Revista de Estudios Europeos
Nº 75, enero-junio, 2020, 114-134
ISSN: 2530-9854. http://www.ree-uva.es/

FROM DANGEROUS CITIZENS TO FOREIGN CRIMINALS: EFFECTS ON HUMAN RIGHTS AND STATE SOVEREIGNTY OF RECENT INTERNATIONAL AND EUROPEAN RESPONSES TO THE TERRORIST THREAT

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Abstract: The so-called "terrorist diaspora" of Foreign Terrorist Fighters (FTFs) to their countries of residence after the defeat of Daesh is a primary concern not only for European countries, but also for the international community as a whole. Some studies have been focused on the causes of this phenomenon and its effects. However, less attention has been paid to the effects of counter-terrorism measures. Since Resolution 1373, the United Nations Security Council has been developing a binding global framework against terrorism, and Resolution 2178 is the icing on this cake. This framework, accepted by many regional organizations such as the European Union and the Council of Europe, forces States to adopt measures against FTFs in areas of criminal, administrative and civil law. Firstly, these measures affect individuals because of the restrictions imposed on certain fundamental rights, such as privacy or freedom of movement. Secondly, a radical interpretation of these measures followed by its unilateral adoption can cause anarchy in the international relations between the States of origin of FTFs and the States of destination. For instance, measures preventing the movement of terrorists can be translated into the expulsion of residents or nationality deprivation, driving them to countries with less capabilities to deal with this risk. A strategy which, at the end, will increase instability in a globalised world. For these reasons, this paper proposes that the global and European frameworks against FTFs should be used as a tool to coordinate efforts, and not as a justification to defend short-term national security interests to the detriment of long-term international security.

Keywords: United Nations, European Union, Council of Europe, Foreign Terrorist Fighters, Revocation of Citizenship, Criminal Law.

Resumen: La denominada «diáspora» de combatientes terroristas extranjeros (CTE) a sus países de residencia tras la derrota del Daesh es una preocupación no sólo para los Estados europeos, sino también para la comunidad internacional en su conjunto. Varios estudios se han centrado en las causas de este fenómeno y sus efectos. Sin embargo, menos atención se ha prestado a los efectos de las medidas antiterroristas adoptadas. Desde la Resolución 1373, el Consejo de Seguridad de Naciones Unidas ha desarrollado un marco global de lucha contra el terrorismo, y la Resolución 2178 es la guinda de este papel. Este marco, aceptado por múltiples organizaciones regionales como la Unión Europea y el Consejo de Europa, obliga a los Estados a adoptar diversas medidas contra los CTE en materia de

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derecho penal, administrativo y civil. En primer lugar, estas medidas afectan a los individuos ya que imponen restricciones en ciertos derechos fundamentales, tales como el derecho a la libertad o a la libre circulación. En segundo lugar, una interpretación radical de estas medidas seguidas de una adopción unilateral puede causar la anarquía en las relaciones internacionales entre los Estados de origen de los CTE y los Estados de destino. Por ejemplo, las medidas que buscan prevenir la circulación de terroristas pueden traducirse en la expulsión de residentes o en la revocación de su nacionalidad, guiándolos hacia países con menos capacidades para lidiar con este riesgo. Una estrategia que, al final, incrementará la inestabilidad en un mundo globalizado. Por estas razones, este estudio propone que el marco global y europeo contra los CTE debe ser utilizado como una herramienta para coordinar esfuerzos, y no como una justificación para defender intereses de seguridad nacional a corto plazo en detrimento de la seguridad internacional a largo plazo.

Palabras clave: Naciones Unidas, Unión Europea, Consejo de Europa, Combatientes Terroristas Extranjeros, revocación de la nacionalidad, Derecho penal.

1. INTRODUCTION

The terrorist attacks in Brussels (2014) and Paris (2015) highlighted the growing threat of foreign terrorist fighters associated with Daesh[1]. A phenomenon that has affected not only Europe, but also other regions of the world. The Philippines has been the scenario of constant fights between the national armed forces and local terrorist groups supported by foreign terrorist fighters trained by Daesh[2]. Officials from countries such as Morocco or Algeria have voiced concern that "North African fighters are returning home from the collapsing Daesh caliphate in Syria, raising the terrorism risk"[3].

Since 2013, the Counter-Terrorism Fusion Centre, a project of the International Criminal Police Organization (INTERPOL), has been following the participation of foreign fighters to terrorist organizations in Syria and Iraq[4]. In September 2014, the UNSC gave the first official definition of "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

1 For different case studies see Braithwaite, A. and Chu, T.S. (2018), "Civil Conflicts Abroad, Foreign Fighters, and Terrorism at Home", *Journal of Conflict Resolution* 62 (8), pp. 1636-1660.

2 Gunaratna, R. (2017), "Marawi: a Game Changer in Terrorism in Asia", Counter Terrorist Trends and Analyses: A Journal of the International Centre for Political Violence and Terrorism Research 9 (7), p. 4; Singh, B. and Ramakrishna, K. (2016), "Islamic State's Wilayah Philippines: Implications for Southeast Asia", 187 RSIS Commentary.

3 Abebe, T.T. (2017), "Algeria and Morocco: developing inclusive strategies can prevent violent extremism", Institute for Security Studies, Policy Brief 112, p. 5.

4 INTERPOL, "Foreign terrorist fighters Information Sheet". Available at: https://www.interpol.int/Crime-areas/Terrorism/Foreign-terrorist-fighters

participation in, terrorist acts, or the providing or receiving of terrorist training, including in connection with armed conflicts"[5].

