitario Europeo*, (2016), 555-592.

[8] For a list updated to 2016, see A. Zammit, 'List of alleged violent plots in Europe involving Syrian returnees'. Available on: https://andrewzammit.org/2014/06/29/list-of-alleged-violent-plots-in-europe-involving-syria-returnees/ (Last visited 15 January 2019).

[9] EUROPOL, European Union Terrorism and Tres Report (TE-SAT), 2017, p. 13. Available on: https://www.europol.europa.eu/sites/default/files/documents/tesat2017_0.pdf (Last visited 19 January 2019)

[10] C.P. Clarke, 'The Terrorist Diaspora: After the Fall of the Caliphate', (2017) The RAND Corporation, Testimony before the Committee of Homeland Security of the United States. Available on: https://www.rand.org/content/dam/rand/pubs/testimonies/CT400/CT480/RAND_CT480.pdf (Last visited 15 January 2019)

[11] UN, Counter-Terrorism Committee, 'The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives', CTED Trends Report, March 2018, p. 2. Available on: https://www.un.org/sc/ctc/wp-content/uploads/2018/04/CTED-Trends-Report-March-2018.pdf

the statistics of EU terrorist fighters returning from conflict zones to their countries of origin[12], although there are different perspectives concerning their motivation and the different profiles they can adopt once they arrive in the EU, many of which do not involve violence[13]. There is, however, the common understating that 'individuals and groups with experience of fighting in the conflict areas are assessed as more lethal on their return than other jihadist extremists'[14].

Therefore, the movement of EU foreign fighters poses two main threats: one at the external border of the EU, where they pretend to leave the EU territory to join a conflict abroad or to come back from that conflict zone to the EU territory; and other within the European territory, where they benefit from the lack of internal borders. This phenomenon has triggered two main responses at the EU level: the reinforcement of border controls through administrative measures[15], and the development of new legislation criminalising the act of travelling for terrorist purposes. In this study, I will focus just on this second set of measures and how they can impact on the right to free movement of EU citizens within the EU territory[16].

3. The legislative answer

3.1 UNSC Resolution 2178

In 2011, Shany wrote that the law enforcement paradigm against terrorism 'encounters difficulties in adopting preventive measures against individuals before establishing their guilt —a state of affairs compatible with the human rights framework's willingness to

(Last visited 15 January 2019)

[12] B. Van Ginkel. and E. Entenmann, eds., 'The Foreign Fighters Phenomenon in the European Union: Profiles, Threats & Policies', (2016) *International Centre for Counter-Terrorism*. Available on: https://icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf (Last visited 15 January 2019)

[13] L. Lindekilde, P. Bertelsen and M. Stohl, 'Who Goes, Why, and With What Effects: The Problem of Foreign Fighters from Europe', 27 *Small Wards & Insurgencies* (2016), 858-877; A. Reed, J.R. Zuijdewijn and E. Bakker, 'Pathways of Foreign Terrorist Fighters: Policy Options and Their (Un)Intended Consequences', *International Centre for Counter-Terrorism*, 2015. Available on: https://www.icct.nl/download/file/ICCT-Reed-De-Roy-Van-Zuijdewijn-Bakker-Pathways-Of-Foreign-Fighters-Policy-Options-And-Their-Un-Intended-Consequences-April2015(1).pdf (Last visited 15 January 2019)

[14] EUROPOL, European Union Terrorism Situation and Trend Report (TE-SAT), 2016, p. 27. Available on: https://www.europol.europa.eu/sites/default/files/documents/europol_tesat_2016.pdf (Last visited 15 January 2019)

[15] See the recent debate on this point at the Special Committee on Terrorist of the European Parliament, Draft Report on findings and recommendations of the Special Committee on Terrorism (2018/2044(INI), 21 June 2018. See also the Briefing of the European Parliament on the Revision of the Schengen Information System for law enforcement from October 2018, analysing the proposal of the EC to amend this system with the objective of combating terrorism. Available on: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599343/EPRS_BRI(2017)599343_EN.pdf (Last visited 15 January 2019).

[16] For a general overview of the EU response see, among others, O. Bures, 'EU's Response to Foreign Fighters: New Threat, Old Challenges?', *Terrorism and Political Violence* (2018), 1-18; L.H. Kennedy, 'Homeward Bound: The European Union's Freedom of Movement in an Age of Transnational Terrorism', 47 *Georgetown Journal of International Law* (2015), 279-316.

assume some degree of risk to society as an acceptable price for preserving liberty'[17]. However, recent developments in the global legislative framework demonstrate how this state of affairs can radically change in a short period of time.

The International Criminal Police Organization (INTERPOL) raised the alarm on the incorporation of foreign fighters to terrorist organizations in Iraq and Syria and established a special project within the Counter-Terrorism Fusion Centre[18]. In 2014, the United Nations Security Council (UNSC) gave a widely criticised definition of the term 'foreign terrorist fighters'[19] 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'[20].

To combat the phenomenon of foreign terrorist fighters, UNSC Resolution 2178 imposes on all States the responsibility of ensuring that their criminal legislations are sufficient to properly prosecute and penalize the following conduct: travel or attempt to travel to a State other than their States of residence or nationality for the purpose of terrorism; the wilful provision or collection of funds for terrorist purposes; and the wilful organization, or other facilitation, of the previous acts (paragraph 6)[21].

