



The Criminalization of Travelling for the purpose of terrorism

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An analysis in light of Article 49(1) of the European Union Charter of Fundamental Rights

by Anna Terrone

Introduction:

Since the 9/11 attacks, terrorism has continued to pose significant challenges at both the national and international level.¹ In the past decade, the phenomenon of

the so-called “foreign-terrorist fighters”² (FTFs), and the growing concern caused by FTFs returning from conflict zones, have in turn added a new dimension to the evol-

ving terrorist threat.³ From a legislative point of view, this resulted in new counter-terrorism measures being swiftly adopted by the European Union (EU) to align the existing

rules with those of the UN Security Council (UNSC) and the Council of Europe.⁴ As a result, Directive 2017/541 now constitutes the cornerstone of the EU’s response to counter-terrorism, especially in relation to FTFs.⁵ In accordance with Article 9, Member States are required to criminalize outbound and inbound travelling for the purpose of terrorism to “stem the flow of FTFs.”⁶ However, the broad delineation of the *actus reus*⁷ together with the difficulties in the establishment of the terrorist intent and purpose may in practice lead to arbitrariness in the application of the law.⁸ This could in turn undermine the principle of legality on the basis of which criminal offences and penalties are to meet a certain standard of clarity and precision for individuals to be able to regulate their conduct accordingly.⁹

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In accordance with Article 9, Member States are in fact required to criminalize outbound and inbound travelling for the purpose of terrorism

I. The principle of legality

The principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*) – as part and parcel of the constitutional traditions of the Member States – constitutes an essential element of the rule of law.¹⁰ Pursuant to Article 49(1) of the EU Charter of Fundamental Rights (CFR), criminal law provisions must

define and clearly delineate the offences and the relevant penalties which they attract.¹¹ This requirement will be satisfied to the extent that the individual concerned is able to infer “from the wording of the relevant rule and if need be, with the assistance of the courts, which acts and omissions will make him criminally liable.”¹² Further conditions with respect to the “qualitative requirements”¹³ of the law have been better delineated by the European Court of Human Right (ECtHR) in relation to Article 7(1) ECHR.¹⁴ In accordance with Article 52(3) CFR, Article 49 is in fact to have the same meaning and scope as the corresponding right guaranteed by the ECHR. Hence, it follows from the ECtHR’s established case-law that legal rules must be drafted in such a way as to be “accessible to the persons concerned and sufficiently

1 Francesca Galli, ‘The criminalisation of terrorism risk within the European Union: a suitable choice?’ in Clive Walker, Mariona Llobet Angl and Manuel C. Meli (eds), *Precursor Crimes of Terrorism* (Edward Elgar Publishing 2022).

2 OSCE/ODIHR, ‘Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework’ (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2018), <https://www.osce.org/odihr/393503> accessed 4 March 2020.

3 European Commission, ‘Proposal for a Directive on Combating Terrorism and Replacing Council Framework Decision 2002/ 475/JHA on Combating Terrorism’ COM (2015) 625 final.

4 European Parliament, ‘Briefing: EU legislation in progress’ (2017), <https://www.europarl.europa.eu/RegData/etudes/BRIE/> accessed 4 March 2020.

5 European Union Agency for Fundamental Rights (FRA), ‘Directive (EU) 2017/541 on combating terrorism — Impact on fundamental rights and freedoms’ (Luxembourg: Publications Office of the European Union 2021) <https://fra.europa.eu/en/publication/2021/combating-terrorism-rights-impact> accessed 4 March 2020.

6 Recital 12 of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA OJ L 88.

7 Actus reus refers to the act or omission that comprise the physical elements of a crime as required by statute. Actus reus includes only a voluntary affirmative act, or an omission (failure to act), causing a criminally proscribed result. https://www.law.cornell.edu/wex/actus_reus

8 Tarik Gherbaoui, ‘Criminalising Foreign Fighter Travel in Order to Prevent Terrorism in Europe: An Illegitimate Assault on Human Dignity?’ in Christophe Paulussen and Martin Scheinin (eds), *Human Dignity and Human Security in Times of Terrorism* (T.M.C. Asser Press 2020).

9 Valsamis Mitsilegas, ‘Counterterrorism and the rule of law in an evolving European Union: Plus Ca Change?’ (2020) *New Journal of European Criminal Law* 1.