Apart from defining the term of "foreign terrorist fighters", UNSC Resolution 2178 imposes on all States the obligation to adopt a wide range of criminal, administrative and civil measures. Its content has also been transposed in the framework of the Council of Europe and the EU. Although the direct addressee of these obligations is the sovereign State, they can also have an impact in the individual because of its possible interpretation by the State when transposing it, or because of the specific nature of some of these obligations [6]. This study explores the impact of two specific measures adopted against the threat of foreign terrorist fighters, namely the revocation of citizenship and the preventive criminal law instruments, and how they affect the rights and obligations of both individuals and States[7].

2. REVOCATION OF CITIZENSHIP

In the eighteenth century, the Italian jurist Beccaria compared deprivation of citizenship with the "death in respect to the body politic"[8]. In this sense, "this political death is a sibling to the historic practice known as civil death, whereby slaves and felons were denied legal personhood. The individual remains physically alive and present in the community, but is no longer recognized as an autonomous legal subject capable of contracting, suing and being sued, or otherwise participating in civic life"[9].

In the past few years, many States have passed laws against terrorist fighters, enabling authorities to revoke the citizenship of nationals convicted of terrorism offences[10]. In 2014, Bahrain introduced in its legislation the possibility to revoke

5 UNSC, Resolution 2178 of 24th September 2014, Doc. S/RES/2178, p. 2. This definition has been criticised because it "blurs the lines between terrorism and armed conflicts". See generally GENEVA ACADEMY, "Foreign Fighters under International Law", Academic Briefing 7, 2014, p. 42. Available at:

https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf

6 For some remarks on the direct effect of UNSC Resolution 2178 on the individual see Peters, A. (2014), "Security Council Resolution 2178 (2014): 'The Foreign Terrorist Fighter' as an International Legal Person", EJIL Talk. Available at:

https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/

7 For a general study of all the measures adopted by the EU against FTFs see, among others, López-Jacoiste (2016), E., "La Unión Europea ante los Combatientes Terroristas Extranjeros", *Revista de Estudios Europeos* 67 (1), pp. 47-71.

8 Beccaria, C. (2009), *On Crime and Punishment* (translation).Transaction Publishers. New Brunswick, p. 63.

9 Macklin, A. (2013), "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien", *Queen's Law Journal* 40 (1), pp. 1-54.

10 Although we acknowledge that there is a conceptual difference between "nationality" and "citizenship", this study is not focused on the difference between them but on the direct consequences

citizenship on terrorism charges, disregarding whether they are dual nationals or not[11]. This new piece of legislation has raised many concerns because of its application to civil society activists, journalists and religious figures[12]. Since 2015, Australia's Allegiance Act grants the immigration minister the power to revoke the citizenship of dual nationals if there are reasons to believe that they have participated in terrorist activities, even on the basis of suspicion if the act was allegedly committed overseas, or the individual is overseas at that time[13]. Dutch legislation from 2017 allows the revocation of citizenship of dual nationals suspected of having joined or fought abroad along with a terrorist group[14]. Belgium also allows the revocation from dual nationals, although in this case there are stronger concerns on discrimination due to the high number of Belgian nationals with African nationalities[15]. For this last situation, we should keep in mind that article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination guarantees "the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment […] of the right to nationality".

Could we say that this measure is a consequence of the obligations imposed on States by UNSC Resolution 2178?[16]. It is difficult to response positively. First of all, because many States adopted measures to revoke the citizenship of individuals related to terrorism before Resolution 2178 was even approved by the UNSC in 2014[17]. In addition, the requirement to revoke the citizenship of terrorist fighters cannot be found anywhere in the wording of the resolution. By contrast, the UNSC

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that deprivation of citizenship has on the right to nationality. In few words, citizenship refers to all rights and obligations attributed to their own State at domestic level, while nationality concerns the international dimension of this relationship. See generally Giustiniani, F.Z. (2016), "Deprivation of nationality: In Defence of a principled approach", Questions of International Law 31, pp. 5-20; Combacau, J. and Sur, S. (2016), *Droit international public*. LGDJ. Issy-les-Moulineaux, pp. 329-335.

11 For a review of recent counterterrorism law in Bahrain see Almutawa, A. (2018), "Terrorism measures in Bahrain: proportionality and the interplay between security, civil liberties and political stability", *The International Journal of Human Rights* 22 (8), pp. 949-965.

12 Bahrain Institute for Rights and Democracy, Stop Revoking Citizenships –BIRD Publishes Full Documentation (2016). Available at:

http://birdbh.org/2016/02/revoked-citizenship/

13 Australian Citizenship Amendment (Allegiance to Australia Act) 2015, No. 166, Section 33A. Available at:

https://www.legislation.gov.au/Details/C2015A00166

14 Immigration and Naturalisation Service, Ministry of Justice and Security of the Netherlands, "Loss and the revoking of Dutch nationality". Available at:

https://ind.nl/en/dutch-citizenship/Pages/Loss-and-the-revoking-of-Dutch-nationality.aspx

15 Tayler, L. (2016), "Foreign Terrorist Fighter Laws: Human Rights Rollbacks Under UN Security Council Resolution 2178", *International Community Law Review* 18, pp. 455-482, p. 470.

16 For this topic, see generally Webb, A.K. (2017), "Swanning back in? Foreign fighters and the long arm of the state", Citizenship Studies 21 (3), pp. 291-308.

17 For example, the idea of revocation of revocation of citizenship from individuals engaged in terrorist activities was proposed in the United States by Senator Joseph Lieberman in 2010. See generally Spiro, P.J. (2014), "Expatriating terrorists", *Fordham Law Review* 82 (5), pp. 2169-2187; Forcese, C. (2014), "A Tale of Two Citizenships: Citizenship Revocation for 'Traitors and Terrorists", Queen's Law Journal 39 (2), pp. 551-586.

specifically addressed in paragraph 8 that nothing among the obligations imposed by the Resolution "shall oblige any State to deny entry or require the departure from its territories of its own nationals or permanent residents".