The position of the UNSC has been criticised on several grounds: first, because it has acted once again as an "universal legislator" in the field of counterterrorism[22], and second, and more relevant to our research, because the duty to criminalize certain conducts in paragraph 6 has been considered as an extremely 'alarming provision'[23]. According to Capone, 'the wide array of obligations imposed on Member States by Resolution 2178

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[17] Y. Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror', in O. Ben-Naftali, ed., *International Humanitarian Law and International Human Rights* Law (Oxford: Oxford University Press, 2011) pp. 13-33, p. 22.

[18] INTERPOL, 'Foreign terrorist fighters Information Sheet'. Available on: https://www.interpol.int/Crime-areas/Terrorism/Foreign-terrorist-fighters (Last visited 15 January 2019).

[19] See, among others, F. Jiménez García, 'Combatientes terroristas extranjeros y conflictos armados: utilitarismo inmediato ante fenómenos no resueltos y normas no consensuadas', 58 *Revista Española de Derecho Internacional* (2016), 277-301; 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. 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 visited 15 January 2019).

[20] UNSC, Resolution 2178 of 24th September 2014, Doc. S/RES/2178, p. 2.

[21] This obligation has been recently confirmed by UNSC Resolutions 2396 and 2354. UNSC, Resolution 2396 of 21st December 2017, Doc, S/RES/2396; Resolution 2354 of 24th May 2017, Doc. S/RES/2354.

[22] See, among others, M. Feinberg, *Sovereignty in the Age of Global Terrorism: The Role of International Organizations* (Leiden: Brill, 2016), p. 55; B. Emmerson, 'New counter-terrorism measures: Continuing Challenges for Human Rights', in M. Nowak A. Charbord, eds, *Using Human Rights to Counter Terrorism*, (Cheltenham: Edward Elgar, 2018), pp. 125-165, p. 139; L.M. Hinojosa Martínez., 'The Legislative Role of the Security Council in its Fight Against Terrorism: Legal, Political and Practical Limits', 57 *International and Comparative Law Quarterly* (2008), 333-359; S. Talmon, 'The Security Council as World Legislature', 99 *American Journal of International Law* (2005), 75-193.

[23] M. Scheinin, "Back to port-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 visited 15 January 2019).

has led to anticipated criminalization that covers both the conduct, i.e., a terrorist offence, and all its preparatory acts, regardless of how remote they are'[24].

Although UNSC Resolution 2178 reminds Member States of the obligation to comply with human rights law[25], it has been considered insufficient due to the wide scope of the obligations imposed: 'those already targeted by such laws include not only terrorism suspects but also peaceful protesters, journalists, political opponents, civil society, and members of ethnic or religious groups, many of them Muslims. The 'FTF' measures that could be used against them include warrantless searches, prolonged or indefinite detention without charge nor trial, travel bans, loss of dual citizenship, convictions in sham trials, and excessive punishments including death'[26]. We can see these very same concerns raised by the UN High Commissioner for Human Rights[27].

3.2 Riga Protocol

The Council of Europe was the first organization in Europe to take up the baton from UNSC Resolution 2178. In October 2015, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism was born in Riga (Riga Protocol)[28]. It calls upon State Parties to criminalise the following conducts: 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).

The criticism directed towards the Riga Protocol is very similar to that received by UNSC Resolution 2178[29]. For Scheinin, the sloppy drafting of the latter has been copied by the former, a problem which is especially serious as the Riga Protocol also 'seeks to address forms of conduct, such as foreign travel, that are routinely exercised by law-abiding people for legitimate reasons'[30]. Several NGOs have also raised the alarm on the negative impact of these measures on the principle of legality, the presumption of innocence, the

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[24] F. Capone, 'Countering 'Foreign Terrorist Fighters': A Critical Appraisal of the Framework Established by the UN Security Council Resolutions', 25 *The Italian Yearbook of International Law*, (2016), 228-250, 249.

[25] UNSC, Resolution 2178, cit. supra., preambular paragraph 7.

[26] L. Tayler, 'Foreign Terrorist Fighter Laws: Human Rights Rollbacks under UN Security Council Resolution 2178', 18 *International Community Law Review* (2016), 455-482, 456.

[27] 'Concerns have been raised over the broad nature of certain provisions and the potential this creates for the implementation of measures at the national level that may result in violations of human rights […]. For example, […] it has prompted well-founded concerns that the resolution may fuel the adoption of repressive measures at the national level against otherwise lawful, non-violent activities of groups or individuals'. See Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism', (2014) Doc. A/HRC/28/28, paragraph 46.

[28] Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217), adopted on 22nd October 2015.

[29] See, among others, F. Seatzu, 'The compatibility of the Additional Protocolo on Foreign Terrorist Fighters with international human rights law', in I. Marrero Rocha. and H.M. Trujillo, eds., *Jihadism, Foreign Fighters and Radicalization in the EU: legal, functional and psychosocial responses* (London: Routledge, 2018), 167-186.

[30] M. Shceinin, The Council of Europe's Draft 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 visited 15 January 2019)

right to non-discrimination and the freedom of movement[31]. In the same line, Pinto de Albuquerque has considered that this type of preventive measure is 'based on a highly indeterminate, probabilistic judgment on the future conduct of the suspected person'[32] and, therefore, that 'the Convention does not provide a ground for *ante o praeter delictum* deprivation of the right to liberty for the purposes of crime prevention'[33].

