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Foreign Terrorist Fighters: analysis of an open question

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ABSTRACT

L'11 settembre 2001 dei militanti associati ad al-Qaeda dirottarono quattro aerei per attuare attacchi suicidi di carattere terroristico nel territorio degli Stati Uniti: dopo quasi due secoli gli Stati Uniti subivano un attacco. Questo evento, oltre ad avere un significato simbolico e storico, ha determinato importanti cambiamenti di carattere politico, culturale, economico e religioso[1].

Analogamente, dal 2014 l'Europa ha assistito ad una serie di violenti attacchi terroristici, condannati dai governi di tutto il mondo. Questi attacchi hanno causato da un lato gravi danni materiali, mentre dall'altro, avendo come obiettivo qualsiasi tipo di evento o luogo, non solo quelli più frequentati da turisti, rendono la percezione degli atti terroristici quasi una quotidianità, piuttosto che un tragico fatto isolato[2].

Il ruolo guida di queste operazioni risiede nelle mani di musulmani affiliati ad organizzazioni terroristiche. Negli ultimi anni, il conflitto in Siria e Iraq ha spronato musulmani da tutto il mondo a raggiungere il Medio Oriente con il fine di unirsi alle forze di opposizione Siriane oppure a gruppi terroristici[3]: viene definito, infatti, *foreign fighter* chi si sposta in un altro Stato, a cui non appartiene, al fine di partecipare ad un conflitto. Il fenomeno dei *foreign fighters* non è di per sé nuovo, come provano eventi come la guerra civile spagnola o l'invasione Sovietica del 1989, ma ha acquisito una nuova dimensione ed importanza dopo gli attacchi dell'11, ed in particolar modo negli ultimi anni. Lo spostamento di *foreign fighters* da Stati

[1] V. ALESSANDRELLI, *L'11 settembre ed il cambiamento globale,* Isituto di Politica, 9 September 2011, available at http://www.istitutodipolitica.it/wordpress/2011/09/09/857/, visited on 15/02//2017

[2] M. BIRNBAUM, Europe may face a grim future with terrorism as a fact of life, 24 December 2016, The Washington Post, available at https://www.washingtonpost.com/world/europe/after-berlin-market-attack-europe-faces-grim-future-with-terrorism-as-fact-of-life/2016/12/23/6f2f6536-c84c-11e6-acda-59924caa2450_story.html?utm_term=.ef5bbf9ac53b, visited on 10/02/2017

[3] B. VAN GINKEL, *Prosecuting Foreign Terrorist Fighters: What Role for Military?*, ICCT Policy Brief, May 2006, p.3

occidentali verso il Medio Oriente oltre a non avere precedenti, continua ad aumentare notevolmente, senza cenni di arresto. Alla luce di tutto ciò, come testimoniano peraltro molti studi, diventa più evidente come il pericolo del fenomeno del cosiddetto *blowback* si faccia più reale che mai: dopo aver ricevuto addestramento in Medio Oriente, esiste la possibilità che i *foreign fighters* tornino in Europa con il fine di attuare attacchi terroristici oppure di creare nuove cellule. Diversamente dal fenomeno storico, i *foreign fighters* diretti in Siria ed Iraq sono ben consapevoli delle attività terroristiche perpetrate da gruppi come ISIL o al-Nusra[4]: sono da definirsi, infatti, *Foreign Terrorist Fighters*, i combattenti che si uniscono ad un'organizzazione terrorista oppure sono mossi da motivazioni di terrorismo.

Questo fenomeno non é nuova, bensì ha subito un'evoluzione durante gli ultimi anni. In questo senso, il nuovo processo di radicalizzazione e reclutamento riveste un ruolo importante: grazie all'utilizzo dei social media e delle moderne tecnologie di comunicazione, il messaggio può raggiungere qualsiasi parte del mondo. Ad esempio, l'ISIS ha diffuso tramite internet video testimonianti le atrocità commesse da lui commesse, come decapitazioni oppure crudeli esecuzioni di prigionieri.

Nonostante ciò, il fenomeno dei FTFs rimane poco studiato, soprattutto a causa della mancanza di dati, che non permette di stabilire un chiaro e ben definito profilo dei combattenti. Altresì, il termine stesso ha numerose interpretazioni. Nella sua definizione il Consiglio di Sicurezza delle Nazioni Unite include anche gli atti che i FTFs compiono durante i conflitti armati. Sebbene ogni atto terroristico sia illecito secondo il Diritto, il rapporto tra FTFs e Diritto Internazionale Umanitario non è chiaramente definito e il coinvolgimento dei FTFs nei conflitti armati solleva diverse questioni: in prima istanza la posizione di questa figura all'interno del diritto internazionale umanitario e, in secondo luogo il ruolo degli atti e dei gruppi terroristici all'interno dello stesso.

Dato che il fenomeno dei FTFs è considerato una minaccia per la pace e la sicurezza, sia a livello nazionale sia internazionale sono state attuate misure volte a preventive e

[4] T. SINKKONEN, *War on two fronts, the EU perspective on the Foreign Terrorist Fighters of ISIL*, FIIA briefing paper 166, January 2015, p. 3-4

contrastare il fenomeno. Nel 2014, il Consiglio di Sicurezza delle Nazioni Unite ha adottato due Risoluzioni contro i *Foreign Terrorist Fighters*. Non solo le Nazioni Unite, ma anche l'Unione Europea ha iniziato ad affrontare questa minaccia, che è ormai diventata un tema prioritario. Da entrambi le parti, però, sono state sollevate diverse critiche alle contromisure portate avanti per combattere i FTFs. La motivazione principale che soggiace alle critiche dipende dall'impatto che hanno queste misure nei confronti dei diritti umani e la reale possibilità che queste ultime possono minare i diritti umani fondamentali.
Questa tesi punta ad analizzare il regime legale attorno alla figura dei FTFs, il loro delicato rapporto con il Diritto Umanitario Internazionale e le misure adottate contro il terrorismo al fine di evidenziare come questa sia ancora una questione aperta e debba essere meglio affrontata.

INTRODUCTION

On 11 September 2001, militants associated with al-Qaeda hijacked four airplanes and carried out unprecedented suicide terrorist attacks towards the United States: this was the first attack to United States since almost two centuries. The event, which had both a symbolical and historical significance, has determined important changes from a political, cultural, economical and religious point of view[5].
Similarly, since 2014 Western Europe has witnessed a wave of violent terrorist attacks that have been condemned by governments worldwide. These attacks have on one side caused massive damaged, while, on the other hand, targeting any kind of events or locations, not only the most famous or touristic ones, terrorist attacks led to the

[5] See *supra* note 1

perception of terrorist acts as a fact of life, rather than tragic isolated events[6].

Muslims who have joined terrorist organizations held the leading role of these operations. In recent years, the conflict in Syria and Iraq has motivated Muslims from all over the world to travel to Middle East aiming to join the Syrian opposition forces or terrorist organizations[7]: people to travel to foreign countries to fight a conflict are defined as foreign fighters. The foreign fighters phenomenon is not new per se, as proved by the Spanish civil war or the 1989 Soviet invasion, but it has acquired a new dimension after 9/11 attacks and its importance has increased in the years. The unprecedented flow of foreign fighters to Middle East from Western Countries is increasingly growing. Against this background, as recent studies proved, the risk of the so-called blowback phenomenon is real: after being trained in Middle East, foreign fighters could back to Europe to perpetrate terrorist attacks or set up new terrorist cells. Differently from the historical actors, fighters leaving for the Syria and Iraq conflict are aware of the terrorist activities perpetrated by groups as ISIL or al-Nusra[8]: they are referred as Foreign Terrorist Fighters since they join terrorist organizations or have terrorist purposes.

As stated before, this phenomenon is not new, but it has experienced an evolution during the last few years. The new process of radicalization and recruitment is playing a fundamental role in this background: aiming to reach any part of the world, this process is occurring via social media platforms and modern communication technologies in general. For instance, ISIS loads on Internet videos that testify its violent acts, from beheadings to cruel executions.

However, the phenomenon of FTFs remains understudied, mostly due to the lack of data that does not allow establishing a clear and well-defined profile of the fighters. Furthermore, the term itself is variously understood. In its definition, UN Security Council includes also FTFs' acts carried out during armed conflicts. Even if any terrorist act is unlawful, the relationship between FTFs and International

[6] See *supra* note 2

[7] See *supra* note 3

[8] See *supra* note 4

Humanitarian Law is not clearly defined and the involvement of FTFs in armed conflicts raises several questions, among all the status of FTFs and terrorist acts or groups under IHL.

Since the phenomenon of FTFs is considered a threat to peace and security, preventive and counteract measures have been adopted both at national and international levels. In 2014, United Nations Security Council adopted two Resolutions against Foreign terrorist Fighters. On the other side, European Union has started to face this threat and to treat it as a priority as well. On both sides, many critiques have been made to the countermeasures carried out to combat FTFs. The main reason lays on the high impact they may have on human rights and the effective possible risk of undermining them.

Against this complex background, this thesis analyzes the existing legal framework around the FTFs, their fragile relationship with IHL and counter-terrorism law in order to highlight that this is still an open issue and has to be better addressed.

CHAPTER I:

ORIGIN OF THE PHENOMENON

SUMMARY: 1.1. Isis, Isil, Is or Daesh - 1.2. Al-Qaeda and Jabhat al-Nusra - 1.3. The blowback phenomenon

While most media connect the term foreign fighters to the Islamist insurgent, over the past few centuries a large number of individuals joined fights outside their country due to political or religious reasons. This reveals immediately that one of the main problems faced on researches about foreign fighters is the lack of conceptual clarity. In fact, the research is compromised by the scarcity and unreliability of data and information: the term foreign fighter itself is "not an established term in political science literature"[9], and the studies are mostly limited to terrorism studies.[10] Only recently the phenomenon of foreign fighter was perceived *per se*. A first mention of foreign insurgency is provided on 21st March 1988 by *The Times* of London[11], while during the following years the newspapers began to compare it to the prior transnational insurgency. The two circumstances brought the term into the public consciousness and highlighted the difference between the foreign fighters to other transnational insurgents: the battle of Kunduz on November 27th, 2001 and the invasion of Iraq[12]. After these events the term appeared increasingly in the major world newspapers.

Researchers have proposed several definitions of these fighters[13]. For example, David Malet's definition is "non-citizens of conflict states who join insurgencies during civil war"[14]. A more accurate definition was provided by Hegghammer who defines foreign fighter as "an agent who (1) has joined, and operates within the confines of, an insurgency, (2) lacks citizenship of the conflict state or kinship links to its warring

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[9] T. HEGGHAMMER, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad* in *International Security*, Vol. 35, No. 3, 2010, p.54

[10] GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS. *Foreign Fighters under International Law*, briefing No. 7, 2014, p.7, available at http://psm.du.edu/media/documents/reports_and_stats/think_tanks/geneva_academy_foreign-fighters.pdf, visited on 28/01/2017, p.5

[11] The article was referring to a mujaheddin's victory during the Afghan War.

[12] D. MALET, *'Why Foreign Fighters? Historical Perspectives and Solutions'*, Orbis Journal of Foreign Affairs, Vol. 54, No. 1, 2010, p.108

[13] GENEVA ACADEMY, *supra* note 10, p.5

[14] D. MALET, *supra* note 12, p. 108

factions, (3) lacks affiliation to an official military organization and (4) is unpaid"[15]. The two definitions aim to ensure a distinction between foreign fighters and other actors. In fact, State governments may hire also mercenaries or private military and security companies, whose recruitment is allowed according their law and whose motivation is material gain[16], since states could "not rely on chance"[17]: they rely on professional armies, not on foreign fighters. Therefore, even if in some groups foreign fighters are generously paid[18], they could not be compared to other figures, such as mercenaries, whose role is regulated by International Law.

According to Mendelsohn, "foreign fighters are found in asymmetric conflicts in which at least one side of the conflict is a non-state actor, usually a guerrilla force or another irregular outside group"[19]. In fact, despite the recent attention focused on Islamist groups, the foreign fighters phenomenon is "neither new or uniquely Islamic"[20]. Transnational insurgencies existed since centuries: the greatest example that History provides us is the Spanish Civil War (1936–1939). A *coup d'état* led by General Franco gave to the opposite sides an opportunity to seek for transnational support: one the one side the communist fighting again fascism, on the other Catholics volunteering against communism.

If the leading argument during the Spanish Civil War was the defense of political ideas, the leading one during the Afghanistan War (1979-1989) was defending religion against Soviet Communism. The first Arabs who came to Afghan in order to support the war were humanitarian workers of the Hijaz-based Islamic charities, not fighters[21]. In this frame, an important role was played by Abudallah Azzam, "a scholar of Islamic jurisprudence born in West Bank Transjordan in 1941 and recruited in the

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15 T. HEGGHAMMER, *supra* note 9, p.58

16 GENEVA ACADEMY, *supra* note 10, p.5

17 B. MENDELSOHN, *'Foreign Fighters – Recent Trends'* in *Orbis,* vol. 55, no.2, 2011, p.190

18 *Ivi*, p.7

19 *Ivi*, p.190

20 D. MALET, *supra* note 12, p. 97

21 T. HEGGHAMMER, *supra* note 9, p.85

mid-1950s by a teacher to join the local branch of the Muslim Brothers"[22]. Since he strongly sustained the "need to retake control of Muslim lands"[23], he supported the mujaheddin during the Afghan conflict from Pakistan, where he moved after the Soviet invasion. Disappointed by the Brothers[24], Azzam tried to attract volunteers who shared his view of Islam. Two factors allowed his influence to be more pervasive: his status, which lent his writing more credit, and his links to the pan-Islamist community, which allowed him to access to many resources and recruitment arenas [25]. Furthermore, after the withdrawal of the Red Army, the mujaheddin were refused to entry or persecuted by home countries after the Afghan War, despite History taught us that the majority of foreign fighters return to their previous normal life. Therefore, we can assume that the Afghan resistance during the 1980s gave rise to the foreign fighters phenomenon of our time[26]. Hegghammer presents some hypotheses without succeeding that aim to explain why Afghanistan attracted many foreign fighters, while other insurgencies did not[27]. In his opinion, it was the "emergence of a qualitatively new ideological movement or subcurrent of Islamism that did not exist before 1980s"[28]: since the *umma*, the Muslim nation, is threatened, it needs to be protected and set free.

A study conducted by Malet draws the attention to the present situation because "in modern history, transnational insurgencies stemmed from various ties of ethno-nationalism and ideology, but contemporary foreign fighters all share the same religious identity"[29]. In fact, the current war in Iraq and Syria has shown the so-called "global call", a globalized reach for foreign fighters[30]. As in the past, individuals join

[22] D. MALET, *supra* note 12,p.105

[23] *Ibidem*

[24] They preferred to send weapons and humanitarian aid instead of mujaheddin.

[25] T. HEGGHAMMER, *supra* note 9., p. 86

[26] B. MENDELSOHN, *Op. cit.,* p.190

[27] T. HEGGHAMMER, *supra* note 9, p.71

[28] *Ibidem*

[29] D. MALET, *supra* note 12, p. 109

[30] S. FELICIAN BECCARI, *Who are the Foreign Fighters?*, The European Post, 5th November 2015

such movements, which seem to have the solution to their fears, in order to fight the isolation and the brake of communal ties caused by modernization and immigration. Malet explains that

> unprecedented waves of emigration by Muslims to the West deterritorialized the ummah, reinventing what it means to be Muslim and what constitute Muslim lands. Also, Wahhabism and other forms of strict Islam are now offered through the internet and global network of madrassah, challenge traditional cultural rituals as un-Islamic, leaving transnational Islamic identity as the only alternative between shunning, alien West and nearly equally closed former home societies. For this reason, much neo-fundamentalist violence, and an increasing number of foreign fighters, hail from Western countries rather than the Middle East[31].