2.1. Impact on the individual

The power of the State to revoke citizenship must be analysed in connection with the human right to nationality[18]. Article 15 of the Universal Declaration of Human Rights establishes that everyone has the right to a nationality and that no one shall be arbitrary deprived of his or her nationality. Article 8 of the Statelessness Convention establishes that States parties "shall not deprive a national of his nationality if such deprivation would render him stateless"[19]. However, according to paragraph 3 of the same provision, States can deprive a person of his nationality if "inconsistently with his duty of loyalty to the Contracting State, the person has conducted himself in a manner seriously prejudicial to the vital interests if the State".

As we can directly see from the more recent title of the Australian counter-terrorism law, the obligation of "allegiance" or "loyalty" is closely connected to nationality and its revocation. This connection could derive from the definition of "nationality" given by the International Court of Justice, according to which it is a "legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State"[20].

Nationality has been traditionally seen as a matter of domestic jurisdiction of sovereign States[21]. However, the power of the State to deprive a person of his nationality is not without limits. Article 8 (4) of the Statelessness Convention establishes that nationality cannot be revoked "except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body". Regarding the term "not arbitrary" of the Universal Declaration of Human Rights, the UN Human Rights Council understands it as a measure "serving a legitimate purpose, being the least intrusive instrument to achieve the desired result and being proportional to the interest to be protected"[22].

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18 Mantu, S. (2018), "Terrorist citizens and the human right to nationality", *Journal of Contemporary European Studies* 26 (1), pp. 28-41, p. 29.

19 For a comprehensive study of the issue of statelessness see Conklin, W.E. (2014), *Statelessness: the Enigma of the International Community*. Hart Publishing. Oxford.

20 ICJ, *Nottebohm Case* (*Liechtenstein v Guatemala)* (Second Phase), Merits, Judgment 27 June 1955, ICJ Rep 1955, p.26.

21 Ibidem.

22 UNGA, Human Rights Council, Human rights and arbitrary deprivation of nationality: Report of the Secretary General, 19 December 2013, UN Doc. A/HRC/25/28, p. 4.

Although the right to citizenship is not guaranteed by the ECHR or its Protocols, the ECtHR has solved some cases related to citizenship on grounds of the right to respect for private and family life (article 8 of the ECtHR)[23]. On 27 June 2013, an application was lodged with the ECtHR concerning the revocation of British citizenship of an individual with Sudanese and British nationalities, while he has abroad, because of terrorism-related activities[24]. The ECtHR considered that the removal of citizenship in this case was not arbitrary on several grounds.

First, because the measure was adopted in accordance with existing UK law. Second, because an out-of-country appeal does not make a decision automatically arbitrary: the procedural guarantees were duly respected by the UK. Third, because he was not rendered statelessness as far as he still preserved the Sudanese nationality. Fourth, because the interference with individual rights was very limited: his right to private and family life that his family were no longer living in the UK. And last but not least, the ECtHR considered that the aim of protecting the public from the threat of terrorism is a legitimate aim.

Taking into account the growing practice of citizenship revocation, it remains to be seen if, in the near future, the ECtHR will find these measures contrary to the ECHR in a case-by-case basis. There are already some pending applications from French citizens, convicted by terrorism and deprived from citizenship on this ground, because of an alleged violation of their right to identity under article 8 of the ECtHR[25]. Even more recently, the British government has started to revoke the citizenship of individuals without current double nationality, but with the possibility to obtain it. In a case concerning two British alleged Islamists, the government defended that the men were eligible for Bangladeshi citizenship and, therefore, they would not be rendered stateless as a result of the revocations. However, the Special Immigration and Appeals Commission found that they had been made stateless and, therefore, that the action of the government was illegal under international law[26].

Depriving an individual from his or her citizenship is not banal decision. It has an enormous consequence: the loss of protection of the human rights recognised by that State. Although "all persons should by virtue of their essential humanity enjoy all human rights", the UN has also recognised, after a review of international human rights law, that "unless exceptional distinctions, for example between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective. For example, non-citizens should enjoy freedom

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23 See generally ECtHR, *Genovese v. Malta* (App. No. 53124/09), Fourth Section, 11 October 2011.

24 ECtHR, *K2 v. the United Kingdom* (App. No. 42387/13), First Section, 9 March 2017.

25 ECtHR, *Ghoumid v. France* (App. No. 52273/16), *Charouali v. France* (App. No. 52285/16), *Turk v. France* (App. No. 52290/16), *Aberbri v. France* (App. No. 52294/16) and *Ait El Haj v. France* (App. No. 2302/16), 23 May 2017.

26 Dearden, L. (2018) "UK blocked from making alleged extremists stateless by secret court in ruling that will set precedent", The Independent. Available at: https://www.independent.co.uk/news/uk/crime/british-citizenship-removal-isis-terrorists-extremists-stateless-illegal-blocked-court-bangladesh-a8645241.html

from arbitrary killing, inhuman treatment slavery, forced labour, child labour, arbitrary arrest, unfair trial, invasions of privacy, refoulement and violations of humanitarian law. They also have the right to marry, protection as minors, peaceful association and assembly, equality, freedom of religion and belief, social, cultural, and economic rights in general, labour rights (for example, as to collective bargaining, workers' compensation, social security, appropriate working conditions and environment, etc.) and consular protection. While all human beings are entitled to equality in dignity and rights, States may draw narrow distinctions between citizens and non-citizens with respect to political rights explicitly guaranteed to citizens and freedom of movement"[27].