10 Valsamis Mitsilegas, ‘Article 49 – Principles of Legality and Proportionality of Criminal Offences and Penalties’ in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart/Beck, Oxford and Portland OR 2014) and Case 303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007].

11 Case 634/18 *Criminal proceedings against JI* (2020).

12 Case 303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007], para 50.

13 *Scoppola v Italy* (no. 2) Application no. 10249/03 (ECtHR, 17 September 2009), para 99.

14 Christina Peristeridou, ‘The Principle of Legality in the Area of Freedom, Security and Justice’ in Sara Iglesias Snchez and Maribel Gonzlez Pascual (eds) *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press 2021).

foreseeable as their effects.”¹⁵ More specifically, provisions of criminal law are to be articulated in a clear and precise manner so that individuals can regulate their conduct accordingly.¹⁶ This corollary of the legality principle aims, in particular, to shield individuals from “arbitrary prosecution, conviction and punishment.”¹⁷ Aside from these substantive aspects, the principle of legality also requires laws to be enacted in a “transparent, accountable, democratic and pluralistic”¹⁸ way. In this respect, the adoption of counterterrorism policies on emergency grounds – for the most part by non-legislative actors – led to significant concerns being raised by scholars and relevant NGOs as to the effects of such norms on, *inter alia*, the principle of legality.¹⁹

II. Normative framework

In response to the heightened security threat posed by FTFs, the UNSC endorsed Resolution 2178 (2014). Based on Chapter VII of the UN Charter, the latter defines FTFs as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training [...]”^{20,21} On the basis of operative paragraph 6, all States Parties were thus required to criminalize such conduct as the travel or attempt to travel abroad, the funding and the organization or facilitation of such travels when committed for terrorist purposes. As it can be seen, by way of Resolution 2178, the UNSC imposed binding and far-reaching legal obligations on States to prevent the movement and activ-

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ities of FTFs.²² In response to the Security Council’s ‘legislative’ action, an Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism was adopted in 2015. In line with Resolution 2178, Article 4(2) of the Additional Riga Protocol similarly required measures to be taken by the Contracting Parties to outlaw the “travelling abroad for the purpose of terrorism.”^{23 24} Shortly after the terrorist attacks in Paris, a European initiative – in the form of Directive 2017/541 – was eventually put forward by the European Commission

to address the shortcomings of Framework Decision 2002/475/JHA in view of the evolving terrorist threat in the EU.²⁵ Directive 2017/541 significantly extended the categories of preparatory offences to cover *inter alia* the outbound and inbound travelling for the purpose of terrorism.²⁶ In light of the repercussions that such preemptive criminal law obligations might have on people’s lives, the absence of an impact assessment on the part of the Commission was highly criticized in that it allegedly promoted an “unbalanced legal response to terrorism.”²⁷

III. Criminalization of travelling and the principle of legality

On the basis of Article 9(1) of Directive 2017/541 all Member States were required to adopt the necessary measures to criminalize travelling for the purpose of terrorism where the intended purpose of such travel is to commit or contribute to the commission of a terrorist offence or participate in the activities of a terrorist group, or ultimately to provide or receive training for terrorism. The *actus reus* of the offence – i.e., the act

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15 *Coëme and Others v Belgium* Applications nos. 32492/96 (ECtHR, 22 June 2000), para 145 and *Scoppola v Italy* (no. 2) Application no. 10249/03 (ECtHR, 17 September 2009), para 99.

16 Stéphanie de Coensel, *Counter-Terrorism & Criminal Law A Normative Legitimacy Test of Terrorism-Related Offences on Expression, Information and Movement* (Maklu 2020).

17 *Scoppola v Italy* (no. 2) Application no. 10249/03 (ECtHR, 17 September 2009), para 92.

18 European Commission, ‘A New EU Framework to Strengthen the Rule of Law’ (Communication) COM (2014) 158 final. Valsamis Mitsilegas, ‘Counterterrorism and the rule of law in an evolving European Union: Plus Ça Change?’ (2020) *New Journal of European Criminal Law* 1.

19 Joint submission by Amnesty International, the International Commission of Jurists, and the Open Society Justice Initiative and the Open Society European Policy Institute on European Commission’s 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 <https://www.amnesty.org/en/documents/ior60/3470/2016/en/> accessed 5 March 2020.