Against this background, it became important to understand the process of radicalization and recruitment of foreign fighters as well. A study looking closely into cases of Dutch jihadists foreign fighters[32] draws key observations that aim to partly fill the lack of knowledge among the radicalization and the involvement in a violent jihad. As Hegghammer states there is no univocal definition of radicalization, but "it is usually understood as the process by which an individual acquires the motivation to use violence"[33]. Malet states that the recruiting message is always focused on the defense of the community instead of the individual gain[34]. The recruitment model he describes could fit a wide range of transnational insurgencies since the recruiters' *modus operandi* is the same. As he stated, it could be compared to "Madison Avenue advertising executives: Identifying a target audience, creating emotive responses over matters that may have previously seemed of little import, and re-framing the message

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[31] *Ibidem*

[32] D. WEGGEMANS, E. BAKKER, P. GROL, *Who are they and why do they go? The radicalization and preparatory processes of Dutch jihadist foreign fighters* in *Perspectives on Terrorism*, vol. 8, no. 4, 2014

[33] T. HEGGHAMMER, *Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting* in *American Political Science Review*, Vol. 107, No. 1, 2013, p.2

[34] D. MALET, *supra* note 12, p. 100

when initial approaches do not meet goals"[35].

Since the recruiters who had experience in the jihadi battlefield are under the watchful eyes of the states, the physical recruitment is decreasing[36]. On the other hand, the media has gained a fundamental role in the recruitment process: "from running production companies, releasing statements and video, translating messages in English, and even appearing in video appealing to Western Muslims or warning Western governments"[37]. For example, also the beheadings of Western journalists by IS have reached a wide audience successfully transmitting his violent message[38].

Even if there are some similarities in these studies, the researchers underline the complexity and dissimilarity of the process of recruiting[39]. However, it is to highlight that according to an Hegghammer's research "most Western jihadists prefer foreign fighting, but a minority attacks at home after being radicalized, most often through foreign fighting or contact wit a veteran. […] militants usually do not leave intending to return for a domestic attack, but a small minority acquire that motivation along the way and become more effective operatives on their return"[40].

In fact, "with the ever rising numbers of foreign fighters in Syria who may some day return, European countries are heading for a serious security problem as most countries do not have the capacity to track or pursue all possible returnees"[41]. However, according to Hegghammer's research the jihadists prefer to leave (or at least try to) the West in order to fight somewhere else: only one in nine comes back, according to his study. This choice could be explained not only "because it is easier"

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[35] *Ivi*, p. 101

[36] B. MENDELSOHN, *supra* note 17, p.199

[37] *Ibidem*

[38] J. DE ROY VAN ZUIJDEWIJN, *The Foreigners' Threat: What History Can (not) Tell Us* in *Perspective on Terrorism*, Vol.8, n.15, 2014, p.66

[39] D. WEGGEMANS, E. BAKKER, P. GROL, *supra* note 32 , *p.107*

[40] T. HEGGHAMMER, *supra* note 33, p.1

[41] D. WEGGEMANS, E. BAKKER, P. GROL, *supra* note 32, p. 100

and "because they need training"[42], but also because they intend the foreign fighting as more legitimate than the domestic one[43].

The Western media are focusing on the militants from Europe and the US, but recent studies have shown that most of foreign fighters in Iraq and Syria are Arabs[44]. In 2014, only about 3,000 foreign fighters were from Western Countries on a total amount of 11,000-12,000[45]. The recruiting scenario is similar from the Western one: recruiters "rely on both online and offline radicalization and recruitment techniques"[46].

Prior to 9/11, they were highly trained, while in recent years the number of "foot soldiers"[47] has increased: the experienced one are more engaged in planning. This change could be explained as following

> "the experience in Iraq indicates that these are often one-time, one-event fighters. This development is not simply a reflection of the growing popularity of suicide bombings and the view of jihadi leaders that this is their most effective weapon, but can also be attributed to the diminishing numbers of experienced mujahideen and the difficulties of properly training new volunteers to carry out their roles."[48]

This could explain what Mendelsohn suggests by saying "foreign fighters may be more useful when it comes to terrorism"[49].

In the last few years, the foreign fighters mobilization for Syria has become notable: the international consulting firm Soufan Group estimated that in June 2014 2,500 of

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[42] T. HEGGHAMMER, *supra* note 33, p. 6

[43] Hegghammer identifies with "domestic fighter" an individual who perpetrates (or tries to) violence anywhere in the West, while as "foreign fighter" someone who leaves (or tries to) the West in order to fight outside it.

[44] M. HASHIM, *Iraq and Syria: who are the Foreign Fighters?*, BBC News, 3 September 2014

[45] *Ibidem*

[46] *Ibidem*

[47] Fighters treated as expendable in the conflict, mainly as suicide bombers. Such individuals do not need any specific skill, but only a strong willingness and devotion to the cause.

[48] B. MENDELSOHN, *supra* note 17, p.197

[49] *Ibidem*

12,000 fighters who joined the conflict in Syria came from Western countries[50]. Due to the several armed groups composing the Syrian armed opposition, it became very difficult to verify to which group the foreign fighters joined, but according to the International Centre for Study of Radicalization 55% of them joined the Islamic State[51]. In any case, after the proclamation of the caliphate in June 2014[52], the number of individuals who joined IS had increased[53]. In fact, even the phenomenon of foreign fighters is not new, this topic has becoming increasingly important for the Western countries since "both the scale of the issue in the context of the Syrian conflict and the speed with which the numbers have risen have caught international security authorities off guard"[54]. Moreover, a recent study highlights that the number of foreign fighters in Syria and Iraq exceeds the total number of foreign fighters of the Afghanistan War[55].

Against this background, it is important to analyze which groups in Iraq and Syria the foreign fighters aim to join.

1.1. ISIS, ISIL, IS OR DAESH

The English-speaking media and governments refer to the jihadist group that controls

[50] J. DE ROY VAN ZUIJDEWIJN, *supra* note 38, p.66

[51] GENEVA ACADEMY, *supra* note 10, p. 10

[52] At the end of June 2014 al-Baghdadi proclaimed a caliphate over the territories controlled by IS (large part of north-east Syria and north-west Iraq).

[53] GENEVA ACADEMY, *supra* note 10, p. 11

[54] T. KEATINGE, *Identifying foreign terrorist fighters: The Role of Public-Private Partnership, Information Sharing and Financial Intelligence*, The International Centre for Counter-Terrorism and RUSI 6, no. 6, 2015

[55] *Ibidem*

large part of Syria and Iraq with various names. UN and US officials refers to it with the acronym ISIL, "Islamic State in Iraq and the Levant"[56], even if the Arab acronym is Daesh (or Da'ish) as "al-Dawla al-Islamiya fil Iraq wa al-Sham[57]". Furthermore, while the acronym IS shortening the name to "Islamic State", another widely used term is ISIS, which stays for "Islamic State in Iraq and al-Sham" or "Islamic State in Iraq and Syria".

Only from June 2014, the group started to qualify itself as Islamic State, when it proclaimed itself a caliphate with Abu Bakr al-Baghdadi as its caliph[58]. Rapidly, ISIL became the most powerful jihadist group. Due to this reason, foreign fighters from all over the world have joined it. While al-Qaeda is pursuing the "far enemy", the United States, ISIL is focusing on the "near enemy", the heretical pro-Western corrupted States[59]. Furthermore, ISIL is giving credit to an ancient jihadist dream: to create a "dar el Islam", an Islamic State[60]. Against this background, it became clear how ISIL is spreading an almost mythological message to the Arabs, assuring a flawless place to live, which was too strong to resist[61].

1.2. AL-QAEDA AND JABHAT AL-NUSRA

As stated before, the majority of foreign fighters went to ISIL and only some of them joined other jihadist groups, especially Jabhat al-Nusra and al-Qaeda.

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[56] F. IRSHAID, *Isis, Isil, IS or Daesh? One group, many names*, BBC News, 2nd December 2015

[57] Al-Sham can be translated in various ways ("the Levant", "Greater Syria", "Syria" or even "Damascus").

[58] T. KEATINGE, *Op. cit.*, p.11

[59] M. GIRO, *La sfida che ci lancia lo Stato Islamico*, Limes, 29 November 2014

[60] *Ibidem*

[61] T. KEATINGE, *Op. cit.*, p.12

Al-Qaeda is a jihadist organization founded by Osama Bin Laden in 1988 and has perpetrated several terrorist attacks, both to civil and military targets, in several countries. On 2nd February 2014, al-Qaeda disaffiliated itself from ISIL[62]. This decision followed the decision of al-Baghdadi to extend "the Islamic State of Iraq into Syria and changing the group's name to the Islamic State of Iraq and al- Sham"[63].

On the other hand, the al-Nusra Front, the old name for Jabhat Fateh al-Sham[64], was a Syrian branch of al-Qaeda. This jihadist organization is fighting the Syrian government inside the Syria Civil War, aiming to found an Islamic State in the country. In July 2016, through Al Jazeer the al Nusra Front announced that the group would leave al-Qaeda in order to "remove any "pretext" for the United States and Russia to conduct airstrikes against the wider rebel movement while claiming they are targeting al-Nusra"[65].

United Security Council, NATO, European Union and various other countries designated all three groups as terrorist groups.

1.3. THE BLOWBACK PHENOMENON

The main fear among the Western countries is the so-called blowback phenomenon, which can be defined as following: "the fear is that foreign fighters with experience of handling weapons and explosives may plan and carry out terrorist acts on return to

[62] A. Y. ZELIN, *The War between ISIS and Al-Qaeda for Supremacy of the Global Jihadist Movement*, Research Notes No. 20, Washington Institute for Near East Policy, 2014, p. 3

[63] *Ibidem*

[64] Litterally, it means "Support Front for the People of the Levant".

[65] L. SLY, K. DEYOUNG, *Syria's Jabhat al-Nusra splits from al-Qaeda and changes its name*, The Washington Post, 28th July 2016

their home countries, or may set up new terrorist cells, recruit new members, or provide funds for terrorist acts or movements"[66]. As the CAGE's Research Director Asim Qureshi notes in his report "as the group Islamic State of Iraq and Shaam (ISIS) occupies further ground in Iraq and Syria, tensions increase around the world as the stability of international peace and security is brought into question"[67]: as many others, he argues that the threat of blowback is exaggerated and the counter-measures used to deal with this phenomenon are not proportional. In fact, according to a Hegghammer's study 1 out of 4 terrorist was a foreign fighter, but their involvement in the West with serious jihadist attacks has been limited[68].

As said before, the main fear of the Western states is that trained foreign fighters may return to their state of origin (or habitual residence) and carry out terrorist attacks "as a part of an externally-directed plot, and individuals who decide to launch an attack without being instructed to do so"[69]. The gravity of the threat is exemplified by several tragic events occurred in Europe during the last two years, from the attack on a Jewish museum in Brussels in May 2014 to the Paris Terrorist Attack in November 2015 and the incidents of this year, but the counter-measures applied by Western states, both at internal and international level, are very controversial and they could become counter-productive. The reason beyond this is that such threat cannot be faced with the common methods by Western countries [70].

In conclusion, as Hegghammer states, "foreign fighters constitute an intermediate actor category lost between local rebels on the one hand, and international terrorists, on the other"[71], but for what this thesis concerned, it is ultimately important to define what a Foreign Terrorist Fighter is. The most useful toll is the UN Resolution 2178, adopted on 24 September 2014, which defines the Foreign Terrorist Fighters as

[66] GENEVA ACADEMY, *supra* note 10, p. 3

[67] A. QURESHI, *Blowback – Foreign Fighters and the threat they pose*, CAGE Report, 2014, p.28

[68] J. DE ROY VAN ZUIJDEWIJN, *supra* note 38, p.66

[69] GENEVA ACADEMY, *supra* note 10, p.13

[70] S. FELICIAN BECCARI, *supra* note 30

[71] T. HEGGHAMMER, *supra* note 9, p.55

"individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving terrorist training, including in connection with armed conflict"[72]. It is clear that using such term UN formally associate foreign fighters with terrorist networks"[73]. This definition will be the one adopted for this thesis.

Ultimately, we can surely affirm that the security thread posed by FTFs and the struggle of identifying them are challenging the modern States. In June 2016, Albanian authorities communicated that a NATO Centre on Foreign Fighters will open within this year[74]. As the others worldwide, this Centre of Excellence trains and educates leaders and specialists from NATO member and partner countries on this new evolving topic. Hopefully, the foundation of such center will contribute to clarify the figure of the foreign fighters in the future.

[72] UN Security Council Resolution 2178, S/RES/2178 of 24th September 2014, preambular para.8

[73] GENEVA ACADEMY, *supra* note 10, p.2

[74] F. MEJDINI, *Albania to Host NATO Centre on Foreign Fighters*, Balkan Insight, 23 June 2016, available at http://www.balkaninsight.com/en/article/albania-will-host-nato-center-on-foreign-terrorist-fighters-06-23-2016, visited on 12/12/2016

CHAPTER II:

QUALIFICATION OF FOREIGN TERRORIST FIGHTERS IN INTERNATIONAL LAW

SUMMARY: 2.1. FTFs and IHL: FTFs as non-state actors involved in armed conflicts zone - 2.1.1. Overview of International Humanitarian Law - 2.1.2 International armed conflict - 2.1.3 Non-International armed conflict - 2.1.4 The status of FTFs under IHL - 2.2. FTFs and terrorism: FTFs' involvement in terrorist activities - 2.2.1 Attempts to define the concept of terrorism: a controversial issue in the international community - 2.2.2 War on Terror - 2.3 Overview of International Counterterrorism Law - 2.4 A fragile background for FTFs' terrorist actions

As discussed in the previous chapter, the definition of Foreign Terrorist Fighters is very controversial. After 9/11, the flow of foreign fighters to Islamic State in Syria and Iraq has become one of the biggest terrorist threats[75]. Foreign terrorist fighters recall some characteristics of mercenaries, but they could not be qualified with this status under IHL.

In order to face the problem, UN Security Council relies on "two resolutions that require states to take measures against 'foreign terrorist fighters'"[76]: UN Resolution 2170 of 15th August 2014 and Resolution 2178 of 24 September 2014. The second one provides a specific definition of foreign terrorist fighters:

> "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, and resolving to address this threat."[77]

UN Resolution 2178 definition of foreign terrorist fighters includes acts committed in connection to an armed conflict making "acts governed by IHL 'terrorist acts', without confining the term to acts prohibited by IHL"[78]. However, it could also be interpreted as if FTFs are "individuals with a certain terrorist purpose, whether they implement that purpose in peacetime countries or in the context of actual armed conflicts"[79]. According to this, the foreign terrorist fighters are always guided by a terrorist purpose, which means that an act committed in connection to an armed conflict without such purpose could not be classified under this Resolution[80]. This

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[75] GENEVA ACADEMY, *supra* note 10, p.7

[76] *Ibidem*

[77] UN Resolution S/RES/2178 (2014)

[78] GENEVA ACADEMY, *supra* note 10, p.42

[79] GLOBAL CENTER ON COOPERATIVE SECURITY, *Addressing the Foreign Terrorist Fighters Phenomenon from a European Union Perspective. UN Security Council Resolution 2178, Legal Issues, and Challenges and Opportunities for EU Foreign Security and Development Policy*, Goshen, December 2014, p. 10

[80] *Ivi*

shows how the lack of clarity in the definition could cause problems for both legislation and adjudication.