Although it is outside the legal provisions, the Explanatory Report attached to the Riga Protocol shows the efforts of the Council of Europe to avoid an application of these instruments that is incompatible with human rights: 'Parties 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'[34].

3.3 EU Directive on combating terrorism

Among the different measures against foreign terrorist fighters[35], the EU adopted the Directive on combating terrorism on 15th March 2017[36]. The legal basis of this instrument is article 83(1) TFEU, 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 […]'.

The EU Directive contains three categories of crimes: terrorist offences (article 3); offences relating to a terrorist group (article 4) and offences related to terrorist activities (articles 5 to 12). Following the instruments from the UN and the Council of Europe, the new measures against terrorism are located within the category of offences related to terrorist activities, such as 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).

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[31] 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, 7th April 2015. Available on:
https://www.amnesty.org/download/Documents/IOR6013932015ENGLISH.pdf (Last visited 15 January 2019).

[32] ECtHR, *Tommaso v. Italy*, judgment of 23 February 2017, partly dissenting opinion of Judge Pinto de Albuquerque, paragraph 8. In the same line of thought see R. Kölbel and S. Selter, 'Hostile Intent – the Terrorist's Achilles Heel? Observations on Pre-Crime by Means of Thought Recognition', 18 *European Journal of Crime, Criminal Law and Criminal Justice* (2010), 237-259.

[33] Ibid., paragraph 31.

[34] Council of Europe, Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, of 22nd October 2015, paragraphs 29-30.

[35] 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, *loc.cit.*, pp. 305-319.

[36] O.J. 2017, L 88/6, 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.

The content of the EU Directive shares many similarities with UNSC Resolution 2178 and the Riga Protocol. Even though it contains an explicit clause of protection of fundamental rights (the necessity and proportionality of interferences with the rights to freedom of movement, data protection and freedom of expression), many of these instruments' criticisms have been extended to the preventive measures of the EU Directive: 'immigration-type measures (albeit in a more serious, criminal law form) are used to regulate the conduct of citizens; and conversely, criminal law measures are used to regulate mobility, a conduct which has been traditionally the domain of immigration law. By blurring these boundaries, the emergence of a preventive justice regime focusing on mobility results in over-criminalisation'[37].

We could argue that the EU Commission will closely scrutinize the national implementation of the Directive on combating terrorism and its compatibility with the EU Charter of Fundamental Rights[38]. However, it is difficult to predict the future behaviour of the EU Commission on this matter. Usually, during the legislative procedure, the EU Commission prepares an impact assessment of EU legislation with respect to the EU Charter in order to 'strengthen the defence of EU legislation against legal challenges before the European Court of Justice"[39]. For the EU Directive on combating terrorism, however, the EU Commission decided not to elaborate such an impact assessment due to the "urgent need to improve the EU framework'[40]. Despite the high number of critics concerning the absence of an impact assessment[41], the EU Commission considered that an *ex post* assessment of the Directive would sufficiently cover its impact on fundamental rights and freedoms[42].

4. The link between public security and EU criminal law in the field of free movement of EU citizens

Criminalisation of travelling is maybe the most obvious, direct, and visible restriction of the free movement of EU citizens. However, is it the only one? We believe that there is

[37] V. Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe* (London: Hart, 2016), p. 259. See also M. Aksenova, 'Of Victims and Villains in the Fight Against International Terrorism', 10 *European Journal of Legal Studies* (2017), 17-38; E. Herlin-Karnell, 'The EU as a Promoter of Preventive Criminal Justice and the Internal Security Context', 17 *European Politics and Society* (2016), 215-225.

[38] Article 17(1) TEU. For the topic of human rights review in counterterrorism see F. De Londras, 'Accounting for Rights in EU Counter-Terrorism: Towards Effective Review', 22 *Columbia Journal of European Law* (2015), 237-274; F. de Londras and J. Doody, eds., *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism* (Oxford: Routledge, 2015).

[39] 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* (London: Hart, 2014), pp. 1645-1648.

[40] 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.

[41] Directorate General for Internal Policies, 'The European Union's Policies on Counter-Terrorism: Relevance, Coherence and Effectiveness' 2017, p. 17; Meijers Committee, 'Note on a Proposal for a Directive on combating terrorism', CM1603, 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 visited 15 January 2019).

[42] European Commission, 2016 Report on the Application of the EU Charter of Fundamental Rights, COM (2017) 239 final, p. 7.

an indirect, invisible and obscure restriction that includes every act under the EU Directive on combating terrorism. The following lines will be devoted to lifting the veil on these restrictions.

To understand why there are hidden restrictions to the free movement of persons in the EU's response to foreign terrorist fighters, we have to take into account two elements. On the one hand, the over-criminalization imposed by supranational legislatures. On the other hand, the case law of the ECJ regarding public security derogations to the free movement of EU citizens.

It is not the aim of this article to determine whether criminal sanctions – for terrorist crimes, for instance – constitute clear restrictions on the free movement of persons. Challenges to the validity of criminal sanctions, such as imprisonment merely because they fall within the scope of free movement law, have already been rejected by the ECJ, which said that there must be a strongest link to the Treaties or EU secondary legislation[43]. Instead, the case law to which we should turn our attention concerns EU criminal law as a justification for the restriction of free movement on grounds of public security.