20 UN Security Council Resolution 2178 (2014).

21 John A.E. Vervaele, ‘Foreign (Terrorist) Fighters: Combatants and/or Terrorists or Just Enemies?’ in Marc Engelhart and Sunčana Roksanđić Vidlička (eds) *Dealing with Terrorism Empirical and Normative Challenges of Fighting the Islamic State* (Duncker and Humblot 2019).

22 Lisa Ginsborg, ‘One step forward, two steps back: The Security Council, ‘foreign terrorist fighters’, and human rights’ in Manfred Nowak and Anne Charbord (eds) *Using Human Rights to Counter Terrorism* (Edward Elgar Publishing 2018).

23 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism No. 217 (2015).

24 Tarik Gherbaoui, ‘Criminalising Foreign Fighter Travel in Order to Prevent Terrorism in Europe: An Illegitimate Assault on Human Dignity?’ in Christophe Paulussen and Martin Scheinin (eds), *Human Dignity and Human Security in Times of Terrorism* (T.M.C. Asser Press 2020).

25 Alejandro Sánchez Frías, ‘The EU Directive on Combating Terrorism and the Criminalisation of Travelling’ (2018) 8 *European Criminal Law Review* 201.

26 Article 9 of Directive (EU) 2017/541.

27 Meijers Committee, ‘Note on a Proposal for a Directive on combating terrorism’ (CM1603 2016), 2.

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of travelling abroad – constitutes as such a perfectly legal behavior which is, however, to be condemned when an intended terrorist purpose can be established.²⁸ In the absence of “distinctively illegal objective elements”²⁹, the terrorist intent and purpose will thus play a central role in distinguishing lawful activities from crimes.³⁰ Hence, in the interests of crime prevention, criminalization appears to be substantially based on mere thoughts and beliefs rather than on culpable conduct.³¹ In practice, however, the construction of the intent often proves to be rather challenging for the prosecutors to the extent that a person’s background, religious belief, or ideology might in turn influence such an assessment.³² In the field of counter-terrorism, the notions of ‘risk’ and ‘dan-

ger’ may thus severely affect the criminalization of offences related to terrorist activities.³³ Hence, the broad scope and the lack of clarity in the formulation of the offence pose significant challenges to the principle of legality, thereby increasing the risk of arbitrary and discriminatory results on the part of the public authorities.³⁴ This is even more true if one considers that – on the basis of Article 13 – it will not be necessary to establish a link between the travel *per se* and any other offence under Directive 2017/541, or that a terrorist offence is actually committed.³⁵ The criminalization of conduct at such an early stage – and in the absence of any concrete harmful act or endangerment – may ultimately lead to unforeseeable consequences for the individuals concerned and to “over-

28 John A.E. Vervaele, ‘Terrorism and Anticipative Criminalization. Ius poenali sine limite?’ in Marc Engelhart and Sunčana Roksanđić Vidlička (eds) *Dealing with Terrorism Empirical and Normative Challenges of Fighting the Islamic State* (Duncker and Humblot 2019).

29 European Union Agency for Fundamental Rights (FRA), ‘Directive (EU) 2017/541 on combating terrorism - Impact on fundamental rights and freedoms’ (Luxembourg: Publications Office of the European Union 2021), page 34 <https://fra.europa.eu/en/publication/2021/combating-terrorism-rights-impact> accessed 4 March 2020.

30 Niovi Vavoula, ‘Prevention, Surveillance, and the Transformation of Citizenship in the ‘Security Union: The Case of Foreign Terrorist Fighters’ (2018) Queen Mary School of Law Legal Studies Research Paper No. 293/2018.

31 Tarik Gherbaoui, ‘Criminalising Foreign Fighter Travel in Order to Prevent Terrorism in Europe: An Illegitimate Assault on Human Dignity?’ in Christophe Paulussen and Martin Scheinin (eds), *Human Dignity and Human Security in Times of Terrorism* (T.M.C. Asser Press 2020).

32 European Union Agency for Fundamental Rights (FRA), ‘Directive (EU) 2017/541 on combating terrorism — Impact on fundamental rights and freedoms’ (Luxembourg: Publications Office of the European Union 2021) <<https://fra.europa.eu/en/publication/2021/combating-terrorism-rights-impact>> accessed 4 March 2020.