In this Resolution, as in the Resolution 2170 of 2014, the term 'foreign terrorist fighter' is formally associated with international terrorist networks. As the Geneva Academy briefing reports, "the perspective of international law, however, it is both simplistic and legally confusing to impose such an association, because different branches of international law govern armed conflict and the prevention and suppression of terrorism"[81]. The analysis of these two resolutions will be discussed deeply in the following chapter.

International Humanitarian Law identify two different types of armed conflict, the international and non-international one: an IAC refers to an armed conflicts opposing two or more States, while a NIAC is between governmental forces and non-governmental armed groups, or between such groups only. It is worth underlining that "when one state or a multinational coalition uses force on the territory of another state with the latter's consent, it is not a case of IAC"[82]. The legal framework to be applied to foreign terrorist fighters depends on the nature of the armed conflict in which they are involved: in case of International Armed Conflict: the legal regime was set by the four 1949 Geneva Conventions, while in case of "non international" armed conflicts the less stringent regime of Common Article 3 of the 1949 Geneva Conventions is applicable[83]. On the other hand, if foreign terrorist fighter's acts are identified as terrorist, they should be governed by counter-terrorism legislation since IHL prohibits conducts characterized as act of terrorism. In fact, "such conduct is generally prohibited as war crimes in the context of armed conflict, which requires prosecution

[81] See *supra,* alla nota 75

[82] *Ibidem*, p.15

[83] E. DE CAPITANI, "Foreign Fighters" and EU implementation of the UNSC resolution 2178. Another case of "Legislate in haste, repent at leisure…" ?, available at https://free-group.eu/2015/04/06/foreign-fighters-and-eu-implementation-of-the-unsc-resolution-2178-another-case-of-legislate-in-haste-repent-at-leisure-1/, visited on 10/12/2016

under national or international jurisdictions"[84], while ordinary criminal law is applied, if a person trained by armed group carries out violent acts outside an armed conflict[85].

The report *Foreign Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response*[86] recommends an accurate analysis to establish if foreign fighters can be held criminally responsible in all States[87] since "whether foreign fighters fall into the category of war criminals or ordinary criminals, and whether this distinction is actually relevant, would differ according to the circumstances of each individual case and would also differ from one Member State to another, depending on their legal systems"[88].

This chapter provides an overview of International Humanitarian Law and Counter-terrorism Law in order to analyze the role of FTFs under them.

2.1 FTF AND IHL: FTF AS NON-STATE ACTORS INVOLVED IN ARMED CONFLICTS ZONE

The four 1949 Geneva Conventions and their Additional Protocols are the core of

[84] AMNESTY INTERNATIONAL, *Preliminary public observations on the terms of reference to draft an Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism*, available at http://www.amnesty.eu/content/assets/Doc2015/Submission_COD-CTE_AI_ICJ_public.pdf, visited on il 10/12/2016

[85] *Ivi*

[86] EUROJUST, Foreign Fighters: *Foreign Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response*, available at http://www.statewatch.org/news/2015/feb/eu-eurojust-foreign-fighters.pdf, visited on 05/12/2016

[87] This report concerns the Members of European Union, but the analysis could be extended to other States.

[88] EUROJUST, *supra* note 86

international humanitarian law, which regulates the conduct of armed conflict and seeks to limit its effects. In particular, the first protects wounded and sick soldiers on land; the second applies to military personnel who is wounded, sick or shipwrecked at sea; the third one provides protection to prisoners of war; the fourth protects civilians, including those in occupied territories. The three Additional Protocols strengthen the protection of victims of international (Protocol I) and non-international (Protocol II) armed conflicts and provides rules for the conduct of the fight, while Protocol III adds a new emblem, the Red Crystal[89]. Such Conventions applies during armed conflicts between states parties that have ratified it[90].

This is the legal framework the foreign terrorist fighters face when they operate in armed conflicts. Since IHL's dispositions are strictly linked to a person's status, different laws will be applied according to the role covered.

2.1.1 OVERVIEW OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law (IHL) is a part of International Law that consists in a body of rules seeking to limit the effect of armed conflicts[91]. Since IHL applies only to the latter[92], it is also known as the law of the war or the law of armed conflicts. IHL

[89] The Red Crystal is composed as composed of a red square on edge frame on a white ground. It has the equal status of the Red Cross and Red Crescent emblems: it may be used in situations where the other emblems have with political or religious connotations.

[90] It is important to underline that the Geneva Conventions are almost universally ratified.

[91] ICRC, *What is International Humanitarian Law?*, 2004, available at https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf, visited on 20/12/2016

[92] It is to underline that IHL does not cover internal tensions, i.e. isolated acts of violence, and it applies only once the conflict has begun, equally to all sides involved.

covers two main areas: the protection of people who are not or no longer taking part in the hostilities and the restriction of the means and methods of warfare.

Even if warfare has always been "subject to certain principle and customs"[93], the universal codification of IHL began only in the 19th century. As anticipated before, the major part of IHL is contained in the four Geneva Conventions of 1949[94], which have been signed by nearly every State of the world, and the Additional Protocols of 1977, but many other agreements implement these Conventions prohibiting the use of certain weapons and military tactics, and protecting certain group of people and goods[95]. Furthermore, it is worth remarking that many disposition of IHL are now accepted as customary laws.

Since IHL is applicable only to armed conflict, it must both be defined the term armed conflict itself and identify its beginning and ending. IHL distinguishes between International armed conflicts (IAC) and Non-international armed conflicts (NIAC). IAC are conflicts opposing two or more States, while NIAC are conflicts that involve "either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other"[96], restricted to the territory of a single State. Legally speaking, other type of conflict does not exist, but it is not always so easy to tell the difference

[93] ICRC, *supra* note 91

[94] The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention relative to the Treatment of Prisoners of War and Protection of Civilian Persons in Time of War. The three Additional Protocols are relating to Protection of Victims of International Armed Conflicts (Protocol I), Protection of Victims of Non-International Armed Conflicts (Protocol II) and the Adoption of an Additional Distinctive Emblem (Protocol III).

[95] Such Conventions are the following: 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (plus its two protocols); 1972 Biological Weapons Convention; 1980 Conventional Weapons Convention and its five protocols; 1993 Chemical Weapons Convention; 1997 Ottawa Convention on anti-personnel mines and 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

[96] ICRC, *supra* note 91

and identify which kind of conflicts we are facing[97].

It must be outlined that IHL does not contain an explicit reference on its scope of territorial applicability. Therefore, mostly due to more frequent extraterritorial use of force through new weapons[98], the question about its territorial scope, and as a consequence also of armed conflict is arising during the last years. In the context of IACs, it is "generally accepted that IHL applies to the entire territories of the States involved in such a conflict, as well as to the high seas and the exclusive economic zones"[99]. The law of neutrality plays an important role in this scenario: the principle behind this law is that the territory of a neutral State is inviolable, meaning it is prohibited to commit any act of hostility on his territory.

On the other hand, the issue about the territorial applicability of IHL emerges when analyzing NIACs. In particular, NIACs with an extraterritorial element, as when "the armed forces of one or more States (the "assisting" States) fight alongside the armed forces of a "host" State in its territory against one or more organized armed groups"[100]: IHL should be apply to all territories of the parties involved. This belief is deeply discussed among the community, but in its *32nd Report on International humanitarian law and the challenges of contemporary armed conflicts* the International Committee of Red Cross support the thesis that either a member of an armed group or an individual civilian directly participating in a NIAC from the territory of a non-belligerent State should not be a target of a third State under IHL. The following two paragraphs will analyze the definition of IAC and NIAC deeper, highlighting the differences among the two of them.

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[97] ICRC, *How is the Term "Armed Conflict" defined in International Humanitarian Law?*, Opinion Paper, March 2008, available at https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm, visited on 15/12/2016, p. 1

[98] For example the use of armed drones.

[99] ICRC, *32nd Report on International humanitarian law and the challenges of contemporary armed conflicts*, 2015, available at https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts, visited on 27/12/2016

[100] *Ivi*

2.1.2. INTERNATIONAL ARMED CONFLICT

The doctrine gives several interpretations about what an IAC is, but there are no univocal thoughts. One of the most important is contained in the *Tadić* case, where the International Criminal Tribunal for the former Yugoslavia (ICTY) proposed a general definition of armed conflicts that goes as following "an armed conflict exists whenever there is a resort to armed force between States"[101]: this definition was adopted by several international bodies.

In his opinion paper of March 2008, International Committee of Red Cross, reflecting the strong prevailing legal opinion, states that IACs "exist whenever there is resort to armed force between two or more States"[102]. To be more accurate, the definition of International armed conflicts and the conditions that make it possible to define a conflict as an international one are contained in Common Article 2 of the four Geneva Conventions, which explains:

> "1. In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> 2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> 3. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof." [103]

According to paragraph 1, conflicts that involve two or more High Contracting

[101] ICTY*, The Prosecutor v. Dusko Tadic* (Appeal Judgment) (IT-94-1-A), 2 October 1995

[102] See *supra* note 97

[103] 1949 Geneva Conventions, Common Article 2

Parties, i.e. States, fit this definition, in spite of the reasons or the intensity of the confrontation[104], and without the need for one State to declare war or to recognize the state of war. Therefore, the threshold for determining an IAC is fairly low.

IACs are defined only upon factual conditions: "the resort to force against the territory, infrastructure or persons in the State that determines the existence of an IAC and therefore triggers the applicability of IHL"[105], while the government, which is only a constitutive element, plays a less important role in this sense. Even if no reciprocity is required, violent acts should express an *animus belli*, namely the will of the attacking State to harm the other[106].

Paragraph 2 extends the sphere of application to partial or total occupation of the territory of a State, even if the counterpart does not use armed resistance. The importance of this paragraph is related to the goods and building existing in the territory. Paragraph 3 contemplates the possibility that in an armed conflict one or more of the States could not be a party of the Geneva Conventions: if one of the Powers in conflict is not a party of this Conventions, the other Powers should remain bond to them both in their reciprocal relations and in the relations with the opposing Power, when the latter accepts and applies the disposition of the Geneva Conventions.
Therefore, the notion of IAC is not defined, but according to this Article its law applies in the following situations: declaration of war[107], armed conflicts between two or more States and in case of occupation without armed resistance from the attacked State.
Additional Protocol I art.1, paragraph 4 extends the definition against colonial domination, racist regime or foreign occupation in the exercise of the right of self-determination, as follow

"The situations referred to in the preceding paragraph include armed conflicts

[104] Common Article 2 of the 1949 Geneva Conventions

[105] ICRC, *supra* note 99, p. 8

[106] As stated before, it is not a IAC when a State or a multinational coalition use force in another's territory with the latter's consent.

[107] This is not a current practice.

> in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

Rising a lot of controversy, this paragraph includes the so-called "war of national liberation"[108]. The Right of self-determination, proclaimed by the French Revolution, gained a global importance during the First World War and has become a *jus cogens* norm in the modern international law. As state also in the paragraph, the principle was included in the Charter of United Nations in article 1, which defines the purposes of the United Nations[109] and the Declaration on Principles of International Law adopted on 24th October 1970. As the Commentary of the ICRC underlines, the paragraphs concerning the issue of self-determination of the Declaration pointed out several notions: "all peoples have the right freely to determine their political status; every State has the duty to respect this right and to promote its realization; every State has the duty to refrain from any forcible action which deprives peoples of this right; in their actions against, and resistance to, such forcible action, peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter"[110]. Therefore, according to Protocol I, two criteria have to be fulfilled for IHL to apply: on one hand the armed conflict has to fight against colonial domination, alien occupation or racist regimes, on the other hand the struggle has to be an expression of the right of self-determination.

However, since IHL applies only to armed conflicts, it becomes fundamental to define the beginning and end of the latter. As already said, the beginning of an IAC depends

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[108] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, available at http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf, visited on 10/01/2017

[109] The Charter of United Nations in his Article 1 paragraph 2 states as follow "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".

[110] See *supra* note 103

only on factual situations, meaning it arises when a State uses force against another. The attack does not need to be directed against another armed forces[111], but the use of force may be directed against territory, infrastructures or population in the opposing State in order to let the IAC begins. One should bear in mind that an armed conflict may arise from this scenario, even if the attacked State does not or cannot respond with force[112]. On the other hand, an IAC could arise from the development and "internationalization" of a NIAC[113]. The two most common situations are the secession, with the creation of a new State, and the foreign intervention in the NIAC[114].

Even establishing whether an armed conflict has come to an end is not such an easy task. The two main reasons lie in the lack of detailed guidance in the 1949 Geneva Conventions and in less common State practice of peace treaties[115]. In fact, the ending of military operation establishes the end of an IAC[116], but when military operations close, IHL is applicable only to persons "whose final release, repatriation or re-establishment takes place thereafter"[117]. However, the general closure of military operations[118] is not so easy to identify, especially when there are no ongoing hostilities. Rather than peace or ceasefire treaties, the real effect of an agreement and its capacity to bring the conflicts to an end are determined by a *de facto* situation. In order to be declared terminated, an IAC must end the hostilities with a degree of stability and permanence. Furthermore, the closure of military operations includes the

[111] ICRC, *supra* note 99, p.8

[112] See *supra* note 97

[113] M. PEDRAZZI, *The beginning of IAC and NIAC for the purpose of the applicability of* IHL, in XXXVIII Round table on current issues of international humanitarian law: the distinction between international and non-international armed conflicts: challenges for IHL?, Sanremo September 2015, p.3

[114] *Ivi*

[115] ICRC, *supra* note 99, p.8

[116] *Ibidem*, p. 9

[117] Cfr. Article 6 (2) of the Third Geneva Convention, Article 6 (4) of the Fourth Geneva Convention, and Article 3 (b) of the 1977 Protocol Additional to the Geneva Conventions.

[118] The general close of military operations includes also military movements of bellicose nature.

interruption of military movement of bellicose nature: only in this case the resumption of hostilities can be excluded. According to academic writing, generally an IAC ends when the States are no longer involved in the conflict. Therefore, we could say, "IHL applicability ceases once the conditions that initially triggered its application no longer exist"[119].

According to this scenario, it is worth also analyzing the notion of occupation, which is a difficult topic since the 1949 Geneva Conventions do not define it. Article 42 of the 1907 IV Hague Convention respecting the Laws and Customs of War on Land and its annex claim that a "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[120].

The core notion behind this definition is the concept of "effective and stable control", which is not outlined neither by 1949 Geneva Conventions nor the 1907 Hague Regulations. In fact, an occupation implies that the territorial sovereign was taken over by some degree of control by hostile army. Therefore, the concept of "effective control" describes the conditions for determining the situation of occupation, since the law of occupation is applicable only when the control of foreign troops is effective. In order to surely determine if a situation could be qualified as a state of occupation under IHL, International Committee of Red Cross lists the following three conditions that should be respected

> "1) [t]he armed forces of a State are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion.
>
> 2) The effective local government in place at the time of the invasion has been or can be rendered, substantially or completely, incapable of exerting its powers by virtue of the foreign forces' unconsented presence.
>
> 3) The foreign forces are in a position to exercise authority instead of the

[119] See *supra* note 115

[120] Article 42 of the Geneva Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

local government over the concerned territory (or parts thereof)."[121]

Legally speaking, as the end of an armed conflict, the declaration of the end of an occupation has blurry borders. In fact, the authority of a foreign army could be effective despite the lack of physical presence of military forces.