2.2. Impact on the State

At first sight, when a State decides to revoke the citizenship of an individual, there is only one category of victims: the individual concerned, and also possibly the relatives attached to them. However, if we go one step further, we can see that the damage does not only affect the relationship among the State and its former "subject". It can also have a negative impact on the peaceful functioning of international relations. This impact can be particularly dangerous if the citizenship has been revoked due to the connection of the individual with terrorist activities.

Revocation of citizenship in the case of foreign terrorist fighters can take place in a scenario as follows: a national from State A travels to State B for the purpose of terrorism. While this individual is abroad, State B decides to revoke his or her citizenship. How can this act affect the international relations between sovereign States? It has been noted that revocation of citizenship against individuals who are abroad "engage the legal interests of other States and may violate its rights"[28]. When a person travels abroad, a wide range of obligations emerges not only between the individual and the State, but also between the State of origin and the State of destination.

First of all, a State which admits into its territory a national from a foreign State is entitled to deport him or her, under certain circumstances, to his or her Sate of nationality. International law does not provide with a definitive and comprehensive framework on the matter, but we can find certain guidelines. Article 3 of the draft articles on the expulsion of aliens adopted by the International Law

27 UN Commission of Human Rights, Prevention of discrimination: the rights of non-citizens, 6 May 2003, UN Doc. E/CN.4/Sub.2/2003/23. In this sense, Hannah Arendt criticised that "no paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as 'inalienable' those human rights, which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves". See Arendt, H. (1979), *The Origins of Totalitarism*. Harcourt, Brace & World. London, p. 279.

28 Krähenmann, S. (2016), "The Obligations under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination", in De Guttry, A., Capone, F. and Paulussen, C. (eds.), *Foreign Fighters under International Law and Beyond*. Springer. The Hague, pp. 229-282, p. 249.

Commission establishes that "A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights"[29]. Article 5 does not give a list of specific grounds of expulsion, but it establishes the general guidelines which every decision of expulsion must comply with. In his preliminary report, the UN Special Rapporteur for the expulsion of aliens identifies, among other common grounds of expulsion in domestic law, that the individual in question is a criminal or is being prosecuted[30].

On the other hand, the State of nationality is obliged to accept the return of its own nationals. This is a consequence of the right that every person has to enter and leave their State of nationality[31]. Nevertheless, if the citizenship of a suspected terrorist fighter is revoked while abroad, then the State's obligation to accept him is completely circumvented. This conduct of "ad hoc denationalization would provide a ready means of evading these duties. In appropriate circumstances responsibility would be established for breach of duty"[32]. In such a situation, "the good faith of a State which has admitted an alien on the assumption that the State of his nationality is under an obligation to receive him back would be deceived if by subsequent denationalisation this duty were to be extinguished"[33].

For some authors, this unilateral measure can even affect the principle of non-interference: the receiving State's sovereignty would be violated as far as it can no longer deport the individual to his country of origin, even if the situation at hand complies with all requirements under its national law and international human rights law[34]. This practice could lead "to a race between states as to who denationalizes first, creating friction in international relations"[35] and, at the end, "the delicate

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29 ILC, Draft Articles on the expulsion of aliens, *Yearbook of the International Law Commission*, 2014, Vol. II, Part II. Available on:
http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/9_12_2014.pdf&lang=EF

30 ILC, Preliminary report on the expulsion of aliens, by Mr. Maurice Kanto, Special Rapporteur, 2 June 2005, UN Doc. A/CN.4554, par. 19. Available on:
http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/9_12_2014.pdf&lang=EF

31 According to article 13 of the Universal Declaration of Human Rights, "everyone has the right to leave any country, including his own, and to return to his country". Article 12 of the International Covenant on Civil and Political Rights guarantees that "no one shall be arbitrarily deprived of the right to enter his own country". In addition, article 3 of the 4th Protocol to the European Convention on Human Rights, article 22(5) of the American Convention on Human Rights, article 12(2) of the African Charter on Human and People's Rights and article 27 of the 2004 Arab Charter on Human Rights prohibit the expulsion of nationals.

32 Crawford, J. (2012), *Brownlie's Principles of Public International Law*. Oxford University Press. Oxford, p. 520.

33 Weis, P. (1979), *Nationality and statelessness in international law*. Stijhoff and Noordhoff. Alphen aan den Rijn, pp. 125-126.

34 Burchardt, D. and Gulati, R. (2018) "International Counter-terrorism Regulation and Citizenship-stripping Laws—Reinforcing Legal Exceptionalism", *Journal of Conflict & Security Law* 23 (2), pp. 203-228.

35 Ibidem. See also Laine, T. (2017), "'Passing the Buck': Western States Race to Denationalise Foreign Terrorist Fighters", *Journal of Peacebuilding and Development*, 12 (2), pp. 22-35.

balance of States and individual rights that the international community has worked so hard to achieve will start to erode"[36].

Second, revocation of citizenship of suspected terrorists while they are abroad also entails a risk for the security of other States and the international community as a whole. As some author has pointed out, "it is appropriate or even lawful to 'export' terrorism risks to other countries, especially as they probably have less information and capability to deal with the risk?"[37]. Indeed, this policy can increase the safety of the State of origin in the short term, but it can motivate terrorist to operate in jurisdictions with less controls and resources or, in other words, this State's policy "will drive terrorist to another state"[38].