4.1 Free movement of EU citizens, public security and EU criminal law

The starting point of our reasoning is the judgment of the ECJ in *Tsakouridis*[44]. Mr. Tsakouridis, a Greek national born in Germany who spent most of his life there, was the subject of an expulsion measure after being sentenced to imprisonment for dealing with narcotics. Is such a measure possible under EU law? According to article 21(1) TFEU, free movement of EU citizens is 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. The EU Citizenship's Rights Directive (CRD)[45], which elaborates the right to free movement of EU citizens, contains two provisions in this respect. According to the express derogations contained in article 27 CRD, Member States can restrict the freedom of movement and residence of EU citizens and their families on grounds of public policy, public security or public health, so long as the measure complies with the principle of proportionality and is based on the personal conduct of the individual.

In the specific case of the expulsion, the level of integration of the individual in the society shall be taken into account. Furthermore, in the case of permanent residents, the only justification is 'serious grounds of public policy or public security'. Finally, for minors and citizens who have resided in the host Member State for the previous ten years, article 28 CRD establishes that the decision can be only based on 'imperative grounds of public security', excluding public policy and public health.

[43] Case C-299/95, *Friedrich Kremzow v Republik Österreich*, ECLI:EU:C:1997:254.
[44] Case C-145/09, Land Baden-Württemberg v Panagiotis Tsakouridis, ECLI:EU:C:2010:708.
[45] O.J. 2004, L 158/77, 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

Following these rules, Germany based its decision against Mr. Tsakouridis on 'imperative grounds of public security'[46]. Hearing on appeal, the Higher Administrative Court of Baden-Württemberg basically asked the ECJ what is the meaning of 'imperative grounds of public security' under EU law. As some authors point out, in *Tsakouridis* the ECJ finds itself 'confronted with a new challenge: on the one hand, to ensure that the strengthened status of Union citizen under the Directive and the integration of citizens into the societies of other Member States associated with it are more than just a political slogan but a legal reality; on the other hand, to take seriously the value of security, recognized as a core objective of the Union offered to the citizens as part of an Area of Freedom Security and Justice (AFSJ)'[47].

The Advocate General based part of his reasoning on the important difference between public policy and public security. This distinction is vital because an expulsion of a permanent resident can only be justified on imperative grounds of public security. Advocate General Bot recognises that the EU legislature and the EU case law have left Member States a certain margin of discretion to define both concepts[48]. After a review of previous case law, the Advocate General stated that public security must 'be understood to include not only the security of the Member State and its institutions, but also all the measures designed to counteract serious threats to the values essential to the protection of its citizens',[49] and, therefore, 'the grounds regarded by the Court as included in the concept of public policy may equally be covered by the concept of public security'[50]. A conclusion which, in his view, must not 'reduce the safeguards which circumscribes the taking of an expulsion decision against a Union citizen'[51].

Although the ECJ did not follow the reasoning of Advocate General Bot regarding the difference between public policy and public security, it arrived at a very similar conclusion due to an interesting interpretation of the concept of 'imperative grounds of public security'. The ECJ focused on the crime at hand (drug trafficking) and whether it could be covered by the concept of 'imperative grounds of public security'. The ECJ found that such acts "could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it'[52].

It is nothing new that the commission of serious crimes is accepted by the ECJ as a public security ground for restricting the free movement of persons. In the context of the Spanish terrorist group, ETA, kidnapping was accepted in *Olazabal*[53], as well as illicit drug trafficking in *Donatella Calfa*[54]. Even the ECtHR recalled in *Tommaso* that, according to the CRD, freedom of movement of residents can be restricted on grounds of public security, including Italian criminal law, so long as these measures 'comply with the

[46] For a general overview of this topic see, among others, C. Barnard, 'Free movement of natural persons and citizenship of the Union' in C. Barnard and S. Peers, eds., *European Union Law*, (Oxford: Oxford University Press, 2017), pp. 369-408.
[47] L. Azoulai and S. Coutts, 'Restricting Union citizens' residence rights on grounds of public security: where Union citizenship and the AFSJ meet: P.I.', 50 *CML Rev*. (2013), 553-570, . 553.
[48] Opinion of Advocate General Bot, delivered on 8 June 2010, Case C-145/09, *Tsakouridis*, cit. supra. paragraph 71.
[49] Ibid., paragraph 77.
[50] Ibid., paragraph 78.
[51] Ibid., paragraph 79.
[52] Case C-145/09, *Tsakouridis*, cit. supra., paragraph 47.
[53] Case C-100/01, Ministre de l'Intérieur v Aitor Oteiza Olazabal, ECLI:EU:C:2002:712.
[54] Case C-348/96, Criminal proceedings against Donatella Calfa, ECLI:EU:C:1999:6.

principle of proportionality and be based exclusively on the personal conduct of the individual concerned, which must represent a genuine, present and sufficient serious threat affecting one of the fundamental interests of society'[55].
What is truly new is that the ECJ is using the existence of EU secondary legislation in order to defend this claim. More specifically, the ECJ mentioned the Framework Decision that establishes minimum rules for the criminalisation of illicit drug trafficking[56]. In any case, the ECJ reiterated that in the balance between public security and the interest of the individual, the referring court must apply the proportionality test and take into account the individual circumstances of the case[57].

The use of EU criminal law as proof of a threat against public security in order to restrict free movement of EU citizens was confirmed by the ECJ two years later. In *PI*, an Italian citizen with permanent residence in Germany was expulsed from the national territory after being found guilty for sexual assault, sexual coercion and the rape of a minor[58]. Once again, Advocate General Bot had the opportunity to express his opinion on the matter. The distinction between public policy and public security returned to the stage through the reasoning of the Advocate General, on this occasion in more concrete and precise terms that in *Tsakouridis*.