2.1.3. NON-INTERNATIONAL ARMED CONFLICT

The definition of Non-International Armed Conflict is even more complex than the one of international conflicts. The two key treaty texts for this definition are Article 3 common to the 1949 Geneva Conventions and Article 1 of 1977 Additional Protocol II. The case of NIAC is contemplated in Common Article 3 of Geneva Conventions as following:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;

[121] ICRC, *supra* note 99, p. 12

> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."[122]

As can be seen, in this paragraph the minimum requirements for humanitarian treatments are defined[123], but no explicit definition of what a NIAC is or its characteristics are provided[124]. However, the main focus is that this Article includes "armed conflicts in which one or more non-governmental armed groups are involved"[125]: hostilities may involve governmental armed forces and non-governmental armed forces or only non-governmental ones. Even if Article 3 applies to conflicts occurring in the territory of States that have ratified the Geneva Conventions, one should underline that the territory's requirement has lost its importance in practice since the Geneva Conventions have universally been ratified.

On the other hand, Article 1 of Additional Protocol II goes further in specifying the

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[122] 1949 Geneva Conventions, Common Article 3

[123] This article prohibits violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; unfair trials.

[124] R. BARTELS, *Timelines, borderlines and conflicts, the historical evolution of the legal divide between international and non-international armed conflicts,* in International Review of the Red Cross, vol. 91, No. 873, March 2009, p.38

[125] ICRC, *supra* note 97

previous definition:

> "1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[126]

This definition distinguishes a NIAC from other less serious kind of conflicts, in which the IHL does not apply[127], even if one should underline that this definition does not extend to the law of NIACs in general, but it is applicable only for Additional Protocol II, as clearly stated in the Article[128]. However, it is generally accepted that the threshold of intensity[129] applies also to Common Article 3[130].

This definition requires that the situation must reach a certain degree of violence, while non-governmental armed forces must demonstrate a high degree of organization, being placed under responsible control and exercising control over a part of territory. In this respect, the ICTY also identified two criteria that distinguish a NIAC from other internal disturbances or tensions[131]: hostilities must have a minimum level of intensity and non-governmental armed group involved must possess

[126] 1977 Additional Protocol II of the Geneva Conventions, Article 1

[127] Article 1 of Additional Protocol II does not apply to wars of national liberation as well, since they are considered international armed conflicts.

[128] ICRC, *supra* note 97

[129] Less serious forms of violence are considered non-international armed conflicts.

[130] ICRC, *supra* note 97

[131] Such as internal tensions, riots or acts of banditry.

organized armed forces, meaning "these forces have to be under a certain command structure and have the capacity to sustain military operations"[132]. Nevertheless, contrary to Article 3, Article 1 of Additional Protocol II does not apply to conflicts between non-governmental armed groups[133]. In this sense, the definition of Article 1 of Additional Protocol II is more restrictive than Article 3 of Geneva Conventions[134]. Besides introducing the requirement of territorial control, Additional Protocol II applies only between States and dissident armed forces or other organized armed group[135].

Against this background, the Rome Statute of the International Criminal Court that entered into force on 1 July 2002 is controversial. It introduces two different lists of war crimes committed during NIACs: the first serious violation of Common Article 3[136] and violation of Additional Protocol II, and other violation of the laws and customs of NIACs[137]. It was deeply discussed if ICC Statute was introducing a third category of NIACs[138], but the purpose of the Statute was to determine the ICCS's jurisdiction, not create a new concept of NIACs[139]. In fact, the Statute focuses on the duration of the conflict as a distinctive factor, which does not correspond to the intensity of the conflict[140]. In *Tadić* case, ICTY have highlighted that each situation that involves protracted armed violence between governmental forces and organized non-governmental groups or solely between the latter fits this definition[141]: "the

[132] ICRC, *supra* note 97

[133] S. VITÉ, T*ypology of armed conflicts in international humanitarian law: legal concepts and actual situations*, in International Review of the Red Cross, vol. 91, No. 873, March 2009, p.80

[134] Article 3 does not include the threshold of territory control. Therefore, all conflicts that fall within the field of application of Additional Protocol II are also covered by Common Article 3, but the reverse is not true.

[135] Common Article 3 refers only to armed conflicts between non-state armed groups.

[136] The Rome Statute of International Criminal Court, art. 8 para. c-d

[137] *Ivi*, art. 8 para. e-f

[138] M. PEDRAZZI, *supra* note 113, p.9

[139] S. VITÉ, *supra* note 133, p. 83

[140] T. D. GILL, *Yearbook of International Humanitarian Law*, Vol. 18, Asser Press, 2015, p.75

[141] ICTY, Prosecutor v. Tadic, Judgment (Trial Chamber), IT-94-1-T, 7 May 1997, para. 561–568.

violence in question must, in the first instance, be protracted in order to cross the threshold from internal disturbance/tension to NIAC; and having done so, the NIAC would additionally need to be protracted in order to engage the application of Article 8(2)(e) of the Statute"[142].

A definition of NIAC could also be found in the Statute of the International Court of Justice. Article 2 paragraph 2 (f) claims:

> "(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."

This definition could be seen as something between Common Article 3 and Additional Protocol II.

On the other hand, International Committee of Red Cross defines NIAC as "protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization".[143]

As for IACs, also in the framework of NIACs establishing an end for hostilities is a difficult task, since IHL has not defined such situation. In *Tadić* case, ICTY stated a NIAC could be considered ceased under IHL through the reaching of a peaceful agreement, namely a factual and lasting pacification of the NIAC[144]. In this case the situation should be proven by facts on the ground, as well as in IACs.

Since a minimum level of intensity of hostilities is required for a NIAC, this requirement became important also to establish the end of the conflict: two points of

[142] T. D. GILL, *v. supra* alla nota 140, p. 77

[143] ICRC, *supra* note 97

[144] ICRC, *supra* note 99

view address this[145]. The first one affirms that the NIAC ends when the intensity of hostilities fall below the threshold required to define the conflict as a non-international armed conflict under IHL; the second focuses on the opposing parties: if latter parties disappear or no longer has the level of organization required by IHL, the NIAC ceases. A NIAC could be declared ended when the hostilities cease and there is no risk of resumption. However, this scenario became more complicate in the light of the fact that contemporary NIACs include multinational coalition forces or a third State in the conflict.

One should bear in mind that a NIAC could also come to an end when the hostilities have stopped and there is no risk of their resumption, even if the parties still meet the level of organization required[146]. A NIAC effectively ends when there is no risk of resumption, meaning when both the hostilities and hostile military operations cease. However, the scenarios of NIACs are evolving and becoming more and more complex, so that the distinction between IACs and NIACs are put into question, mostly due to transnational conflicts[147] involving non-state entities[148] that do not fit into any of the traditional classification of armed conflict. As a consequence, determining the applicability of IHL to such conflicts is increasingly difficult[149].

2.1.4. THE STATUS OF FTFS UNDER IHL

Little attention has been paid to the relationship between IHL and the phenomenon of

[145] *Ivi*

[146] NIACs are characterized by temporary break in the armed violence or instability level of organization of non-State party involved: this should not take into consideration to declare the end of the conflict.

[147] These are conflicts involving non-government entities that operate beyond the territory of the State.

[148] R. BARTELS, *supra* note 124, p.36

[149] ICRC, *supra* note 99, p.10

foreign fighters. Though "foreign fighters" is not a term contemplated in IHL, the latter applies to foreign terrorist fighters, as other belligerents, when their actions take place in an armed conflict.

According to IHL, during IACs a person could generally be considered a civilian or a combatant, which is a regular member of the armed forces (other than medical personnel and chaplains)[150]. Since FTFs are not part of a State army, their role should be investigated under the other figures involved in the armed conflicts and identified by IHL. Despite historical precedents, nowadays foreign fighters are active mostly in NIACs[151].

In fact, if foreign terrorist fighters are identified as combatants, the results will be different: IHL does not directly define combatants, but identifies them as members of armed forces of a Party to a conflict, who have the right to participate directly in the hostilities[152]. The combatants are not only immune from criminal prosecution for belligerent acts that comply with IHL[153], but also combatants who fall into hands of an adverse Party became of prisoners of war[154], and even if a combatant violates IHL in armed conflicts, his status of prisoner of war cannot be taken away[155]. As stated in Article 4 of the 1949 Geneva Conventions III, the persons entitled of prisoner of war are members of armed forces of a Party to the conflict, members of other militias and volunteer corps that are part of this armed forces[156] or that belong to a Party to the conflict[157] fulfilling specific conditions:

> "(a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;

[150] Knut DÖRMANN, *The legal situation of "unlawful/unprivileged combatants"*, 2003, available at https://www.icrc.org/eng/assets/files/other/irrc_849_dorman.pdf, visited on 28/12/2016

[151] GENEVA ACADEMY, *supra* note 10

[152] 1977 Additional Protocol I to the Geneva Conventions, art 43

[153] GENEVA ACADEMY, *supra* note 10, p.17

[154] Cfr. Geneva Convention III, art. 4 and Additional Protocol I, art. 44 para. 1.

[155] Though there are exceptions to this rule, as stated in art. 43 para. 3-4.

[156] 1949 Geneva Convention III , art. 4 par. 1

[157] The organized resistance movements are included.

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war". [158]

A combatant is identified through these conditions and there is no connection to nationality[159], according both to long-standing practice and the above-cited article.

On the other hand, the status of civilian is defined under Article 50 as "any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."[160] In this sense, civilians are defined negatively in relation to other actors.

Even if nationality is irrelevant to qualify a combatant, it is important to underline that it plays a fundamental role here, since it determines whether the Geneva Convention IV could afford protection to civilians or not[161]. However, the Geneva Convention IV protects civilians directly participating in hostilities when they fall into the hands of the enemy. The definition of Protected Persons is contained in Article 4 of Geneva Convention IV, which states as following:

"[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State that is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

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[158] 1949 Geneva Convention III , art. 4 par. 2

[159] GENEVA ACADEMY, *supra* note 10, p.18

[160] 1977 Additional Protocol I, art. 50 par.1

[161] If civilians participate in the conflicts, they lose their immunity from attack, but they are still protected by the Geneva Conventions if they fall into the hands of a Party to the conflict, as set in Article 4 of Geneva Convention IV.

> Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention."[162]

The core of this article is that a protected person is anyone who finds himself in the hand of a party, provided that he is not a national of such Party, not only the permanent resident. Nationals of neutral States or of a co-belligerent ones are excluded since normal diplomatic channels provide them protection. Civilians who directly participate in hostilities remain protected when they fall into the enemy's hands, provided they are not nationals of that States, but they lose their immunity from attack during the time they do so.

Against this background, nationality plays a key role in respect of FTFs: it determines whether a foreign fighter could be covered by Geneva Convention IV as civilian[163].

As stated in the International Criminal Tribunal for the former Yugoslavia, the preparatory works suggest an intent to extend this protection to "refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection"[164]. It could be argued that a similar scenario could be applied to FTFs, since religion and ideology lead their actions, not nationality. Nationals of neutral States in an occupied territory are normally protected by their State of origin[165], but in the case of FTFs their States of origin are not always willing to offer them diplomatic protection: in the light of this, such approach reveals its importance.

On the other side, since the nationality does not play any role in NIACs, IHL applies to "all persons affected by armed conflict without adverse distinction"[166]. Common

[162] 1949 Geneva Convention IV, art. 4

[163] GENEVA ACADEMY, *supra* note 10, p.19

[164] ICTY, *Prosecutor v. Tadić*, Judgment (Appeals Chamber), Case No.IT-94-1-A 15 July 1999, par. 164

[165] Geneva Convention IV does not cover such actors as well as nationals of a co-belligerent State.

[166] GENEVA ACADEMY, *supra* note 10, p.20

Article 3 of the 1949 Geneva Conventions, which govern NIACs, is "like a mini-Convention within the Conventions as it contains the essential rules of the Geneva Conventions in a condensed format and makes them applicable to conflicts not of an international character"[167]. With respect of NIACs, IHL does not include combatants, POW or similar status related to members of armed groups[168], neither it makes reference to protected persons. On the other hand, Common Article 3 does apply to persons who are not or no longer taking part in hostilities and to *hors de combat* requiring a humane treatment. Even if the lack of status in NIACs is controversial, concerning FTFs nationality or permanent residency do not play any role[169]: on one hand, during NIACs IHL applies to all individuals affected by armed conflicts; on the other hand, due to the lack of combatant status, individuals may be punished for acts lawful under IHL[170].

To overtake this difference, Article 6 paragraph 5 of the Additional Protocol II states that "[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained"[171], even if war or international crimes are excluded[172]. If foreign fighters are fighting abroad against their State of nationality, several issues under their national laws arise.

Frequently, foreign fighters are assimilated to mercenaries. Under IHL, the notion of

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[167] ICRC, The Geneva Conventions of 1949 and their Additional Protocols, 29 October 2010, available at https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm, visited on 3 February 2017

[168] See *supra* note 163

[169] *Ivi*

[170] This shows the difficult relationship between IHL and domestic laws during NIACs: fighters of the opposing State could be prosecuted and punished even if their acts comply with IHL. In this regards, Article 6 paragraph 5 of the 1977 Additional Protocol II recommends amnesties to who have participated in hostilities, but not for war or international crimes: according to ICRC, it is a rule of customary international law.

[171] 1977 Additional Protocol II, art. 6 par. 5

[172] ICRC sustained that it is also a customary international law.

mercenary only exists in IACs and, according to the various definitions[173], mercenaries could be defined as "individuals who directly participate in hostilities, but are not nationals of a party to the IAC in question, residents of territory controlled by party, or members of the armed forces of a party"[174], motivated by private gain: this definition is far too different from the one of FTFs provided in the previous chapter, especially due to their lack of interest in private gain.

It is important to underline the none of the four Geneva Conventions of 1949 refers to mercenaries, but only Additional Protocol I does. In particular, the first paragraph states that a mercenary should not have the right to be a combatant or a prisoner of war and they have the right to a fair trial before they could be convicted or sentenced: in ICRC's opinion it is a reflection of customary international humanitarian law[175]. Looking deeper into Article 47 paragraph 2, the definition goes as follow:

> "A mercenary is any person who:
>
> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
>
> (b) does, in fact, take a direct part in the hostilities;
>
> (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
>
> (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
>
> (e) is not a member of the armed forces of a Party to the conflict; and
>
> (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces."[176]

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[173] Cfr. 1977 Additional Protocol I (Article 47), 1987 Un Convention against Recruitment, Use, Financing and Training of Mercenaries (Article 1) and 1972 Organisation of African Unity Convention of Elimination of Mercenaries (Article 1).

[174] GENEVA ACADEMY, *supra* note 10, p.16

[175] K. FALLAH, *Corporate actors: the legal status of mercenaries in armed conflict*, vol. 88 n.863, 2006, available at https://www.icrc.org/eng/assets/files/other/irrc_863_fallah.pdf, visited on 15/01/2017

[176] 1977 Additional Protocol I to Geneva Conventions, art. 47

Since all six conditions must be fulfilled for a person to be defined mercenary, it is important to highlight how restrictive this definition is. Other more specific conventions on mercenaries exist and criminalize mercenary activity, in opposition to Additional Protocol I[177].

Finally, 1977 Additional Protocol I introduces also the figure of *hors de combat* and defines it as following:

> "A person is ' hors de combat ' if:
> (a) he is in the power of an adverse Party;
> (b) he clearly expresses an intention to surrender; or
> (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
> provided that in any of these cases he abstains from any hostile act and does not attempt to escape."[178]

This status is recognized to combatants, civilians and persons and it is granted to them special protection. Therefore, *hors de combat* foreign fighters will thus be entitled to the guarantees of common Article 3 and of Additional Protocol II, when applicable, as well as to the safeguards of customary law norms, like everyone with this status.