In relation to the global decrease of security, the revocation of citizenship on grounds of terrorism is also a way to elude some of the obligations assumed by the States parties to the framework of international conventions against terrorism. Fourteen out of nineteen of the sectorial conventions against terrorism establish that each State Party shall take such measures as may be necessary to establish its jurisdiction when the offence is committed by a national of that State[39]. Eluding this obligation goes against the purpose of all these conventions, meaning the exclusion of impunity for terrorist acts with transnational elements. It is also arguable that this avoidance of responsibility goes against the right to receive justice of the victims of terrorist attacks[40].

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36 Esbrook, L. (2016), "Citizenship unmoored: expatriation as a counter-terrorism tool", *University of Pennsylvania Journal of International Law* 37 (4), pp. 1273-1329, pp. 1306-1307.

37 Walker, C. (2014), "Counterterrorism and Security Bill 14-15, Submission to Joint Committee on Human Rights", 5 December 2014, p. 5. Available on:
https://www.parliament.uk/documents/joint-committees/human-rights/Prof_Clive_Walker_Submission.pdf

38 Feinberg, M. (2017), "Terrorism Inside Out: Legislating for Humanity to Cooperate against Terrorism", *North Carolina Journal of International Law* 42, pp. 505-543, p. 523.

39 See the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft as amended by the 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the 1979 International Convention against the Taking of Hostages; the 1980 Convention on the Physical Protection of Nuclear Material and its 2005 Amendment to the Convention on the Physical Protection of Nuclear Material; the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, including its 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, its 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; the 1997 International Convention for the Suppression of Terrorist Bombings; the 1999 International Convention for the Suppression of the Financing of Terrorism; the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism and, finally, the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation.

40 For a study on the victims of terrorism, see generally Fernández de Casadevante Romani, C. (2010), "International Law of Victims", *Max Planck Yearbook of United Nations Law*, 14, pp. 220-272, pp. 253-270.

3. CRIMINAL LAW RESPONSES

Paragraph 6 of UNSC Resolution 2178 is one of the key provisions of this instrument. It imposes on all States the duty of ensuring that their domestic laws give the ability to prosecute and penalize in a duly manner a list of conducts related to foreign terrorist fighters. This list includes: travel or attempt to 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 (a); the wilful provision or collection of funds 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 for the purpose of terrorism (b); the wilful organization, or other facilitation, including acts of recruitment, of the previous acts of travelling (c)[41].

The UN has not been the only organization to require the criminalisation of certain conducts related to the phenomenon of foreign terrorist fighters. In 2015, the Council of Europe decided to create the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE) in order to elaborate a Draft Protocol to the Council of Europe Convention on the Prevention of Terrorism. That same year, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism was approved in Riga (Riga Protocol)[42]. Following UNSC Resolution 2178, the Riga Protocol calls upon State Parties to criminalize: 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).

In addition, the EU adopted the Directive on combating terrorism on March 2017. It 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). 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); organizing or

41 These same obligations have been confirmed later 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.

42 Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), adopted on 16th May 2005. For an analysis of the draft of the Protocol see generally Piacente, N. (2015), "The Contribution of the Council of Europe to the Fight Against Foreign Terrorist Fighters: The Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism 2005", *The European Criminal Law Associations' Forum* 1, pp. 12-15.

otherwise facilitating travelling for the purpose of terrorism (article 10); and the financing of such acts (article 11)[43].

Last but not least, many States have adapted their domestic legislation to penalize and punish these conducts. Italian criminal law prohibits the passive and active recruitment for terrorist purposes, as well as travelling abroad (or financing or organising it) and training for the purpose of terrorism[44]. Spain amended its penal code in 2015 to include crimes such as self-indoctrination or the attempt to travel for terrorist purposes[45]. France has recently passed new pieces of criminal legislation including acts such as travelling and inciting terrorism online[46]. Germany has also approved amendments in its criminal code to prosecute the planning and preparatory stages of conducts related to foreign terrorist fighters[47]. The level of implementation of the measures required by UNSC Resolution 2178 depends on the region: most European countries have adopted them, while Asian countries have included it only partially, and most African countries have not taken specific criminal measures against foreign terrorist fighters[48].

3.1. Impact on the individual

Thanks to the inclusion of these conducts within new categories of crimes of terrorism, or as a part of more general terrorism-related offences, many foreign terrorist fighters have been condemned on these bases by national courts. According to a report published in 2017, approximately ten per cent of cases concerning foreign terrorist fighters in the US have resulted in a trial, all of them resulting in convictions with an average sentence of 32.5 years[49]. The specific treatments,

43 For a comprehensive study of this legal instrument see generally Maliszewska-Nienartowicz, J. (2017), "A New Chapter in the EU Counterterrorism Policy? The Main Changes Introduced by the Directive 2017/541 on Combating Terrorism", XXXVII *Polish Yearbook of International Law*, pp. 185-201.

44 Law No. 43 of 17 Avril 2015. For this topic, see Marone, F. (2016), "Italy's Jihadists in the Syrian Civil War", ICCT Research Paper, 2016. Available at:
https://icct.nl/wp-content/uploads/2016/08/ICCT-Marone-Italys-Jihadists-in-the-Syrian-Civil-War-August2016-1.pdf

45 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 at: https://www.boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3440.pdf

46 Heinke, T., and Raudszus, R. (2018), "Germany's Returning Foreign Fighters and What to Do About Them, in: T. Renard and R. Coolsaet (eds.), Returnees: Who Are They, Why They Are (Not) Coming Back and How Should We Deal with Them", Egmont Paper 101, 2018, pp. 41-54, p. 50.

47 Chalkiadaki, V. (2015), "The French 'War on Terror' in the post-Charlie Hebdo Era", *The European Criminal Law Associations' Forum* 1, 2015, pp. 26-32, p. 31.