In his view, public security would have a higher degree of seriousness than public policy, so only public security can justify an expulsion of a permanent resident[59]. In criminal matters, these two concepts would correspond to two different realities. The rules of criminal law are all within the framework of public policy as far as they define conduct prohibited to the individual under pair of sanctions. On the other hand, public security would require an additional element: the effects must go beyond the harm caused to the individual victim and reach a 'level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it'[60]. Therefore, sexual crimes committed in a family context, notwithstanding the moral contempt attached to them, could not fall within the justification of public security[61].

Once again, the ECJ did not follow the Opinion of the Advocate General. The ECJ pointed out that, while Member States have a certain *marge de manoeuvre* to define public security, this restriction to the free movement of persons 'must nevertheless be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union'[62].

How does the ECJ control the ground of public security as applied by Germany for the expulsion of Mr I? Following *Tsakouridis*, the ECJ refers to secondary legislation: to the Directive on combating the sexual abuse and sexual exploitation of children and child

[55] ECtHR, *Tommaso v. Italy*, cit. supra., paragraph 72.
[56] Case C-145/09, *Tsakouridis*, cit. supra., paragraph 46.
[57] Case C-145/09, *Tsakouridis*, cit. supra., paragraphs 52-53.
[58] Case C-348/09, P.I. v *Oberbürgermeisterin der Stadt Remscheid*, ECLI:EU:C:2012:300.
[59] Opinion of Advocate General Bot, delivered on 6 March 2012, Case C-348/09, *PI*, cit. supra. paragraph 34.
[60] Ibid., paragraphs 36-42.
[61] Ibid., paragraph 44. In this specific case, however, the Advocate General accepted the validity of the expulsion of Mr I as far as the protection of article 28.3 CDR would only apply to individuals who are genuinely integrated in the host Member State.
[62] Case C-348/09, *P.I.*, cit. supra., paragraph 23.

pornography[63]. In addition, it mentions primary law and, more specifically, the legal basis for the EU competence on criminal matters: article 83(1) TFEU. This article includes the sexual exploitation of children among the crimes in which the EU can intervene. For the first time, the ECJ considered that 'it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3) of Directive 2004/38, as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it'[64].

After reading these two judgments, some authors agree that there is 'a curious link which emerges from this line of reasoning: the existence of rules conferring on the EU the competence to legislate is relied upon in order to render a specific activity within the scope of powers of national authorities in order to restrict the application of EU law in cases where, otherwise, the moral underpinnings of EU citizenship might appear to be compromised'[65]. According to Mitsilegas, the argument that the list of crimes under article 83(1) can be used to justify the expulsion of EU citizens means that this provision 'is transferred from its traditional context of judicial co-operation in criminal matters to the EU citizenship framework and acquires additional functions that are unrelated to the purpose it serves and were certainly not intended when the Lisbon Treaty was drafted'[66].

4.2 The application of free movement case law to the criminal counterterrorism framework

The link between EU citizenship and EU criminal law is indeed a curious one but also extremely dangerous for EU citizenship. This link is precisely the key to revealing those hidden restrictions in the EU Directive on combating terrorism that were mentioned at the beginning of this section. As we shall see below, the application of jurisprudence on EU criminal law and free movement (*Tsakouridis* and following) to terrorist cases can pose additional problems.

Illicit drug trafficking and the sexual exploitation of children are not the only acts considered by article 83(1) TFEU as "particularly serious crimes with a cross-border dimension", nor are the Decision against illicit drug trafficking and the Directive on combating the sexual abuse of children are the only pieces of secondary law in the field of EU criminal law. However, these are the only two categories of crimes in which the ECJ has had the opportunity to establish a link between EU secondary criminal law and the derogation of the free movement of EU citizens.

[63] Case C-348/09, *P.I.*, cit. supra., paragraphs 26-27.
[64] Ibid., paragraph 8.
[65] P. Koutrakos, 'Public Security Exceptions and EU Free Movement Law' in P. Koutrakos, N.N Shuibhne, and P. Syrpis, eds., *Exceptions from EU Movement Law: Derogation, Justification and Proportionality*, (London: Hart, 2016), pp. 190-217, p. 212; S. Peers, *EU Justice and Home Affairs Law: Criminal Law, Policing and Civil Law* (Oxford: Oxford University Press, 2016), Vol. II, p. 182.
[66] V. Mitsilegas, *EU Criminal Law After Lisbon*…, *op. cit*., p. 233.

Terrorism also forms part of the insidious club of article 83(1) TFEU. Moreover, the EU legislature has recently exercised its competence in this field with the Directive on combating terrorism, which replaces the previous Decisions on combating terrorism. This new piece of legislation, commented on above, can be a direct restriction to free movement insofar as it criminalises the mere act of travelling. However, once we apply the previous case law, we can see that it can serve an even 'higher purpose': every act contained in the Directive can potentially be used by Member States as a justification to restrict the free movement of EU citizens.

The seriousness of the impact of EU law on illicit drug trafficking and sexual abuse on the free movement of persons pales once we compare it to the criminal justice responses to terrorism. Why do we make this assumption? The reason lies precisely in the new preventive pathway followed by the EU legislature in the fight against terrorism.