Since in NIACs the status of combatants or prisoners of war does not exist and the protected persons regime is not contemplated, all individuals may be punished for "the mere fact of taking up arms or for acts that are potentially lawful under IHL"[179]. However, IHL still protects anyone who does not or no longer take an active part in the conflict, namely civilians. Even in this case the nationality does not play any role. On the other side, when a FTF participates in a NIAC involving a multinational force, additional questions may arise concerning national laws, if FTF have the same nationality of one of the States of the multinational force.

Against this background, a controversial aspect arises: acts that are lawful under IHL could be judged unlawful under domestic law. To overcome this ambiguity Article 6

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[177] See *supra* note 175

[178] 1977 Additional Protocol I, art. 41, para. 2

[179] GENEVA ACADEMY, *supra* note 10, p.20

paragraph 5 of Additional Protocol II[180] claims that "at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained"[181].

On the contrary, nationality plays a role in IACs, but not in NIACs, concerning the status of "protected persons". The Third Geneva Convention states that a person could be qualify as combatant in IAC despite his nationality, which became important to determine the status of prisoner of war. Furthermore, nationality determines whether a certain person will benefit the "protected persons" status under the Fourth Geneva Convention. Such status is described as follow:

> "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
> Nationals of a State that is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."[182]

Even if POW or protected-person status could be granted to foreign fighters due to their nationality, they could be protected by Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict[183]. In conclusion, during IACs, FTF may be considered "either combatants or civilian, albeit civilians directly participating in hostilities"[184]. However, regardless of their status under IHL, human rights law, as the prohibition of

[180] The International Committee of Red Cross underline that this is also a customary international law.

[181] 1977 Additional Protocol II, art. 6 para. 5

[182] 1949 Geneva Convention IV, art. 4

[183] ICRC, as most scholars, claimed that this Article has a customary status.

[184] GENEVA ACADEMY, *supra* note 10, p.17

refoulement[185], applies also to foreign fighters during armed conflicts.

2.2. FTFS AND TERRORISM: FTFS' INVOLVEMENT IN TERRORIST ACTIVITIES

Almost all countries have dealt with national terrorism sooner or later during History, but it is only in recent times that States have faced the so-called international terrorism[186]. UN Security Council condemns Terrorism; as stated in Resolution 2253 (2015), it is identified as

> "most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever, and by whomsoever committed, and reiterating its unequivocal condemnation of the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), Al-Qaida, and associated individuals, groups, undertakings, and entities for ongoing and multiple criminal terrorist acts aimed at causing the deaths of innocent civilians and other victims, destruction of property, and greatly undermining stability"[187]

In order to fight and prevent this phenomenon, both UN and States in their domestic law have developed counter-terrorism measures, which are addressed also to foreign fighters.

Despite the classification of an armed group as terrorist, the armed conflict they are

[185] Non-refoulement prohibits transfer of persons to countries where there is a clear risk of violation of fundamental human rights.

[186] C. WALTER, *Defining Terrorism in National and International Law*, available at https://www.unodc.org/tldb/bibliography/Biblio_Terr_Def_Walter_2003.pdf, visited on 10/12/2016

[187] UN Security Council Resolution 2253, S/RES/2253, adopted on 17 December 2015

involved in could still be considered as being under IHL. Furthermore, the motivation or the willingness to comply with IHL are not considered in the definition of the legal status of the non-State armed group, but it is the capacity of organization to comply with it that matters.[188]

2.2.1 ATTEMPTS TO DEFINE THE CONCEPT OF TERRORISM: A CONTROVERSIAL ISSUE IN THE INTERNATIONAL COMMUNITY

Legally speaking, currently there is no universal agreement on the definition of terrorism, even if numerous national and international treaties have been developed. Most of these are sectorial, namely punish or prevent certain terrorist acts[189].

IHL does not provide a definition of terrorism, but as International Committee of Red Cross underlines "fighting in an armed conflict (including one abroad) is not per se a violation of law, while engaging in terrorist acts is, by definition, criminal.[190] In particular, Article 33 of the Geneva Convention IV[191] and Article 4 of Additional Protocol II[192] prohibit measures and acts of terrorism. Furthermore, both Additional

[188] GENEVA ACADEMY, *supra* note 10, p. 23

[189] For example: aircraft hijacking, hostage taking, bombings, nuclear terrorism, or financing terrorist acts or organization.

[190] G. RONA, *Foreign Fighters, Mercenaries, and Private Military Companies Under International Law*, available at https://www.justsecurity.org/27732/foreign-fighters-mercenaries-pmscs-ihl/, visited on 10/02/2017

[191] Quoting the article "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited."

[192] The Article states as follow "Without prejudice to the generality of the foregoing, the following acts

Protocol I (Article 51 paragraph 2) and II (Article 13 paragraph 2) prohibit acts whose only aim is to spread terror among the population.

The notion of terrorism under IHL has a different meaning from the one outside the conflicts. First of all, the prohibition of acts whose primary purpose is to spread terror is strictly connected to the "violations of the principle of distinction"[193], which is a customary law that affirms all parties must at all times distinguish between civilians and combatants and attacks should only be directed against combatants, not against civilians. Secondly, the prohibition of acts of terrorism aims to protect who is not or no longer taking part in the conflict: besides armed conflicts, terrorists rarely detain victims, excluding hostage taking. In addition, under IHL violence by state actors could be qualified as terrorism, while the same definition is not accepted outside armed conflict[194]. Finally, in opposition to what happen outside armed conflict, under IHL terrorist acts are not directed against the government, since it is prohibited to intimidate the population during an armed conflict.

An Ad Hoc Committee, established by General Assembly resolution 51/210 of 17th December 1996, has the purpose of elaborating international conventions in order to fight international terrorism[195]. Among the various topic in its agenda, the Committee is working on the Comprehensive Convention on International Terrorism, which is a treaty proposed by India aiming primarily to reach a common definition of international terrorism. The importance of the success of this Convention lies in the possibility that the same person could be defined as a terrorist all over the world. Unfortunately, its negotiation is currently deadlocked. In September 2016, the Indian

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against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: […] (d) acts of terrorism".

[193] GENEVA ACADEMY, *supra* note 10, p.30

[194] This issue is still currently debate.

[195] The Ad Hoc Committee was mandated to elaborate an International Convention for the Suppression of Terrorist bombings, an International Convention for the Suppression of the Financing of Terrorism, and International Convention for the Suppression of Acts of Nuclear Terrorism. Through its resolutions, General Assembly renews and revises the mandate.

foreign minister Sushma Swaraj, in her speech at the UN General Assembly, urged once again the General Assembly to overcome the existing problems and adopt this Convention [196].

In fact, an agreement could not be found due to the opposition between the Coordinator, supported by most of Western delegations, and the Member State of the Organization of the Islamic Conference on the definition of terrorism. The main reason behind this "revolves around what should be included and what should be excluded from the CCIT's scope of application"[197].

The definition proposed reads as follow:

> "Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
> (a) Death or serious bodily injury to any person; or
> (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
> (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss;
> when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."[198]

Even if such definition is not controversial in itself, in its background it hides the question if this could apply to armed forces and Self-determination movement. In

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[196] LIVEMINT, *What is the Comprehensive Convention on International Terrorism?*, 28 September 2016, available at http://www.livemint.com/Politics/Ee84kLhbyP5NJ9mFnMzkKO/Will-Sushmas-speech-at-the-UNGA-give-fresh-push-to-antiter.html, visited on il 05/12/2016: B. SAUL, *Research Handbook on International Law and Terrorism*, Cheltenham, 2014; V.D. COMRAS, *Flawed Diplomacy: the United Nations and the War on Terrorism*, Washington, 2010.

[197] S. OJEDA, *Global counter-terrorism must not overlook the rules of war*, 13 December 2016, available at http://blogs.icrc.org/law-and-policy/2016/12/13/global-counter-terrorism-rules-war/, visited on 05/01/2017

[198] Draft of Comprehensive Convention against International Terrorism A/59/894, art. 1 par. 1

order to overstep this obstacle, the Co-coordinator proposes some exceptions through Article 20:

> "1.Nothing in the present Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law.
>
> 2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by the present Convention.
> 3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by the present Convention.
> 4. Nothing in the present article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws."

The problem arises since the Member State of the Organization of the Islamic Conference does not accept such proposal. Aiming to exclude armed struggle for liberation and self-determination, they suggest other wording instead:

> "2. The activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
> 3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are in conformity with international law, are not governed by this Convention"

The Draft does not exclude situations of armed conflict from its scope of application, but it only excludes certain acts committed in such situations. Furthermore, one of the main points of disagreement was the relationship between the acts deemed terrorist under the Draft CCIT and acts committed during armed conflict.

The applicable international legal framework related to counter-terrorism is related to a range of sources that include treaties, resolutions of the Security Council and the General Assembly, and jurisprudence. In fact, the International Convention also provides a generic description of terrorist acts for the Suppression of the Financing of

Terrorism:

> "1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
>
> (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
>
> (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."[199]

Currently sixteen international conventions and protocols exist, which address certain criminal conducts, related to the prevention and suppression of terrorism. All resolutions have been adopted under chapter VII of the United Nations Chart; consequentially Member States are required to take the following actions in relation to individuals and entities included on the Consolidated List:

> "All states are required to freeze without delay the funds and other financial assets or economic resources of designated individuals and entities [assets freeze]; All states are required to prevent the entry into or transit through their territories by designated individuals [travel ban]; All states are required to prevent the direct or indirect supply, sale and transfer from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types, spare parts, and technical advice, assistance, or training related to military activities, to designated individuals and entities"[200].

Due to the lack of a general international definition of terrorism, one should bear in mind that terrorism is neither a war crime nor a crime against humanity, but also an international crime of terrorism in the sense of a *delicta juris gentium* does not exist.

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[199] International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly in Resolution A/RES/54/109 of 9 December1999, art. 2 par.1

[200] Available at https://www.un.org/sc/suborg/en/sanctions/1267, visited on 20/12/2016

Furthermore, also the statutes of the various tribunals do not include terrorism as a crime *sui generis*.

Furthermore, it must be highlighted that some actors, contemplated in IHL, may elicit allegations of terrorism[201]. First of all, "irregular" forces could accompany the armed one, as stated in Article 4 paragraph A (4)[202]. Another case is the guerrilla in IACs, which is not admissible in IHL according to Additional Protocol I Article 44 paragraph 3, but it could play a role in this scenario. Moreover, the case of the l*evée en masse*, defined in Third Geneva Convention as "inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war"[203]. Finally, the terrorism allegations could arise from national liberation movements[204].

2.2.2.THE US-DECLARED "WAR ON TERROR"

After 9/11, President Bush declared the so-called "war on Terror". The idea

[201] G. BLUM, D.A. LEWIS, N.K. MODIRZADEH, *Key concepts in the laws of armed conflict and counterterrorism frameworks*, Harvard Law School Program on International Law and Armed Conflict, September 2015, available at https://pilac.law.harvard.edu/mcac-report//2-key-concepts-in-the-laws-of-armed-conflict-and-counterterrorism-frameworks#_ftnref59, visited on 05/12/2017

[202] The Article claims "Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model."

[203] 1949 Geneva Convention III, art. 4 par. a

[204] ICRC, *What does IHL say about terrorism?,* 22 January 2015, available at https://www.icrc.org/en/document/what-does-ihl-say-about-terrorism, visited on 28/12/2016

underlying this affirmation was that there was an actual global NIAC between the US and al-Qaeda and its associated forces, albeit many legal authorities rejected this opinion. In fact, the USA aimed to be allowed to use the rules controlling use of force and detention of individuals, which is less restrictive under IHL. The controversial term war on Terror has been used to described as "a range of measures and operations aimed at preventing and combating terrorist attacks"[205]. According to IHL, it is only a rhetorical mean and it does not describe a real status of war, legally speaking. Even if various strategies carried out after 9/11 by US-led coalition may be describe by IHL[206], they would involve States and not terrorist groups[207].

As the International Committee of Red Cross summarizes "terrorism is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted 'fight against terrorism' rather than a 'war on terrorism'"[208]. However, this declaration led to a debate on the possibility of qualifying violence involving terrorist group as NIAC[209].

The ICRC claims that, from a legal perspective, there is no such thing as a war against terrorism. Adopting a case-by-case approach to classify the situation of violence, ICRC supports the thesis that the fight against terrorism involves various factors: the use of both force, in certain instances, and other measures, such as intelligence gathering, financial sanctions and judicial cooperation. In fact, ICRC does not convey that a global armed conflict is (or has been) taking place, since this assertion would require a confrontation between a unite non-State party and one or more States. Furthermore, ICRC states that "based on available facts, there are not sufficient elements to consider the al-Qaeda "core" and its associated groups in other parts of

[205] *Ivi*

[206] *Ivi*

[207] For example, the war in Afghanistan started in October 2001 involved only States: on one side the US-coalition, on the other Afghanistan.

[208] See *supra* note 204

[209] GENEVA ACADEMY, *supra* note 10, p.23

the world as one and the same party within the meaning of IHL. The same reasoning also applies, for the time being, to the Islamic State group and affiliated groups"[210].

Furthermore, the ICRC supports the thesis that the applicability of IHL could not spread beyond the territory of the parties to the conflict. In fact, due the continuity of hostilities, NIACs could spread into neighboring countries, but not to third countries. Furthermore, criteria of intensity and organization required to a NIAC should be fulfilled in the territory of each individual third State for the applicability of IHL to be applicable[211].

2.3. OVERVIEW OF INTERNATIONAL COUNTERTERRORISM LAW

In 1994, the Declaration on Measures to Eliminate International Terrorism condemned "all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed"[212]. In fact, the Security Council classifies acts of international terrorism as a threat to international peace and security. Therefore, several of its resolutions related to terrorism have been adopted under chapter VII of the United Nations Charter.

To be more accurate, only after 9/11 the response to terrorism became more and more important on the international agenda, since in the past it was considered a national issue. As stated above, various treaties dealing with specific act of terrorism have been

[210] ICRC, *supra* note 99

[211] *Ivi*

[212] UN General Assembly Declaration on Measures to Eliminate International Terrorism, A/RES/49/60, 9 December 1994

adopted: these conventions aim to provide an international legal basis for such terrorist acts. Thanks to this, States could extend their national jurisdiction beyond their territory, if the crime was not committed on it, or involved none of its nationals. Typically, these treaties have some specific characteristics: firstly, they contain compulsory universal jurisdiction clauses[213]; secondly, arrangements for juridical cooperation and mutual legal assistance are provided and finally, they "require states parties to criminalize and punish perpetration or participation in terrorist acts"[214], including preparatory acts[215], in their national law. One possible consequence is that blurred line between foreign terrorist fighters and foreign fighters

One should bear in mind that no sphere of International Law is independent from the others. Therefore, also Counter-terrorism Law deals with global framework. In fact, as analyzed before, some terrorist acts are governed by IHL. However, each act of terrorism is penalized as criminal, both under domestic or international law. Furthermore, even if UN counterterrorism treaties exclude acts regulated by IHL, for the measures adopted by the Security Council is not the same: they are believed to "blur the distinction between armed conflict and terrorism, notably in respect of designate terrorist group that are at the same time a party to an armed conflict"[216]. The UN and Security Council counterterrorism measures will be discussed in detail in the following chapter.

As stated before, IHL and counterterrorism are two different legal regimes, having distinct objectives and structures. The fundamental difference lays on acts of violence: any act qualified as "terrorist" is considered unlawful, while IHL comprehends and regulates both lawful and unlawful acts of violence. In fact, during armed conflicts, IHL does not prohibit the violence against the opposing armed forces, while if such

[213] It reflects the principle *aut dedere aut judicare*, meaning the legal obligation of a state to prosecute or extradite the alleged criminals in its territory.