48 For a regional analysis see UNSC, Third Report of Implementation of Security Council resolution 2178 (2014) by States affected by foreign terrorist fighters, 29 December 2015, UN Doc. S/2015/975; UNSC, Second Report of Implementation of Security Council resolution 2178 (2014) by States affected by foreign terrorist fighters, 2 September 2015, UN Doc. S/2015/683.

49 Greenberg, K.J. and Weiner, S. (2017), "The American Exception: Terrorism Prosecutions in the United States: The ISIS Cases March 2014-August 2017", Center on National Security at Fordham Law, p. 27. Available at:

however, differs from one country to another. 6 years has been the maximum sentence in the Netherlands, 28 years in Belgium or life imprisonment in Sweden[50].

Despite of the usefulness of the criminal justice response to foreign terrorist fighters, the protection of fundamental rights shall also be taken into account. UNSC Resolution 2178 recalls generally that all States must ensure that "any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law". The Riga Protocol establishes in article 8, with more detail than UNSC Resolution 2178, the conditions and safeguards which shall be taken into account by States when implementing this instrument[51]. This provision is completed with an Explanatory Report, which clarifies the conditions for the compatibility of these criminal measures with human rights[52]. In the same sense, article 23 of the EU Directive on combating terrorism contains a fundamental rights safeguard[53].

However, are these provisions good enough to protect fundamental rights and freedoms? In relation to UNSC Resolution 2178, paragraph 6 has been

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https://news.law.fordham.edu/wp-content/uploads/2017/09/TheAmericanException9-17.pdf

50 Paulussen, C. and Pitcher, K. (2018), "Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges", ICCT Research Paper, p. 22. Available at:
https://icct.nl/wp-content/uploads/2018/01/ICCT-Paulussen-Pitcher-Prosecuting-Potential-Foreign-Fighters-Legislative-Practical-Challenges-Jan2018.pdf

51 It reads:

(1)Each Party shall ensure that the implementation of this Protocol, including the establishment, implementation and application of the criminalisation under Articles 2 to 6, is carried out while respecting human rights obligations, in particular the right to freedom of movement, freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and other obligations under international law.

(2) The establishment, implementation and application of the criminalisation under Articles 2 to 6 of this Protocol should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.

52 It reads:

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. See 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.

53 It reads:

(1) This Directive shall not have the effect of modifying the obligations to respect fundamental rights and fundamental legal principles, as enshrined in Article 6 TEU.

(2) Member States may establish conditions required by, and in accordance with, fundamental principles relating to freedom of the press and other media, governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where such conditions relate to the determination or limitation of liability.

considered as its "most alarming provision"[54]. First of all, because "the wide array of obligations imposed on Member States by Resolution 2178 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"[55]. The phenomenon of anticipated criminalization is especially dangerous in this context because "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"[56]. More specifically, it is the lack of definition of terrorism in this resolution what can be used as a justification "by oppressive regimes that choose to stigmatize as 'terrorism' whatever they do not like – for instance political opposition, trade unions, religious movements, minority groups, etc"[57].

Indeed, the UNSC requires States to criminalise activities included in any person's daily life. In the criminalisation of travelling, for example, "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?"[58]. It is indeed arguable that this kind of measures raises, among others, "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"[59].

The Riga Protocol has been the target of similar criticism. For Scheinin, this instrument also "seeks to address forms of conduct, such as foreign travel, that are routinely exercised by law-abiding people for legitimate reasons"[60]. NGOs such as

54 Scheinin, M. (2014), Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters, Just Security. Available at: https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/

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

56 Tayler, *cit. supra.*, p. 456. In the same sense, the UN High Commissioner for Human Rights expressed that "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.

57 Marrero Rocha, I. (2016), "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* 54, pp. 555-592, p. 587.

58 Ambos, K. (2014), "Our terrorists, your terrorists? The United Nations Security Council urges states to combat 'foreign terrorist fighters', but does not define 'terrorism'", EJIL Talk. Available at: 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/

59 Conte, A. (2016), "States' Prevention and Responses to the Phenomenon of Foreign Fighters against the Backdrop of International Human Rights Obligations", in De Guttry et al, *cit. supra.*, pp. 283-298, p. 286.

60 Scheinin, M. (2015), "The Council of Europe's Draft Protocol on Foreign Terrorist Fighters is Fundamentally Flawed", Just Security. Available at:

Amnesty International or the International Commission of Jurists have also considered that the Riga Protocol can have negative consequences on principle of legality, the presumption of innocence, the right to non-discrimination and the freedom of movement[61]. There are even discrepancies regarding these criminal measures among the judges of the ECtHR. Judge Pinto de Albuquerque, for instance, have made clear that they are "based on a highly indeterminate, probabilistic judgment on the future conduct of the suspected person"[62] and, thereof, 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"[63].

Finally, the EU Directive on combating terrorism has been criticised on the same grounds. For Murphy, "taken as a whole, the Directive continues the ongoing restriction of various mobilities – of finance, information, and people – in the name of counter-terrorism. This restriction has been the hallmark of international efforts since 11 September 2001. There is an inevitable risk for critiques of such action: on the one hand it appears to be restrictive of civil liberties across Europe and on the other hand its operational usefulness is unclear. Can such a law be both draconian and ineffective?"[64].