While in EU legislation against sexual exploitation and drug trafficking, there are not serious concerns about preventive justice, the principle of legality or the presumption of innocence, this criticism is undeniably strong in the case of terrorism[67]. Now, due to the connection between EU citizenship and EU criminal law built by the ECJ, the problems related to procedural rights will also have an impact on the freedom of movement and residence of EU citizens. In other terms, the acts listed in the Directive will not only be criminalised by the Member States with the support of the EU legislature, they will also serve as a public security derogation against the free movement of EU citizens thanks to the blessing given by the ECJ. Member States now have a clear justification to prohibit the entrance in or to expulse EU citizens from their territory for acts defined in very ambiguous terms.

These concerns are not merely hypothetical. Although not strictly related to EU citizenship but to EU asylum law, we can see the potential problems in the judgment of the ECJ in *Lounani*[68]. Mr Mostafa Lounani, a Moroccan national, was convicted in Belgium for organising travelling for terrorism purposes. Some years later, his application for refugee status in Belgium was refused on these grounds. According to the Qualification Directive in force at that time, refugee applications could be excluded if 'he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations'[69]. In his preliminary reference, the Council of State basically asked whether an application for refugee protection could be rejected even when there is not a conviction for terrorist offences in the sense of the Framework Decision on combating terrorism (an instrument which did not contain the crime of organising travelling for the purpose of terrorism)[70].

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[67] For a comprehensive study on the principle of legality see K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008).

[68] Case C-573/14, Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani, ECLI:EU:C:2017:71.

[69] O.J. 2004, L 304/12, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Nowadays, O.J. 2011, L 337/9, 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 (recast).

[70] See, among others, A.M. Kosinska, 'The Problem of Exclusion from Refugee Status on the Grounds of Being Guilty of Terrorist Acts in the CJEU Case-law: Commentary on the Lounani Case', 19 *European Journal of Migration and Law* (2017), 425-446; P. Chatelet, 'Statut de réfugié et lutte contre le terrorisme

In her Opinion, Advocate General Sharpston explained what some commentators had already argued concerning the transferral of the EU competence on criminal matters to EU citizenship: the scope and the purposes of the EU competence concerning visas, migration and free movement of persons are not the same as the EU competence concerning cooperation in criminal matters[71]. She also plainly pointed out the problem of interpreting exclusions based on acts of terrorism: '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?'[72].

The judgment of the ECJ in *Lounani* is extremely deferential to UNSC 2178. Following the indications of an organ with whom the ECJ does not have an easy relationship, particularly in the field of counterterrorism, the judgment recalls that 'the Security Council Resolutions, in particular Resolution 2178(2014), in points 5 and 6(c), identify, 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'[73]. Peers have already noticed that this deference seems to have some connection with recent developments in EU criminal law, namely, the EU Directive on combating terrorism[74].

Could we apply the same reasoning to the freedom of movement and residence of EU citizens? The ECJ has already solved a case in which a Member State considered the act of travelling abroad as a public security ground sufficient enough to restrict the free movement of EU citizens. In *ZZ*, a citizen of dual French and Algerian nationality with permanent residence in the UK had his rights of residence cancelled and his entry into the UK refused after a trip to Algeria[75]. Based on his apparent relation with the Armed Islamic Groups, the Special Immigration Appeals Commission decided that 'the personal conduct of ZZ represents a genuine present and sufficiently serious threat which affects a fundamental interest of society, namely its public security [,] and that it outweighs his and [his family's] right to enjoy family life in the [United Kingdom]'[76].

In its preliminary reference, the Court of Appeal only asked whether the secrecy followed during this procedure was compatible with the right to an effective remedy and a fair trial[77]. It would have been interesting to have an ECJ decision as to whether this act could

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CJUE, 31 janvier 2017, Commissaire général aux réfugiés et aux apatrides / Mostafa Lounani, aff. C-573/14, ECLI:EU:C:2017:71', 1 *Revue des Affaires Européennes* (2017), 107-118.

[71] Opinion of Advocate General Sharpston, delivered on 31 May 2016, Case C-573/14, *Lounani*, cit. supra., paragraph 55.

[72] Ibid., paragraph 73.

[73] Ibid., paragraph 76.

[74] S. Peers, 'Foreign fighters' helpers excluded from refugee status: the ECJ clarifies the law', *EU Law Analysis*, 2017. Available online on: http://eulawanalysis.blogspot.de/2017/01/foreign-fighters-helpers-excluded-from.html (Last visited 15 January 2019).

[75] Case C-300/11, ZZ v Secretary of State for the Home Department, ECLI:EU:C:2013:363.

[76] Ibid., paragraph 32.

[77] For this topic, see, among others, N. de Boer, 'Secret evidence and due process rights under EU law: ZZ', 51 *CML Rev*. (2014), 1235-1262; R. Grozdanova, 'The Right to Fair Trial and the Rise of Sensitive Intelligence Evidence: Responses from the Dutch and UK Courts', *Verfassungsblog*, 2018. Available online on:

be considered as a serious ground of public security under article 27 (1) CRD in light of the existing case law about EU criminal law and EU citizenship. Such a pronouncement would have helped to predict the possible position of the ECJ in relation to the Directive on combating terrorism. Meanwhile, we will have to trust that the principle of proportionality will be strictly applied and that 'the more extensive and serious the interference with fundamental rights, the less discretion the EU legislator enjoys and the stricter judicial scrutiny will be'[78]. This has been the position, at least, in the case law regarding terrorism and targeted sanctions[79].