[214] GENEVA ACADEMY, *supra* note 10, p.34

[215] They address foreign fighter as a terrorism threat.

[216] GENEVA ACADEMY, *supra* note 10, p.35

violence is directed against civilians and civilian targets it became unlawful[217]. Furthermore, IHL ensures the equal protection of persons and objects involved in an armed conflict and equal rights and obligations of belligerents taking part in the hostilities (principle of equality).

Being a transnational phenomenon, a global response is required and it can be pursued most effectively through the United Nations: the role of UN in counter-terrorism is extensive. The General Assembly plays an important role in elaborating an international legal framework, aiming to promote cooperation among States in order to better address this threat. After 9/11, Security Council has established several measures in support of counterterrorism, even if it is to highlight that sometimes it has blurred the line between armed conflicts, governed by IHL, and terrorism. In order to fight al-Qaeda and its associate, the Security Council adopted the Resolution 1390 (2002). Such resolution expanded the previous Resolution 1267 (1999) by turning the 1267 sanctions regime into a general one, without time limits and wherever these were located[218]. The 1267 Sanctions Committee is an executive organ of the UN that monitors implementation of the sanctions[219] and maintains a list of entities and individuals, associated with al-Qaeda, to which the sanctions apply. The second most important UN Security Council sanctions regime is the one provided by Resolution 1373 (2001), which established a "general regulatory framework to combat terrorism, without defining terrorism, terrorist acts or designating particular groups of terrorist"[220]. This Resolution has a legislative character, i.e. it does not "deal with a particular conflict but create law for all states in a general issue area"[221].

In conclusion, the UN Global Counter-terrorism Strategy is a global instrument that provides a common strategy approach to fight and prevent terrorism. The four-pillar

[217] IHL aims to safeguards civilian and civilian objects from the violence of the conflict.

[218] GENEVA ACADEMY, *supra* note 10, p. 36

[219] The sanctions concern travel ban, freeze assets and deny weapons to whoever is in the list.

[220] GENEVA ACADEMY, *supra* note 10, p. 39

[221] I. JOHNSTONE, *The UN Security Council, Counterterrorism and Human Rights*, in A. BIANCHI, A. KELLER, *Counterterrorism: Democracy's Challenge*, Portland, Hart Publishing, 2008, pp. 336 ss.

strategy consists in:

> "measures to address the conditions conducive to the spread of terrorism Measures to prevent and combat terrorism; measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard; measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism."[222]

Furthermore, the previous Secretary-General, Mr. Kofi Annan, established also the Counter-Terrorism Implementation Task Force (CTITF) in July 2005: its aim is to "strengthen coordination and coherence of counter-terrorism efforts of the United Nations system"[223]. It brings together 38 international entities, active in the counter-terrorism effort, and its main goal is to provide support to the States on the application of the Global Counter-terrorism Strategy.

In conclusion, the responses carried out to improve the existing counterterrorism measures or legislation may undermine the principles of International Humanitarian Law and International Human Rights Law, especially in relation with human rights and dignity. Therefore, a special eye should be kept on this issue in order to avoid such effects. During the last years it seems that the lines between armed conflict and terrorism has more and more blurred taking the situation to a risky point. In fact, if during a conflict any act of violence of a non-State armed group is qualify as terrorist, the risk is for such groups not to be considered as a party in a NIAC[224], even if the acts carried out are lawful under IHL.

[222] UN General Assembly Resolution 60/288, The United Nations Global Counter-Terrorism Strategy, A/RES/60/288, adopted on 20 September 2006

[223] Available at https://www.un.org/counterterrorism/ctitf/en/about-task-force, visited on 28/12/2016

[224] At least, according to the definition provided by IHL.

2.4. A FRAGILE BACKGROUND FOR FTFS' TERRORIST ACTIONS

Paragraph 5 of UN Resolution 2178 of 2014, States that the prevention and suppression of "recruiting, organizing, transporting or equipping"[225] of foreign terrorist fighters have to be consistent to international humanitarian law. Many acts that are criminalized as war crimes during an armed conflict are considered as terrorist. As stated before, IHL prohibits both acts, namely attacks, with the primary purpose of spreading terror[226] and acts of terrorism against persons who are not or no longer taking part in hostilities. Besides the two 1977 Additional Protocols which prohibit attacks aimed to spread of terror among the civilian population, the first prohibition is a rule of international customary law, valid both in IACs and NIACs. Such prohibition comprehends either attacks against civilians or indiscriminate or disproportionate attacks as long as their primary aim is to spread terror, without giving important military advantages. According to ICTY, during IACs or NIACs such attacks could be judged as war crimes if they are acts "directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population"[227] while the "offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence"[228]. In fact, the *mens rea* should be the real intent to spread terror, excluding *dolus eventualis* or recklessness[229]. On the other hand, article 33 of the Geneva Convention IV prohibits

[225] UN Security Council Resolution S/RES/2178 (2014), par. 5

[226] This is also an International Customary Law both for IACs and NIACs.

[227] ICTY, Prosecutor v. Galic, (Appeals Chamber), 2006,

[228] *Ivi*

[229] ICTY, Prosecutor v. Galič, Judgment (Trial Chamber), Case No. IT-98-29-T, 5 December 2003

"[c]ollective penalties and likewise all measures of intimidation or of terrorism"[230] against civilians in the hand of the opposing Power.

Common Article 3 of the Geneva Convention states clearly: "the application of the preceding provisions shall not affect the legal status of the Parties to the conflict". In fact, it is important to bear in mind that acts that are lawful under IHL must not be qualified as "terrorist" both on a domestic and international level. The classification of such acts as terrorist could influence the effectiveness of IHL over non-State armed group party in NIACs: even if they follow the IHL, their actions could be judged as unlawful. Furthermore, such scenario could affect Article 6 paragraph 5 of Additional Protocol II, which claims

> "[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[231]

This principle is supported by the UN Security Council resolution 1456 (2003), which claims that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law"[232]. If a non-State armed group party to a NIAC is classified as "terrorist", it would be included in lists of terrorist organizations, either of United Nations, regional organizations or States. Such lists are taken updated according to the new historical development. As stated above, for example, the 1267 Committee, which is responsible for the designation of individuals or entities associated with Al-Qaida, Osama bin Laden and the Taliban[233], was established under Security Council resolution 1267 (1999) to monitor implementation of the sanctions regime[234]. On

[230] 1949 Geneva Convention IV, art.33

[231] 1977 Additional Protocol II, art. 6 par.5

[232] UN Security Council Resolution on Combating Terrorism S/RES/1456, adopted on 20 January 2003

[233] The List is updated on a regular basis and contains anyone, both individuals and entities.

[234] G. BLUM, D.A. LEWIS, N.K. MODIRZADEH, s*upra* note 201

December 17th 2015, the Security Council, through the unanimously adopted resolution 2253 (2015), expanded the listing criteria to include individuals and entities supporting the Islamic State in Iraq and the Levant (ISIL).

This affects activities in war zones, as for assistance or protection: such engagement could be criminalized due to the terroristic nature of the armed group, since the neutrality, independent and impartial intent of the humanitarian action fades. Furthermore, as ICRC affirms, there is no limit given by IHL to non-state armed groups listed as terrorists on an international level from being considered as party to an armed conflict under IHL, but "if you do not consider your adversary as a party to an armed conflict, then you cannot carry out a military operation against it."[235]

Another important theme is the nationality. As explained in the previous chapter, through the evolution of terrorism, the phenomenon of the foreign terrorist fighter has increased in these years. Some States have gone in the direction of deprive FTFs of their nationality, even if it should be subjected to international legal rules, but depriving someone of their nationality means breaking the bond between the person and the international community. In fact, the right of nationality is contained in Article 15 of the Universal Declaration on Human Rights, which affirms "everyone has the right to a nationality"[236] and "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality"[237]. In addition, due to the importance of the issue, other Conventions and treaties strengthen these principles[238].

Against this context, the main challenging issue on FTFs is that they tend to be judged through the Counter-terrorism law for the threat of a blowback: they could be criminalized for something that has not taken place yet and, maybe, never will[239]. In

[235] S. OJEDA, *supra* note 197

[236] Universal Declaration on Human Rights, adopted on 10 December 1948, art. 15

[237] *Ivi*

[238] For example: Convention on the Reduction of Statelessness (CRS), the Convention Relating to the Status of Stateless Persons, European Convention on Nationality (ECN) and the American Convention on Human Rights.

[239] S. CHESTERMAN, *Dogs of War or Jackals of Terror? Foreign Fighters and Mercenaries in International Law*, National University of Singapore - Law, August 2016, available at

the next chapter, some legislations, both international and domestic, will be analyzed to take a deeper look on this question.

http://law.nus.edu.sg/wps/pdfs/007_2016_Simon%20Chesterman.pdf, visited on 27/12/2016

CHAPTER III:

PREVENTIVE AND REPRESSIVE MEASURES

SUMMARY: 3.1. Measures adopted by the UN Security Council – 3.1.1. UN Resolution 2170/2014 and the topic of support to terrorist group – 3.1.2. UN Resolution 2178/2014 on Foreign Terrorist Fighters – 3.1.3. UN Resolution 2178: a controversial Resolution - 3.1.4. UN Resolution 2249/2015: a focus on ISIL – 3.2 Measures of the European Union in response to the Foreign Terrorist Fighter phenomenon – 3.2.1. Response after the terrorist attack in Europe and lines of action – 3.2.2 The complex relationship between the new countermeasures and the founding principle of EU

3.1. MEASURES ADOPTED BY THE UN SECURITY COUNCIL

Under the Charter, the UN Security Council has primary responsibility for the maintenance of international peace and security, addressing threats through political action. Against the magnitude of the danger posed by ISIS, UN Security Council has adopted resolutions that focus on FTFs, stressing the urgent need to undertake effective countermeasures against them.

Formal expressions of the will of United Nations organs[240], the resolutions generally consist in a preamble, which contains consideration the document purposes and the basis on which action is take, an opinion expressed or a directive given, and an operative part, which states the opinion of the UN Security Council or the actions to be taken. The following paragraphs analyze three resolutions, all adopted in response to acts of international terrorism, that implement the already existing counterterrorism framework.

Recent studies have noted that the UN Security Council has entered its legislative phase with UN Resolution 1373 of 2001[241]. In this Resolution, adopted under Chapter VII of the UN Charter, the UN Security Council provides a range of abstract measures for fighting terrorism, such as freezing the resources of terrorists or criminalization of terrorist acts. Contrary to classic individualized Resolutions, these new generic Resolutions do not name a particular target and their obligations are similar to the ones in international agreements. Since international terrorism is recognized as a threat to peace and security, the UN Security Council can deal with "terrorist organizations in general, enabling it to have measures in place when another terrorist

[240] Available at http://www.un.org/en/sc/documents/resolutions/, visited on 05/01/2017

[241] S. TALMON, *The Security Council as World Legislature*, American Journal of International Law, Vol. 99, No. 175, 2005, p.175

organization is set up, or even to prevent its foundation"[242]. However, the UN Security Council can be effective only with the full support of the UN Member States.

3.1.1. UN RESOLUTION 2170/2014 AND THE TOPIC OF SUPPORT TO TERRORIST GROUPS

On 15th August 2014, the UN Security Council adopted Resolution 2170. The Resolution, aiming to stop the flow of money, weapons, fighters and other supports to terrorist groups in Iraq and Syria[243], condemns widespread abuse of Human Rights by Extremist Groups in Iraq, Syria[244]. The Resolution falls under Chapter VII of the United Nations Charter, namely it is legally binding for all UN Members.

The UN Council abstained from defining FTFs, even if the content makes clear that the term referred to foreign fighters of ISIL, al-Nusra and other entities associated with al-Qaeda[245]. The Council uses the term FTFs associating "overtly and explicitly [...] the fighters with particular groups and with terrorism"[246]. According to this Resolution, UN Security Council considers ISIL as an associated force of al-Qaeda[247],

[242] *Ibidem*, p.192

[243] D. LEIMBACH, *UN Security Council Sanctions Six Terrorists Operating in Iraq and Syria*, available at http://www.passblue.com/2014/08/17/un-security-council-sanctions-six-terrorists-operating-in-iraq-and-syria/, visited on 30/01/2017

[244] Available at https://www.un.org/press/en/2014/sc11520.doc.htm, visited on 15/01/2017

[245] GENEVA ACADEMY, *supra* note 10

[246] *Ibidem*, p.42

[247] M. SCHEININ, *ISIS/ISIL remains associated with Al-Qaida because the UN Security Council says so?*, Just Security, available at https://www.justsecurity.org/15014/isisisil-remains-al-qaida-security-council-so/, visited on 31/01/2017

i.e. as entity number QE.J.115.04, one of the aliases of Al-Qaida in Iraq. In addition, the annex to the Resolution added six key individuals linked to ISIL or al-Nusra to the sanctions list[248], "subjecting them to an international travel ban, asset freeze and arms embargo"[249].

Resolution 2170 imposes three main duties on States. Firstly, it restates the duty to prevent and suppress the financing of terrorism, already disposed in Resolution 1373[250]. Secondly, it confirms that to the 1267 sanctions list might be added "those recruiting for or participating in the activities of ISIL, ANF [al-Nusra front], and all other individuals, groups undertaking and entities affiliated with Al-Qaida under the Al-Qaida sanctions regime, including through financing or facilitating, for ISIL or ANF, of travel of foreign terrorist fighters"[251]. The list, originally established to pursue Taliban of Afghanistan, was "broadened to become a universal list of individuals and entities associated either with the Taliban or Al-Qaida"[252]. Before 2011 sanctions against Taliban and al-Qaeda hade been handled by the same Committee, but Resolution 1989 (2011), adopted under the Chapter VII of the UN Charter, modified the Committee established in Resolution 1267 to include only al-Qaeda and associates[253].

Lastly, the UN Security Council condemned recruitment of foreign terrorist fighters by ISIL, al-Nusra front, and other entities associated with al-Qaeda, while it required all these foreign terrorist fighters to withdraw, as well. In order to fulfill this task, it called on Member States to take national measures to suppress the flow of FTFs to ISIL, al-Nusra and other groups associated with al-Qaeda. In fact, if the fight against terrorist financing has achieved significant successes, States struggled to obtain

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[248] One of the six individuals was Abu Bakr al-Baghdadi, leader of ISIL.

[249] S. TALMON, *supra* nota 241

[250] This Convention, almost universally ratified, entered into force on 10 April 2002.

[251] UN Security Council Resolution 2170 on Condemning Gross, Widespread Abuse of Human Rights by Extremist Groups in Iraq and Syria, S/RES/2170, adopted on 15 August 2014, para. 19 and Annex I

[252] GENEVA ACADEMY, *supra* note 10,

[253] UN Security Council Resolution 1988, adopted on 17 June 2011, addresses sanctions against the Taliban.

similar goals in limiting and preventing the flow of FTFs to Syria and Iraq[254]. On the other hand, States should bring to justice all FTFs belonging to one of the previous terrorist groups, recalling that their "attacks against civilians on the basis of ethnic or religious identity might constitute crimes against humanity"[255].

