



HIGHLIGHT

THE PROPOSAL FOR A NEW DIRECTIVE ON COUNTERING TERRORISM: TWO STEPS FORWARD, HOW MANY STEPS BACK?

ASIER GARRIDO MUÑOZ*

KEYWORDS: terrorism – foreign terrorist fighters – harmonisation of criminal offences – terrorist financing – victims – terrorist training.

Since the 9/11 attacks, the harmonisation of national legislations has been one of the yardsticks in the efforts made by the EU to fight terrorism. The landmark Framework Decision 2002/475/JHA on combatting terrorism (amended once in 2008)¹ established for the first time a common European definition of terrorism and a list of preparatory acts that Member States were obliged to implement in their national legal orders.² Notwithstanding the merits of the Framework Decision, the challenge posed by the so-called *foreign terrorist fighters* (FTF) has called for new measures specifically addressed to tackle this evolutionary threat. In particular, it is necessary to effectively criminalise the travel of individuals to receive terrorist training as well as the dissemination of propaganda and the interaction with potential recruits through the Internet, especially after the adoption by the UN Security Council, Resolution 2178 of 24 September 2014, UN Doc. S/RES/2178 (2014) and the Additional Protocol (CETS No. 217) to the Council of Europe Convention on the Prevention of Terrorism.³

* Law clerk, International Court of Justice, a.garrido@icj-cij.org. The views set out in this Highlight are exclusively those of the author and do not necessarily reflect the views of the International Court of Justice.

¹ Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism.

² Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

³ See A. GARRIDO MUÑOZ, *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*, in *European Papers – European Forum, Highlight* of 16 april 2016, 2016, p. 349-351, www.europeanpapers.eu.

The proposed Directive is based on two main pillars: the definition of new forms of terrorism in order to overcome the gaps of the existing Directive and the protection of victims of terrorism.⁴

As to the new forms of terrorism, the proposal introduces the following new forms of conduct:

- *Receiving terrorist training* (Art. 8): the proposal not only covers providing training, but also receiving it. According to the Commission's explanatory report, this provision will facilitate the persecution of those acting collectively or alone, for instance "by attending a training camp run by a terrorist association or group, or through various electronic media, including through the Internet".

- *Travelling abroad for terrorism* (Art. 9): this provision is intended to criminalise the act of travelling to another country, if it can be demonstrated that the intended purpose of the travel is to commit a terrorist offence.

- *Organising or otherwise facilitating traveling abroad for terrorism* (Art. 10).

- *Terrorist financing* (Art. 11): this provision requires Member States to criminalise the provision of funds in relation to all the forms of conduct envisaged in the Directive, including the new forms of terrorism regulated in previous paragraphs. In accordance with Art. 15, it is not required that the offence is actually committed or to establish a link with to a specific terrorist offence or offences related to terrorist activities.

- *Aiding and abetting in relation to travelling for the purposes of terrorism* (Art. 16).

- *Jurisdiction and prosecution* (Art. 21). The proposed Directive provides that Member States should establish jurisdiction for the offence of providing training for terrorism as in Art. 7. According to the Commission's explanatory report, "[t]his especial provision is necessary to ensure that the offence can be effectively prosecuted as regards those (typically) non-EU nationals that are providing training for terrorist purposes".

As indicated above, the second pillar of the proposed Directive is the protection of victims of terrorism. This part has to be considered in light of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.⁵ Two main measures are envisaged: the provision of professional emergency assistance and long-term psychological assistance (Art. 22) and access to information (Art. 23).

The proposed Directive is overdue. While the former Framework Directive on combating terrorism already contained provisions that could potentially address certain terrorist acts typical of FTF, the aforementioned measures adopted by the UN Security Council and the Council of Europe called for a reform of the current legislative frame-

⁴ Commission 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.

⁵ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. This is the case, in particular, of the definition of *victim of terrorism* which is based on the definition enshrined in Art. 2, para. 1, let. a), of that Directive.

work on the definition of terrorism and the protection of victims' rights. At present, the text, which is to be adopted under the ordinary legislative procedure, is under discussion by Council preparatory groups and the European Parliament.⁶ Once adopted, Member States will have 12 months to implement the Directive in their legal systems. It is to be expected that the text be adopted in the shortest time possible.

As any measure relating to the fight against terrorism, the proposed Directive may be a source of undue restrictions of human rights. The modes of conduct regulated may potentially affect the freedom of movement of individuals inasmuch Member States shall criminalise travelling with the aim to "participat[e] in the activities of a terrorist group [...] or the providing [*sic*] or receiving of training for terrorism [...]". An additional problem is the all-encompassing definition of the crime of terrorist financing, whose application may make difficult the humanitarian work of actors engaged in conflicts in which a terrorist group is a party. The latter problem, which is particularly relevant now that some European leaders have embraced the *war on terror* rhetoric, is exacerbated by the fact that the proposed Directive does not explain how it relates to International Humanitarian Law (IHL).⁷

The collateral effects of the fight against terrorism are possible in European societies only if Member States provide sufficient procedural safeguards in order to challenge restrictive measures. As far travel restrictions are concerned, the Commission's explanatory report on the proposed Directive evokes the possibility to justify such restrictions under the safeguard clauses of Directive 2004/38/EC on EU freedom of movement and residence.⁸ How Member States will keep such a delicate balance, this is still to be seen.

⁶ See EUR-Lex, Procedure 2015/0281/COD, www.eur-lex.europa.eu.

⁷ For a brief account on the relationship between IHL and EU criminal law in the current Framework Directive on combating terrorism, see A. GARRIDO MUÑOZ, *Not Only a Matter of Lex Specialis: the European Union and Its Two Definitions of Terrorism*, in *EJIL: Talk!*, 1 December 2014, www.ejiltalk.org

⁸ 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.