5. Transposition of international counterterrorism measures by Member States

Ultimately, Member States must transpose EU Directives into their domestic orders[80], as well as any international instrument according to the specificities of each system[81]. It is commonly understood that, 'disproportionate and highly intrusive EU legislation is made even worse by its national implementation. Measures introduced with the putative aim of combating terror and organized crime soon degenerate into the police authorities making their lives easier to the detriment of society at large'[82]. In the case of the EU Directive on combating terrorism, Member States should have brought into force laws that comply with it by 8 September 2018, and some of them have not informed yet about the national measures of implementation[83]. However, taking into account that this European legislation is mostly based on UNSC Resolution 2178, we can determine the position of some Member States in relation to the measures against foreign terrorist fighters[84]. What

https://verfassungsblog.de/the-right-to-fair-trial-and-the-rise-of-sensitive-intelligence-evidence-responses-from-the-dutch-and-uk-courts/ (Last visited 1 5 January 2019).

[78] K. Lenaerts and J.A. Gutiérrez-Fons, 'A Constitutional Perspective' in R. Schütze and T. Tridimas, eds., *Oxford Principles of European Union Law: The European Union Legal Order* (Oxford: Oxford University Press, 2018), Vol I, p. 113. By contrast, some authors consider that the ECJ 'has provided a very restrictive interpretation of the range of fundamental rights, when they clash with the effective implementation of EU law, more specifically within EU criminal law'. See P. De Hert, 'EU criminal law and fundamental rights', in V. Mitsilegas, M. Bergström and T. Konstadinides, eds., *Research Handbook on EU Criminal Law* (Cheltenham: Edward Elgar, 2016), pp. 105-124, p. 111.

[79] For studies on the *Kadi* Saga see, among others, Avelbj, M., Fontanelli, F. and G. Martinico, eds., *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Oxford: Routledge, 2014); S. Buszewski and H. Gött, 'Avoiding Kadi – 'Pre-emptive Compliance' with Human Rights when Imposing Targeted Sanctions', 54 *German Yearbook of International Law* (2014), 507-540; E. De Wet, 'From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions', 12 *Chinese Journal of International Law* (2013), 787-808.

[80] Article 288 TFEU.

[81] For the different approaches to the relations of international and national law see, among others, J. Crawford, *Brownlie's Principles of Public International Law*, (Oxford: Oxford University Press, 2012), pp. 48-111; M. Dixon et al., *Cases and Materials on International Law*, (Oxford: Oxford University Press, 2016), pp. 102-135; J. Combacau amd S. Sur, *Droit International Public* (Paris: LGDJ, 2016), pp. 181-188.

[82] 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*, (Leiden: Brill, 2014), pp. 261-274, p. 268.

[83] The national transposition measures of the EU Directive on combating terrorism are available on: https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32017L0541 (Last visited 15 January 2019)

[84] C. Murphy, 'The draft EU Directive on Combating Terrorism: Much Ado About What?', *EU Law analysis*, 2016. Available on: http://eulawanalysis.blogspot.com/2016/01/the-draft-eu-directive-on-combating.html (Last visited 15 January 2019).

experiences do we have so far on the measures adopted by EU Member States, based on the different supranational instruments?[85].

The amendment of criminal legislation to include new offences in the framework of preventive justice has been a common response. The Spanish Criminal Code was amended in 2015 to include crimes such as self-indoctrination or the attempt to travel for terrorist purposes[86], although the Spanish courts have been reticent to apply these new offences due to the extreme 'expansion of the barriers of protection' of criminal law that they imply[87]. Germany has adopted wide-ranging changes in its criminal code to prosecute the planning and preparatory stages of terrorist crimes[88]. France has approved, based on paragraph 6 of UNSC Resolution 2178, several counter-terrorism laws in recent years to criminalise acts such as travelling and inciting terrorism online[89]. This has been considered to be 'a legislative fever, aiming to boost – once more – the capacities of the criminal justice system and the law enforcement agencies in the prevention of terrorist attacks'[90]. In fact, many of these French counter-terrorism measures have been recently declared unconstitutional by the *Conseil Constitutionnel*[91]. In the Netherlands, case law about foreign terrorist fighters shows that this phenomenon can be addressed either by regular criminal law provisions or specific legal tools against terrorism[92].

The wide adoption of these types of counterterrorism measures not only by EU member States but also by many others in the rest of the international community, motivated Ms. Ní Aoláin to include among her agenda's priorities the study of 'the emergence of permanent states of emergency where ordinary legal regulation recedes and may be side lined by the deployment of expansive executive powers, extensions of the criminal law to new categories of crime, the primacy of military, security and intelligence institutions over police power within states, and sustained limitations on a broad range of rights from assembly to association'[93].