3.1.2. UN RESOLUTION 2178/2014 ON FOREIGN TERRORIST FIGHTERS

On 24th September 2014, in a rare session of the UN Security Council attended by heads of States, UN Security Council unanimously adopted Resolution 2178, which is considered one of the most important quasi-legislative efforts of the Council since resolution 1373[256]. The structure is modeled after UN Resolution 1373, since it required all member states to criminalize the provision of financial support to terrorist groups[257]. However, there is a significant difference between the two: Resolution 2178 "imposes new legislative obligations upon Member States, without the existence of preceding treaty adopted by the General Assembly, and there is no way states could regularize the legal basis for their action by ratifying a treaty"[258]. On the contrary, the

[254] Z. GOLDMAN, *The Foreign Fighter Resolution: Implementing a Holistic Strategy to Defeat ISIL*, Just Security, 29 September 2014, available at https://www.justsecurity.org/15721/foreign-fighter-resolution-implementing-holistic-strategy-defeat-isil/, visited on 15/01/2017

[255] S. TALMON, *supra* nota 241

[256] M. MILANOVIC, *UN Security Council Adopts Resolution 2178 on Foreign Terrorist Fighters*, EJIL: Talk!, 24 September 2014, available at http://www.ejiltalk.org/un-security-council-adopts-resolution-2178-on-foreign-terrorist-fighters/, visited on 30/01/2017

[257] GENEVA ACADEMY, *supra* note 10

[258] M. SCHEININ, *A Comment on Security Council Res 2178 (Foreign Terrorist Fighters) as a "Form" of Global Governance*, Just Security, 6 October 2014, available at

UN Security Council imposed the adoption of Resolution 1373, regardless of its ratification[259], due to the emergency situation created by the terrorist attacks committed by al-Qaeda. Furthermore, emphasizing the countering violent extremism, Resolution 2178 encouraged a balanced response to the previous one and to terrorism with the aim to combine repressive and preventive measures[260].

First of all, Resolution 2178 reaffirms once again that terrorism represent one of the most serious threats to international peace and security[261]. This particular threat, namely the foreign terrorist fighter threat, "includes, among others, *individuals* supporting acts or activities of Al-Qaida and its cells"[262].

Against the background of the rise of ISIL, al-Nusra and other terrorist groups associated with al-Qaeda, this Resolution, focusing on FTFs, foresees measures to prevent their movement and their recruitment in a comprehensive manner. This resolution's effort is to present a holistic approach to the problem of FTFs by "recognizing that terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone"[263]. On the other hand, it outlines that there is a need to "address the conditions conducive to the spread of terrorism, as outlined in Pillar I of the United Nations Global Counter-Terrorism Strategy"[264].

Even if the instructions related to the implementation of law enforcement tools, freezing sanctions of financial assets, border management mechanisms, or intelligence

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https://www.justsecurity.org/15989/comment-security-council-res-2178-foreign-fighters-form-global-governance/, visited on 30/01/2017

[259] The Security Council exercised its powers under Chapter VII.

[260] Global Center on Cooperative Security, *supra* note 79, p. 2

[261] UN Resolution 2178 (2014), preambular paragraphs

[262] *Ibidem*

[263] *ICCT Commentaries: The New Security Council Resolution 2178 on Foreign Terrorist Fighters: a missed opportunity for a holistic approach*, 8 November 2014, available at https://terroristinformation.wordpress.com/2014/11/08/icct-commentaries-the-new-security-council-resolution-2178-on-foreign-terrorist-fighters-a-missed-opportunity-for-a-holistic-approach/, visited on 05/01/2017

[264] UN Resolution 2178 (2014), preambular paragraphs

sharing needs[265] are detailed, the strategies aiming to pursue these goals are not developed, apart from few paragraphs that oblige States to take counter measure[266]. In paragraph 4, it called on Member States to develop and implement rehabilitation and reintegration strategies. In paragraph 16, UN Security Council "encourages states to engage with relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, and include relevant stakeholders in this process to adopt tailored approaches to countering recruitment and promote social inclusion and cohesion"[267]. Encouraging States to work with communities, Resolution 2178 aimed to develop more strategic response to ideologies of violent extremism. In fact, even if it is demonstrated by facts that extremist narratives could persuade certain individuals and attract support, no strategic countermeasure to this has been discovered. It highlights the need to research and develop a more effective violent extremism responses[268].

The Resolution may pursue its goals only through a mix of the tools, already used in the terrorism financing fight:

> "1) Consistent pressure at the highest levels designed to overcome domestic political obstacles to robust enforcement of UNSCR 2178 in states that are the origin or transit points for foreign fighters;
>
> 2) Sustained information sharing to help states with less effective intelligence services identify networks of facilitators operating in their countries; [...]
>
> 3) Working-level assistance, including by UN organs like the

[265] *Ibidem*

[266] In particular, operative paragraphs 5, 6, 7 and 8.

[267] UN Resolution 2178 (2014)

[268] Counter violent extremism initiatives should focuses on providing alternatives to extremism narratives and countering them, empowering communities and providing support, both psychological and social, to individuals.

Counterterrorism Executive Directorate, to build effective border control and interdiction processes"[269].

Resolution 2178 addresses directly to individuals, as can be read in operative paragraph: "demands that all foreign terrorist fighters disarm and cease all terrorist acts and participation in the conflict"[270], even if resolutions of the UN Security Council oblige only Member States, according to Article 25 of UN Charter. In its Kosovo advisory opinion, International Court of Justice emphasizes a "mere "indication" suggests that it would be possible to impose obligations on non-state actors where such obligations can be inferred by the circumstances, even if they are not explicit"[271]. The binding effect of resolution on individuals is to be researched in the UN Charter: in the view of the practice accepted by UN Members and ICJ's Kosovo opinion, the UN Charter endows the UN Security Council with a special authority that "also is effective *erga omnes* vis-à-vis individuals"[272]. This result can be understood in the light of the need of avoid a regulatory gap[273]: due to their pacifying task, UN Security Council resolutions should address to individuals or group[274].

[269] UN Resolution 2178 (2014)

[270] *Ivi*, preambular paragraphs

[271] A. PETERS, *Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person, Part I*, EJIL: Talk!, 20 November 2014, available at http://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/, visited on 20/01/2017

[272] *Ivi*

[273] *Ivi*

[274] It became more important in the context of fragile statehood.

3.1.3. UN RESOLUTION 2178: A CONTROVERSIAL RESOLUTION

Blurring the lines between terrorism and armed conflict, Resolution 2178 is partly in conflict with IHL. This can be seen already in the definition of FTF, which goes as follow

> "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict"

Such definition includes as terrorist acts also the ones carried in connection with an armed conflict, without "confining the term to acts prohibited by IHL"[275], as explained in the previous chapter. Furthermore, according to the definition, an individual who joins a group that is both a party to an armed conflict and a designated terrorist one, may be accused of receiving terrorist training: once again, IHL rules are not taken into consideration. On the other hand, if the definition is interpreted in a different way[276], FTFs' terrorist purpose is the discriminating factor, whether their actions take place during armed conflicts or in peacetime. Therefore, if a person commits an act in connection with an armed conflict, but without any terrorist purpose, cannot be defined as FTF. The two opposing interpretations show the lack of clarity in the definition above.

Additionally, FTFs are treating as actors in an armed conflict even in the operative paragraphs. Firstly, acting under Chapter VII of the UN Charter, the UN Security Council "demands that all foreign terrorist fighters disarm and cease all terrorist acts

[275] GLOBAL CENTER ON COOPERATIVE SECURITY, *supra* note 79, p.42

[276] M. SCHEININ, *supra* note 258

and participation in armed conflict"[277]. Secondly, in accordance with human rights law, IHL and international refugee law, Member States shall ensure their legislation to prosecute:

> "(a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;
>
> (b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training; and,
>
> (c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training"[278].

The aim of such measures is to bring to justice anyone who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting them.

A significant critique to Resolution 2178 is that it does not provide definition of terrorism; it does not even adopt the definition of international terrorism recognized by customary international law. The Resolution refers to FTFs belonging to "the Islamic State in Iraq and the Levant (ISIL), the Al-Nusra Front (ANF) and other cells, affiliates, splinter groups or derivatives of Al-Qaida"[279], without referring to this as a definitive list. Scholars emphasize that Resolution 2178 carries "a significant risk of abuse"[280]. For example, the first paragraph of the Resolution asserts that "terrorism in

[277] UN Resolution 2178 (2014), para. 1

[278] *Ibidem*, par. 6

[279] *Ivi*

[280] A. PETERS, *supra* note 271

all forms and manifestations constitutes one of the most serious threats to international peace and security"[281]. Thus, not only international terrorism is identified as threat, but also all forms and manifestations are considered as a threat and are subjected to the measures carried out in the Resolution. This could pose a great risk on human rights and civil liberties. The main risk is that authoritarian States could apply the definition of terrorism to groups they do not like, even to self-determination movement, or limit the liberties of its citizens.

The question of human rights compliance in opposing FTFs do not poses any new issue. Invoking explicitly human rights law and other rules of international law, the Resolution could "blunt overly extravagant arguments relying on the primacy clause in Article 103 of the UN Charter"[282]. However, the broad participation of states in counterterrorism issues could be seen as a guarantee, or at least an attempt, of the protection of human rights.

Martin Scheinin argues that this Resolution "wipes out the piecemeal progress made over 13 long years in introducing protections of human rights and the rule of law into the highly problematic manner in which the UN Security Council exercises its supranational powers"[283]. As explained before, the legislative and judicial powers are distributed among the General Assembly, the UN Security Council and the Court of Justice. After 9/11 and the menace of Osama bin Laden, the UN Security Council identified the terrorism threat as threat to peace and security and, Scheinin claims, it took for itself both legislative and judicial powers. In fact, since the Resolution is adopted under Chapter VII of the UN Charter, the decisions taken in the operative paragraphs have biding force in conformity of Article 25 and 103 of the UN Charter.

In paragraph 6, the Resolution required States to "criminalize travel, or attempted

[281] UN Resolution 2178 (2014), preambular para. 1

[282] Z. GOLDMAN, *supra* note 253

[283] M. SCHEININ, *Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters*, Just Security, 23 September 2014, available at https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/, visited on 30/01/2017

travel, by foreign fighters to join groups condemned as terrorist groups"[284]. It poses into question how it is possible to detect the terrorist purpose of the travel. According to paragraph 8, credible information that provides reasonable grounds" is required, without fall into discrimination[285]. Furthermore, according to paragraph 2, States should prevent the movement and travel of terrorist through border control and monitor the issuance of identity and travel documents. As one outlined, it is clear, but unrealistic[286]. The countermeasures carried out by the States may impact several human rights, for example the freedom of movement or the freedom of entry into a State, but also "rights applicable to the criminalization of conduct"[287].

Paragraph 9, requiring "that airlines operating in their territories provide advance passenger information to the appropriate national authorities in order to detect the departure from their territories, or attempted entry into or transit through their territories"[288], poses another question about which information should be shared and according to which criteria[289]. In fact, the Resolution refers only to "domestic law and international obligations"[290], without providing any criteria or safeguards for the passengers.

In his report of 2006, former Secretary General Kofi Annan outlined that "[e]ffective counter-terrorism measures and the protection of human rights are not conflicting

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[284] GLOBAL CENTER ON COOPERATIVE SECURITY, *supra* note 79, p.43

[285] UN Resolution 2178 S/RES/2178 (2014), para. 2

[286] 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! 2 October 2014, available at http://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/, visited on 20/01/2017

[287] A. CONTE, *An Old Question in a New Context: Do States Have to Comply with Human Rights When Countering the Phenomenon of Foreign Fighters?* , EJIL: Talk!, 19 March 2015, available at http://www.ejiltalk.org/an-old-question-in-a-new-context-do-states-have-to-comply-with-human-rights-when-countering-the-phenomenon-of-foreign-fighters/, visited on 31/01/2017

[288] UN Resolution 2178 S/RES/2178 (2014), para. 9

[289] M. SCHEININ, *supra* note 277

[290] See *supra* note 283

goals, but complementary and mutually reinforcing ones"[291]. Such complementarity is reflected also in the Global Counter terrorism Strategy. States are obliged to comply with their international human rights rules by both customary international law and international treaties.

In Paragraph 3, the UN Security Council requests Member States to intensify and accelerate the exchange of operational information, especially with the United Nations, without explaining how UN could facilitate this exchange[292]. On the other hand, through paragraph 7, the Resolution affirms that UN Security Council will start blacklisting entities that support terrorist activities and groups in various ways, including through communication technologies. This paragraph poses the question whether Internet providers or famous media platforms could risk to be listed if their cooperation was not sufficient[293].

In conclusion, several lacunas have been found in Resolution 2178, especially, as explained before, in relation to the strategy proposed, that need to be fixed to improve the result. Ones considered this Resolution as a "missed opportunity to further the development and implementation of more genuine preventive measures"[294]. The implementation of such measures in national framework is not so simple and poses several challenges, mainly due to the lack of definition of terrorism and ambiguous relationship with IHL. Additionally, not providing concrete policy tools, Resolution 2178 gives the States a freedom in interpreting and implementing its obligations: it could lead to the development of far different, or even counterproductive, measures.

[291] Report United Against Terrorism of the Secretary General A/60/825, para. 5

[292] GLOBAL CENTER ON COOPERATIVE SECURITY, *supra* note 79, p. 9

[293] *Ivi*

[294] ICCT Commentaries, *supra* note 263

3.1.4. RESOLUTION 2249/2015: A FOCUS ON ISIL

On 16 November 2015, UN Security Council adopted unanimously Resolution 2249, drafted by France, on combating ISIL. It condemns ISIL terrorist attack of 2015 and determines that ISIL is a "global and unprecedented threat to international peace and security"[295]. Contrary to the previous resolution, this one was not adopted under Chapter VII of UN Charter, namely the UN Security Council must authorize or decide to do something for the Resolution to became binding and have operative legal effect[296].

In this Resolution, the UN Security Council urges "Member States to intensify their efforts to stem the flow of foreign terrorist fighters to Iraq and Syria and to prevent and suppress the financing of terrorism"[297]. Against this background, it also is to bear in mind that UN Security Council Resolution 2253 renamed the list 'ISIL (Da'esh) and Al-Qaida Sanctions List', in order to add individuals and entities supporting ISIL. In detail, according to paragraph 1, from the adoption of this Resolution the Al-Qaida Sanctions Committee will "be known as the "267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee" and the Al-Qaida Sanctions List shall henceforth be known as the "ISIL (Da'esh) and Al-Qaida Sanctions List"[298].

Moving to paragraph 5, which is the key operative paragraph, UN Security Council:

> "*Calls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the

[295] UN Security Council Resolution 2249, S/RES/2249, adopted on 20 November 2015, preambular para 5

[296] D. AKANDE, M. MILANOVIC, *The Constructive Ambiguity of the Security Council's ISIS Resolution*, EJIL: Talk!, 21 November 2015, available at http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/, visited on 31/01/2017

[297] UN Security Council Resolution 2253 (2015) para. 6

[298] *Ibidem*, para 1

> territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant the Vienna Communiqué of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria"[299]

It is significant the use of the expression "all necessary measures", i.e. the use of force: according to this wording, the use of force is contemplated by the Resolution, even if it is not authorized. Clearly, in this paragraph the Resolution is sending a mixed message. In addition, the use of force should be always in compliance with IHL and UN Charter. This call upon States to take "all necessary measures" could be seen as a self-defense act against global reach of ISIS, a permanent and active threat of further attack: this interpretation could justify the operation of Member States in Syria.