In addition, the EU Directive on combating terrorism has been criticised for circumventing a common practice in the EU system: the *ex ante* impact assessment on the rights protected by the EU Charter[65]. Legislative proposals use to include an impact assessment with respect to the EU Charter in order to "strengthen the defence of EU legislation against legal challenges before the European Court of Justice"[66]. Indeed, "when considering the impacts of a measure for the purpose of assessing its proportionality, the Court is investigating its legal impact. Thus, as any

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https://www.justsecurity.org/21207/council-europe-draft-protocol-foreign-terrorist-fighters-fundamentally-flawed/

61 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 at:

https://www.amnesty.org/download/Documents/IOR6013932015ENGLISH.pdf

62 ECtHR, *Tommaso v. Italy* (App. No. 43395/09), Grand Chamber, 23 February 2017, partly dissenting opinion of Judge Pinto de Albuquerque, paragraph 8.

63 Ibidem, paragraph 31.

64 Murphy, C. (2016), "The draft EU Directive on Combating Terrorism: Much Ado About What?", EU Law analysis. Available at:

http://eulawanalysis.blogspot.com/2016/01/the-draft-eu-directive-on-combating.html

65 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; Meijers Committee, "Note on a Proposal for a Directive on combating terrorism", CM1603, 16 March 2016. Available at:

http://www.commissie-meijers.nl/sites/all/files/cm1603_note_on_a_proposal_for_a_directive_on_combating_terrorism_.pdf

66 European Commission, Operation Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC (2011) 567 final, p. 5. See also De Schutter, O. (2014), "Impact Assessments", in Peers, S. et al (eds.), *The EU Charter of Fundamental Rights: A Commentary*. Hart Publishing. Oxford, pp. 1645-1648.

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"[67]. In this specific case, however, the EU Commission decided not to elaborate it due to the "urgent need to improve the EU framework"[68].

3.2. Impact on the State

The criminal law response of the international community against foreign terrorist fighters has also had an impact on States. Criminal law, as a reflection of the State's monopoly of legitimate use of violence[69], has always been closely related to the sovereignty of the State[70]. In consequence, every development of criminal law at the international level has been particularly respectful with State's sovereignty[71]. Even the EU, an international organization of integration, has been traditionally cautious in the exercise of its competence of harmonization of criminal laws in the Area of Freedom, Security and Justice[72].

In the case of substantive international crimes such as aggression, war crimes, crimes against humanity or genocide, progress has been made, after the Nuremberg and Tokyo Trials, thanks to ratifications of the Statute of the International Criminal Court and the development of customary international law (which requires the elements of State practice and *opinio iuris*)[73]. On the other hand, national crimes with transnational elements, such as terrorism, are usually criminalised on the base of multilateral conventions, which also gives a framework of cooperation among States parties[74].

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67 F. De Londras, "Accounting for Rights in EU Counter-Terrorism: Towards Effective Review", 22 (2) *Columbia Journal of European Law*, 2016, pp. 237-274, p. 256.

68 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.

69 Weber, M. (1948), "Politics as a vocation", in H.H. Gerth and C.W. Mills, (eds. and transl.) from M. Weber, *Essays in sociology*. Oxford University Press. New York, pp. 77–128, p. 78.

70 Funk, A. (2003), "The Monopoly of Legitimate Violence and Criminal Policy", in Heitmeyer, W. and Hagan, J. (eds.), *International Handbook of Violence Research*. Springer. Dordrecht, pp. 1057-1077.

71 For a general analysis on the introduction of criminal law in the supranational arena see Ambos, K. (2013), "Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law", *Oxford Journal of Legal Studies* 33 (2), pp. 293-315.

72 Mitsilegas, V. (2010), "European Criminal Law and Resistance to Communautarisation after Lisbon", *New Journal of European Criminal Law* 1 (4), pp. 458-480.

73 Bassiouni, M.C. (1983), "The Penal Characteristics of Conventional International Criminal Law", *Case Western Reserve Journal of International Law* 15 (1), pp. 27-37; Ambos, K. and Timmermann, A. (2014), "Terrorism and customary international law", in Saul. B. (ed.), *Research Handbook on International Law and Terrorism*. Edward Elgar Publishing. Cheltenham, pp. 20-38; Cassese, A. (2006), "The Multifaceted Criminal Notion of Terrorism in International Law", *Journal of International Criminal Justice* 4, pp. 933-958.

74 Wilmshurst, E. (2010), "Transnational Crimes, Terrorism and Torture", in Cryer, R. et al (eds.), *An Introduction to International Criminal Law and Procedure*. Cambridge University Press. Cambridge, pp.

Apart from being developed by treaties and customary law, international criminal law has also been developed by the activity of the UNSC, an organ composed by just fifteen Members of the United Nations[75]. For example, both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were set up by a resolution of the UNSC[76]. And, in both cases, "because the tribunals are created pursuant to the Security Council's Chapter VII powers, they may only be established to confront discrete threats to international peace and security. Accordingly, the tribunals would have a defined and limited temporal and geographic competence, and once they had completed their tasks they would be dissolved"[77].

We have already seen that the criminal justice response to foreign terrorist fighters has been led by the UNSC. The participation of this organ in the fight against terrorism is not a new phenomenon: "Resolution 2178 is not a stand-alone document, on the contrary, it extensively relies on the existing skeleton of anti-terrorism norms developed by the international community and as such it inherits, and even amplifies, a number of problems"[78]. After the terrorist attacks of 11 September 2001, the UNSC decided to consider these acts, "like any act of international terrorism, as a threat to international peace and security"[79]. This resolution has been largely criticised because it expands the concept of threat to international peace and security from specific acts to "any act of international terrorism"[80].

However, from the perspective of criminal law, the most important provision can be found in a resolution adopted some weeks later. The UNSC decided in its Resolution 1373 that all States shall "criminalize 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 carry out terrorist acts". For the first time, the UNSC called upon States to criminalise a specific conduct. Although this obligation was already a part of the 1999 Convention for the suppression of the financing of terrorism, Resolution 1373 had the effect of extending this obligation to all members of the UN, disregarding the position of those States that did not ratify that convention[81].