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[85] For a general overview of this point see A. Segura Serrano., 'National measures implementing United Nations Resolutions on foreign fighters', in I. Marrero Rocha and H. M. Trujillo, eds., *loc.cit.*, pp. 148-166.
[86] 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 visited 15 January 2019). For an analysis of the Spanish legislation from the preventive justice framework perspective see N. Corral Maraver, 'La armonización penal en materia de terrorismo como ejemplo de irracionalidad político-criminal', 1 *Democrazia e Sicurezza – Democracy and Security Review* (2017), 201-246.
[87] See Sentencia 354/2015 de 17 de mayo de 2017, del Tribunal Supremo, Sala de lo Penal, Sección Primera.
[88] See D.H. Heinke and J. Raudszus, 'Germany's Returning Foreign Fighters and What to Do About Them', in T. Renard and R. Coolaset, eds., *Returnees: Who Are They, Why They Are (Not) Coming Back and How Should We Deal with Them*, 101 Egmont Papers, 2018, pp. 41-54, p. 50.
[89] C. Paulussen and E. Entenmann, 'National Responses in Select Western European Countries to the Foreign Fighters Phenomenon', in A. De Guttry, F. Capone and C. Paulussen, *cit, supra*., pp. 301-422, pp. 400-405.
[90] V. Chalkiadaki., 'The French 'War on Terror' in the post-Charlie Hebdo Era', 1 *The European Criminal Law Associations' Forum* (2015), pp. 26-32, p. 31.
[91] For instance, in relation to the 'Loi nº2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme', see Décision du Conseil Constitutionnel n° 2017-682 QPC du 15 décembre 2017.
[92] C. Paulussen and K. Pitcher, 'Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges', *International Centre for Counter-Terrorism*, 2018, 12-23.
[93] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 27 September 2017, UN Doc. A/72/43280, p. 4. She also makes a specific reference to the Riga Protocol and the EU Directive on combating terrorism among the "explosion

6. Conclusion

We started this study by asking how the preventive criminal framework against terrorism can impact on the right to free movement of EU citizens. From our perspective, it can have two main effects. First, the EU Directive on combating terrorism can directly restrict the free movement of EU citizens because of the requirement to criminalise certain acts of travelling. Second, the concept of public security has been expanded in the case law of the ECJ in parallel to the "hegemonic attribution of supremacy to secondary law"[94]. The piece of EU secondary law analysed in this study, namely, the EU Directive on combating terrorism, expands the field of application of EU criminal law by introducing obligations for Member States to criminalise conducts at a very early stage, which can raise many doubts regarding the principle of legality and the presumption of innocence. This collapse between public security and preventive criminal law can seriously damage the right to free movement of EU citizens to an extent that was not intended by the legislature when the Lisbon Treaties were drafted. Therefore, any artificial link between these two concepts developed by the ECJ must be carefully drawn, and it must take into account that recent EU criminal law does not only criminalise real conducts, but also potential threats in a very early stage.

The previous conclusion does not mean that our position towards the EU Directive on combating terrorism is absolutely negative. Taking into account that many of the obligations contained in the EU Directive already existed under previous international instruments and that some Member States already adopted them, this harmonization of criminal law also shows some positive impacts. It is without doubt that there was a necessity to give a legal response to the phenomenon of foreign terrorist fighters and that "having EU legislation harmonizing the behaviour of all member states would ensure effective implementation, send a strong signal, prevent gaps and constitute a shared benchmark"[95].

Finally, it is possible that the ECJ will try to solve future litigation in this field by clarifying the interpretation of the principle of proportionality and by asking national courts to apply it in stricter terms. Or, maybe, the ECJ will apply the link between public security derogations and criminal law exclusively to the fields of law harmonised by the EU legislature, although it is difficult to imagine such an intrusive step into the sovereignty of the Member States[96]. In any case, we cannot disregard that, at least under

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of legal norms" and the necessity to "understand the full scope of a state's legal obligations and commitments in the counter-terrorism arena identifying overlap, contradiction and inefficiencies".

[94] N.N. Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship', 52 *CML Rev*. (2015), 889-938, 891.

[95] Declarations of the EU Counter-terrorism coordinator, Gilles de Kerchove, at the occasion of a meeting of EU justice ministers in December 2014. Available on: http://www.ansamed.info/ansamed/en/news/sections/politics/2014/12/04/eu-anti-terrorism-chief-wants-law-against-foreign-fighters_72a0f475-d801-4598-a35a-ca5c2577765b.html (Last visited 15 January 2019).

[96] "Of all the grounds for exceptions from free movement, public security is most closely associated with what is traditionally understood as the core of national sovereignty, that is, the sphere of activity within which the State has primary responsibility to protect its territory and citizens. As such, the term is politically charged to an even greater extent than in relation to other grounds of justification. This characteristic not only makes it more difficult to define the scope and content of the term. It also raises questions about the

the law of physics, a collapse between two elements does not necessarily mean their destruction: it can also lead to the creation of new ones[97].

intensity of judicial review and the criteria pursuant to which this should be exercised". See P. Koutrakos, *loc.cit.*, p. 191.

[97] R. Higgings, 'Time and the Law: International Perspectives of an Old Problem', 46 *International and Comparative Law Quarterly* (1997), 501-520. In a similar way, Abi-Saab points out that "Elle [the traditional theory] représente le développement du droit en termes d'explosions et des ruptures, plutôt que des transitions et des transformations, ou comme un processus qui continue en constant evolution… Nous aboutissons ainsi à une théorie de creation juridique par "big bang". See G. Abi-Saab, 'Les Sources Du Droit International: Essai de Déconstruction', in M. Rama-Montaldo, ed., *El derecho internacional en un mundo en transformación: liber amicorum en homenaje al Profesor Eduardo Jiménez de Aréchaga*, (Montevideo: Fundación de Cultura Universitaria, 1994), pp. 29-49, p. 47.