33 Tarik Gherbaoui, ‘Criminalising Foreign Fighter Travel in Order to Prevent Terrorism in Europe: An Illegitimate Assault on Human Dignity?’ in Christophe Paulussen and Martin Scheinin (eds), *Human Dignity and Human Security in Times of Terrorism* (T.M.C. Asser Press 2020).

34 Meijers Committee, ‘Note on a Proposal for a Directive on combating terrorism’ (CM1603 2016), 2.

35 Antonio Caiola, ‘The European Parliament and the Directive on combating terrorism’ (2017) 18 ERA Forum 409.



criminalization.”³⁶ Therefore, the criminalisation of terrorist travel in such abstract, unpredictable, and possibly discriminatory ways cannot arguably be reconciled with the principle of legality as enshrined in Article 49(1) CFR.

Conclusion and room for improvement

In view of the growing threat posed by FTFs, a renewed ‘securitization’ impetus led to the strengthening of counter-terrorism legislation on a global level.³⁷ However, within such a logic of prevention, the anticipative criminal in-

tervention, together with an excessively broad and unclear formulation of the offence, may have caused inconsistencies with the principle of legality.³⁸ An otherwise lawful activity – i.e., travelling abroad – may in fact turn into a criminal offence where a terrorist purpose can be established. In this context, the risk exists that such terrorist intent may arbitrarily be inferred from stereotypical elements as for example the person’s origin, religious background, or belief resulting in the notion of ‘danger’ essentially guiding criminalization.³⁹ Hence, in light with what has been suggested by many scholars, defence lawyers and independ-

ent organizations, outbound and inbound travelling for the purpose of terrorism should be criminalized under strict criteria and only to the extent that the intent required as to the terrorist purpose can clearly be established on the basis of objective and distinct



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factual evidence.⁴⁰ In this way, the risk of arbitrary prosecution and punishment could significantly be averted. Furthermore, the offence at hand should be worded with greater clarity and precision to en-

sure a close enough nexus between the prohibited conduct and the potential terrorist offence.⁴¹ This appears to be essential to strengthen the foreseeability of the law so that individuals can ultimately

predict whether their actions will be lawful or not. If these elements were to be considered, the demands of the legality principle with respect to Article 9 of Directive 2017/541 could be met more distinctly.



Outbound and inbound travelling for the purpose of terrorism should be criminalized under strict criteria



ABOUT THE AUTHOR

Anna Terrone holds an LL.B in European Law from Maastricht University and an LL.M in European Criminal Law from Utrecht University. She is working at the European Commission as a ‘Blue Book’ trainee in the Procedural Criminal Law department. Anna recently completed a three-month internship at UNICRI in the Public Information Unit.

³⁶ Valsamis Mitsilegas, ‘Counterterrorism and the rule of law in an evolving European Union: Plus Ça Change?’ (2020) *New Journal of European Criminal Law* 1, page 11.

³⁷ Valsamis Mitsilegas, ‘European Criminal Law and the Dangerous Citizen’ (2018) 25(6) *Maastricht Journal of European and Comparative Law* 733.

³⁸ Tarik Gherbaoui, ‘Criminalising Foreign Fighter Travel in Order to Prevent Terrorism in Europe: An Illegitimate Assault on Human Dignity?’ in Christophe Paulussen and Martin Scheinin (eds), *Human Dignity and Human Security in Times of Terrorism* (T.M.C. Asser Press 2020).

³⁹ European Union Agency for Fundamental Rights (FRA), ‘Directive (EU) 2017/541 on combating terrorism — Impact on fundamental rights and freedoms’ (Luxembourg: Publications Office of the European Union 2021) <<https://fra.europa.eu/en/publication/2021/combating-terrorism-rights-impact>> accessed 4 March 2020.

⁴⁰ Meijers Committee, ‘Note on a Proposal for a Directive on combating terrorism’ (CM1603 2016), 2.

⁴¹ Joint submission by Amnesty International, the International Commission of Jurists, and the Open Society Justice Initiative and the Open Society European Policy Institute on European Commission’s 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 <<https://www.amnesty.org/en/documents/ior60/3470/2016/en/>> accessed 5 March 2020.