335-336; Gaeta, P. (2009), "International Criminalization of Prohibited Conduct", in Cassese, A., *The Oxford Companion to International Criminal Justice*. Oxford University Press. Oxford, pp. 63-74, p. 63.

75 Article 23 (1) of the Charter of the United Nations.

76 Respectively, UNSC Resolution 808 of 22 February 1993, UN Doc. S/RES/808; UNSC Resolution 955 of 8 November 1994, UN Doc. S/RES/955.

77 Goldstone. R.J. and Simpson, J. (2003), "Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism", *Harvard Human Rights Journal* 16,pp. 13-26, p. 20.

78 Capone, *cit. supra.*, p. 231.

79 UNSC Resolution 1368 of 12 September 2001, UN Doc. S/RES/1368.

80 See generally Duffy, H. (2015), *The 'War on Terror' and the Framework of International Law*. Cambridge University Press. Cambridge, p. 275.

81 Rosand, E. (2004), "The Security Council As 'Global Legislator': Ultra Vires or Ultra Innovative?", *Fordham International Law Journal* 28 (3), pp. 542-590.

The scholarship has been divided ever since between those who accept the exercise of such legislative power by the UNSC[82], and those who consider that this kind of actions are beyond the competences of this political organ[83]. Perhaps an intermediate position asking for an amendment of the UN Charter would be the best option: "in the absence of those reforms, the dangers hidden behind the SC's normative activity are many and serious. It cannot be ruled out that, at a given moment, a SC under pressure from the circumstances would opt to impose general obligations, with the aim to break the tough opposition of a significant group of States to accept certain compromises. However, the international legal order is based on State consent, as a corollary of an international society made up of independent sovereign States. If the foundations are attacked, the whole edifice can collapse"[84].

The obligation to criminalise a list of conducts related to foreign terrorist fighters follows the same pattern that Resolution 1373. With one difference: while the financing of terrorism had already been enlisted by previous international conventions, the conducts enlisted in Resolution 2178 were not. In the foreign fighters' case, there was no previous practice of the international community, and the UNSC just created a new set of *ex novo* obligations for all States[85]. With Resolution 2178, the UNSC has affirmed again that it can invade sovereign domains such as criminal law, imposing general obligations "to address a particular crisis in a widespread way"[86].

4. CONCLUSIONS

Two of the most known reactions against the phenomenon of foreign terrorist fighters are revocation of citizenship and preventive criminal law. Both of them have the potential to disturb the rights and obligations of the individuals, as well as the delicate balance of international relations between States.

82 Alvarez, J.E. (2003), "Hegemonic International Law Revisited", *American Journal of International* Law 97 (4), pp. 873-888; Szasz, P.A. (2002), "The Security Council Starts Legislating", *American Journal of International Law* 96 (4) pp. 901-905; Tomuschat, C. (1993), "Obligations Arising for States Without or Against their Will", *Recueil des Court de l'Académie de Droit International* 241, pp. 344-346.

83 Lagrange, E. (2004), "Le Conseil de Securité des Nations Unies peut-il violer le droit international?", *Revue Belge de Droit International* 2, pp. 568-592; Happold, M. (2003), "Security Council Resolution 1373 and the Constitution of the United Nations", *Leiden Journal of International Law* 16, pp. 593-610.

84 Hinojosa Martínez, L.M. (2008), "The Legislative Role of the Security Council in its Fight Against Terrorism: Legal, Political and Practical Limits", *International and Comparative Law Quarterly* 57, pp. 333-360, p. 359.

85 Jiménez García, F. (2016), "Combatientes terroristas extranjeros y conflictos armados: utilitarismo inmediato ante fenómenos no resueltos y normas no consensuadas", *Revista Española de Derecho Internacional* 68 (2), pp. 277-301, p. 279.

86 Feinberg, M. (2016), *Sovereignty in the Age of Global Terrorism: The Role of International* Organizations. Brill Nijhoff. Leiden, p. 41.

Some States have recently adopted citizenship revocation as a measure to increase their national security against suspected terrorists. This measure does not have a basis on the international counterterrorism framework. It is undeniable that the power to revoke citizenship belongs to the State, under certain conditions. However, this power must be carefully exercised. First, because it strips individuals of their political and private life. Second, because in the case of suspected terrorists, it is a way to export security risks to countries, with probably less resources, which have accepted foreigners on their territory under the assumption that these individuals can be returned to their home States.

Contrary to revocation of citizenship, preventive criminal measures have a clear basis on recent instruments adopted by the UN, the EU and the Council of Europe. These measures can have an extreme negative impact on the rights on the individuals though. At the end, it will depend on the State's commitment with procedural safeguards. The obligation to ensure a sufficient criminal framework imposed on States by the UNSC is a step further in the role of this organ as a "universal legislator" in the fight against terrorism, interfering with criminal law as one of the traditional competences of the State.

Finally, it can be argued that the *raison d'être* of these responses against foreign terrorist fighters are radically incompatible. On the one hand, the goal of the international criminal law framework against terrorism, which includes UNSC Resolutions and UN sectorial conventions, is to deny "safe heavens" to terrorists by imposing on their States of nationality the obligation to establish jurisdiction and, at some point, to prosecute and punish them. On the other hand, revocation of citizenship is just a way to elude responsibility by exporting a national security risk. It is difficult to imagine how States can revoke citizenship on grounds of terrorism and, at the same time, respect international obligations to prevent and suppress terrorism.

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