Finally, the main critique to this Resolution is its ambiguity, which "lies not only in the fact that it does not legally endorse military action, while appearing to give Council support to action being taken, but also that it allows for continuing disagreement as to the legality of those actions."[300]

3.2 MEASURES OF THE EUROPEAN UNION IN RESPONSE TO THE FOREIGN TERRORIST FIGHTER PHENOMENON

Within EU, Member States continue updating their legal framework using various

[299] UN Security Council Resolution 2249 (2015), para. 5

[300] See *supra* note 300

tools, from criminal law to administrative measures. States, such France, directly affected by terrorist attacks in their territory have often developed an *ad hoc* legislation[301]. At the universal level, UN Security Council Resolution 2178 had established a legal framework with regard to FTFs. Against this background and the international counterterrorism law, Europe's counterterrorism framework has been developed on two main pillars: on one side, the EU Framework Decision on Combating Terrorism and the EU framework Decision on the European Arrest Warrant, on the other side the Council of Europe's 1977 Convention for the Suppression of Acts of Terrorism[302] and the 2005 European Convention for the Prevention of Acts of Terrorism[303].

First of all, besides listing a series of acts that falls under the definition of terrorist offence, the Framework Decision on Combating Terrorism defines this term as

> "intentional acts [...] which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:
>
> — seriously intimidating a population, or
>
> — unduly compelling a Government or international organisation to perform or abstain from performing any act, or
>
> — seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation"[304].

The added value of this definition is the specification of terrorist purpose. Additionally, taking as reference al-Qaeda structure, the Framework Decision defines also terrorist groups: structured group of more than two persons, established over a

[301] G. CAVALLONE, L. PAOLONI, V. SPINOSA. G. CAPPELLO, *Foreign fighters: a new challenge for the EU counterterrorism strategy How to tackle effectively foreign fighters. Existing and innovative legal tools*, EJTN, p.12, available at http://www.ejtn.eu/Documents/THEMIS%202016/Semi%20A/Italy_TH_2016_01.pdf, visited on 30/02/2017

[302] It refers to other international conventions to define terrorist acts and establishes mutual criminal cooperation for them.

[303] Geneva Academy, *supra* nota 6, p.45

[304] EU Framework Decision 2002/475/JHA of 13 June 2002, art. 1

period of time and acting in concert to commit terrorist offences"[305].

It is to remark that, according to this Framework Decision, terrorism and IHL are separated branches and acts governed by IHL does not fall into this definition[306]. Despite EU strongly supported current Article 3 of the Draft Comprehensive Convention on International Terrorism, which aims to exclude acts lawful under IHL from the definition of terrorism, it does not always follow this line[307]. In fact, in the *Tamil Tiger* case the General Court identified two definitions of terrorism that EU applies in the Area of Freedom, Security and Justice, and the Common Foreign and Security Policy[308]: the former excludes acts committed in armed conflict[309], while the other does not[310]. As a result, from a legal perspective this dichotomy could cause controversial decisions. However, it is to bear in mind that the Framework Decision does not intend to reduce or restrict human rights and the acts governed by IHL are excluded from its scope of application.

The following Article 2, 3 and 4 of the Framework Decision list a series of acts that are relevant to the identification of FTFs since their focus is on the offences linked to terrorist groups and activities, aiding and abetting. In 2008[311], Article 3 and 4 have

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[305] EU FD, art. 2 para. 1

[306] EU FD, preamble

[307] A. GARRIDO-MUÑOZ, *Not Only a Matter of Lex Specialis: IHL, the European Union and Its Two Definitions of Terrorism*, EJIL: Talk!, 1 December 2014, available at http://www.ejiltalk.org/not-only-a-matter-of-lex-specialis-ihl-the-european-union-and-its-two-definitions-of-terrorism/, visited on 15/01/2017

[308] The area of freedom, security and justice (AFSJ) ensures security, justice and free movement within EU, while the Common Foreign and Security Policy (CFSP) covers areas of foreign policy of the EU, for mainly security and defence.

[309] This definition refers to the one contained in the Framework Decision on Combating Terrorism, explained above.

[310] Article 1 paragraph 3 of the Council Common Position of 27 December 2001 defined terrorist act as "intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law," are committed with one of the listed aims.

[311] Council Framework Decision 2008/919/JHA of 28 November 2008

been amended, including to this list the training with the specific purpose of committing terrorist acts, recruitment for terrorism and incitation to commit terrorist offences. Furthermore, according to new Article 3, there is no need to have been committed a terrorist offence for these acts to be punishable[312]. It has been argued that the criteria provided by the definition could criminalize a wide range of acts, which became more threatening considering the fact that individuals may be punished before committing any terrorist, or presumed terrorist, act.

As the Framework Decision on Combating Terrorism, also the Framework Decision on the European Arrest Warrant (EAW) and the EU's targeted sanctions system[313] implemented the obligations set out in Resolution 1373. Settled by the Framework Decision, the EAW is intended to replace the system of extradition for suspected criminals[314], including terrorist, with mutual recognition of arrest warrants and limited grounds for refusal[315]. Despite its effectiveness, EAW remains a complex and problematic tool, mainly since it allows "reaching policy convergence without amendments to [Member States] criminal justice systems"[316]. Furthermore, the execution of EAWs is problematic also due to the need of States to have both a legal framework that incriminates the suspect and sufficient evidences to prosecute[317].

On the other hand, 2005 European Convention for the Prevention of Acts of Terrorism is a balanced combination of preventive and repressive countermeasures. It identifies terrorist offences as any offence listed "within the scope of the international treaties listed in its annex"[318]. This Convention, focusing on criminalizing activities

[312] D. LEIMBACH, *supra* note 243

[313] EU reproduced the list of 1267 Sanctions Committee and created another sanctions list at its own discretion.

[314] EAW applies only to serious crimes.

[315] EUROPEAN COMMISSION, available at http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm, visited on 10/02/2017

[316] See *supra* note 301

[317] EUROJUST, *supra* note 86

[318] The Council of European Convention on the Prevention of Terrorism, CETS196, 16 May 2005, art.1

that may facilitate, provoke or incite acts of terrorism[319], requires states to criminalize intentional actions similar to the ones listed in the Framework Decision.

2015 Additional Protocol to the 2005 Council of Europe Convention on the Prevention of Terrorism was completed in May, but it has not come into force due to the lack of ratification[320]. It supplements the 2005 Convention[321] providing for the criminalization of a series of acts such as receiving training for terrorism (Article 3), travelling abroad for the purpose of terrorism (Article 4), funding such travels (Article 5) and organizing or facilitating travelling abroad for the purpose of terrorism (Article 6). States are obliged to adopt such measures and, according to Article 4, they "may establish conditions required by and in line with its constitutional principles"[322] in order to prohibit travel abroad. Additionally, Article 7 focuses on exchange of information and, far more important, introduces the creation of a network of national "focal points"[323] that should facilitate the exchange of information about individuals travelling abroad with terrorist purpose[324].

Finally, in Article 8 the 2015 Additional Protocol emphasizes the need to respect human rights obligation. Even if 2015 Additional Protocol effectively improves the 2005 Convention, it has to face some limits. Firstly, the "focal point" is not so easy to realize in the light of delicate relation between States[325]. Secondly, the delicate

[319] GENEVA ACADEMY, *supra* note 10, p.46

[320] The text will enter into force after six states, including four members of the Council of Europe, ratify it.

[321] Article 9 of the Additional Protocol states clearly that word and expression of the text should be interpreted according to 2005 Convention.

[322] Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, CETS No 217, 19 May 2015, art. 4 para. 2

[323] A point of contact must be available on a 24-hour, seven-days-a-week basis.

[324] An example of global database is the one of INTERPOL.

[325] A. GARRIDO-MUÑOZ, *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*, European Papers, 22 April 2016, available at http://www.europeanpapers.eu/it/europeanforum/additional-protocol-council-europe-convention-prevention-terrorism#A1, visited on 29/01/2017

relationship with IHL shows up once again: according to Article 9 of the Protocol, Article 26 paragraph 5, which excludes activities of armed forces during an armed conflict from the Convention[326], should apply. Against this unclearly background, it may happen that States would adopt different approaches on this issue. Lastly, it should be considered "the possibility that human rights issues result from the broad definition of preparatory acts of terrorism made in the Protocol"[327]: the implementation of the criminal offences in the national system could undermine the fundamental guarantees.

3.2.1. RESPONSE AFTER THE TERRORIST ATTACKS IN EUROPE AND LINES OF ACTION

The threat posed by FTFs requires a comprehensive approach, where the primary role is played by the Member States, while the EU plays a supportive role[328]. Since 2013, the Council of EU and the European Council have developed a response, including both internal and external lines of action.

Concerning the internal sphere, there are four areas where the EU, supporting the Member States, could be significantly important: prevention, information exchange on identification and detection of travel, criminal justice response and cooperation with third countries. In 2014, Member States proposed an implementation of such measures, while in the same year Ministers of Justice and Home Affairs agreed on

[326] Such acts are governed by IHL.

[327] See *supra* note 322

[328] Available at http://www.consilium.europa.eu/en/policies/fight-against-terrorism/foreign-fighters/, visited on il 01/02/2017

some important points:

> "-the urgency of finalising the EU PNR [EU Passenger Name Record] directive, calling the European Parliament to adopt its position on the draft directive as soon as possible
>
> -the need to improve checks at the external borders of the Schengen area
>
> -the need to improve the judicial response and, in particular, to update the framework decision on combating terrorism
>
> -the need for improvements in information exchange, highlighting the role of Europol and Eurojust
>
> -a number of specific actions to accelerate the implementation of existing measures"[329].

To be precise, the idea behind PNR data is to prevent known terrorist from entering EU territory and to warn about potentially dangerous individuals. Many political parties have criticized this measure since sharing information with third countries is considered as "breaching the current legislation on privacy, non-discrimination and protection of personal data"[330].

After the 2015 Paris Attacks, Justice and Home Affairs ministers issued a joint statement[331]. Against this background, on 12 February EU leaders held a debate to develop a statement to guide the work of EU and the member States in the future with the aim of reinforce counter terrorism measures, in compliance with human rights law and the rule of law. This statement outlined three main lines of action: ensuring the security of citizens, which is considered an immediate necessity, preventing radicalization and safeguarding values and cooperating with international partners. In December 2015 the improvement of such measures was still a priority for the EU.

In March 2015, Ministers of Justice and Home Affairs decided to implement the internal measures, focusing on

> "-the reinforced application of the Schengen framework: ministers agreed to implement systematic checks based on risk assessment no later than June 2015

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[329] *Ivi*

[330] T. SINKKONEN, *Counterterrorism in external action*, FIIA briefing paper 129, May 2013, p.4

[331] Riga joint statement on counter-terrorism of 2 February 2015.

-internet content promoting violent extremism or terrorism: they asked Europol to set up an EU Internet referral unit by July 2015

-trafficking of firearms: they called on the Commission and Europol to propose ways to fight against trafficking of firearms and enhance information exchange and operational cooperation

-EU PNR directive: ministers agreed to actively engage with the European Parliament in order to make decisive progress in the coming months"[332]

In the same year, the Council and the European Parliament adopted new rules to prevent money laundering and terrorism financing. On the other hand, in October 2015, the Council adopted conclusions on strengthening measures to fight trafficking in firearms. In June 2016, such conclusion was implemented thanks to the Home Affairs ministers that agreed on Council proposal for a control of the acquisition and possession of weapons.

Following the terrorist attacks in Paris, on 20 November 2015, justice and home affairs ministers adopted several conclusions, focusing on "finalising the EU passenger name record (PNR) directive before the end of the year, fighting against the trafficking of firearms, reinforcing controls at EU external borders, targeting terrorist financing and improving information sharing and judicial cooperation"[333]. Furthermore, conclusions on improving the criminal justice response to radicalization leading to terrorism and violent extremism have been adopted.

In December 2015, an agreement on PNR between ministers and European Parliament was found and the European Commission advanced a set of proposals to manage the EU's external borders and protect the Schengen area, aiming to protect EU internal security and safeguard the principle of freedom of movement. In February 2016, the Council agreed on one of the proposal: the reinforcement of checks all external EU borders[334].

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[332] Available at http://www.consilium.europa.eu/en/policies/fight-against-terrorism/foreign-fighters/, visited on 05/02/2017

[333] *Ivi*

[334] The proposal of the European Commission was to reinforce controls at the EU borders: States would

In the same month, counter measures against terrorist financing have been strengthen by the Council, while during the following month Justice ministers Council's negotiating position "strengthens the EU's legal framework in preventing terrorist attacks, in particular by criminalising preparatory acts such as training and travel abroad for terrorist purposes, hence contributing to combatting the phenomenon of foreign fighters"[335].

After the terrorist attacks in Brussels, representatives of EU and Justice and Home Affairs ministers adopted a joint statement that focused on

> "-urgent adoption of the PNR directive by the European Parliament in April 2016
>
> -swift completion of legislation under discussion and full implementation of agreed measures, particularly in respect of firearms and precursor chemicals used in the manufacture of explosives
>
> -increasing the feeding and use of European and international databases in the fields of security, travel and migration
>
> -finding ways to secure and obtain more quickly digital evidence
>
> -improving early detection of signs of radicalisation"[336]

On 21 April 2016, Home Affair ministers adopted a measure on the use of PNR data aimed to prevent and prosecute terrorist acts and other serious crimes. The aim is both to regulate the transfer from the airlines to the Member States of such data concerning passengers of international flights, and to process them thanks to competent authorities[337]. Whereas air carrier are oblige to provide all PNR data of flights crossing the EU border, namely entering or departing, Member States should not do the same for European domestic flights.

In June 2016, ministers endorsed a framework for implementing the exchange of information. Finally, in July 2016 a preliminary meeting of economy ministers took

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have been obliged to check both EU-citizens and foreigners.

[335] See *supra* note 332

[336] *Ivi*

[337] Available at http://www.consilium.europa.eu/en/press/press-releases/2016/04/21-council-adopts-eu-pnr-directive/, visited on 31/01/2017

places: the main focus was on the strengthening of the rules related to money laundering and terrorist financing.

Concerning the external lines of action of the EU, in October 2014 foreign affairs ministers adopted the EU counter terrorism/foreign fighters strategy focusing on Syria and Iraq. This strategy, aiming to present a broad approach, has a wide range of action. Two of the most important areas covered by this strategy are the prevention of flow of FTFs and the improvement of the cooperation with third countries in order to identify FTFs and their networks. In January 2015, foreign affairs ministers started a debate on improving counter terrorism measures that continued until a meeting on 9 February 2015. During this meeting, a set of conclusions on counter terrorism has been adopted.

In March 2015, the Foreign Affairs Council adopted the regional strategy for Syria and Iraq as well as the Da'esh threat, which was implemented by the Council in May. This strategy focus on foreign fighters as well, remarking the need to block the flow of FTFs and the willing to work with third countries in order to better fight this threat.

Following the terrorist attacks in Paris, France formally invoked bilateral assistance from member states under Article 42 paragraph 7 of the Treaty of the European Union and set out several lines of action on how States could provide such assistance. This article establishes that "if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with article 51 of the United Nations charter. This shall not prejudice the specific character of the security and defence policy of certain Member States"[338]. According to this wording a direct country-to-country approach is provided, rather than more complex involvement of EU institutions[339]. Thus, Member States are required to provide aid and assistance, without prejudging their specific policy on defence and security. For example,

[338] Treaty on European Union (consolidated versions 2012), originally signed on 13 December 2007, art. 42 para. 7

[339] Available at http://www.ecfr.eu/article/commentary_article_427_an_explainer5019, visited on 31/01/2017

"countries with a long-standing traditions of neutrality, like Ireland or Sweden, are not required to break these"[340].

At their meeting in November, EU defence ministers expressed their support, even if it is the first time this article had been used. On his side, French Defence Minister, Jean-Yves Le Drian, emphasized that the request of article 42.7 was "a political act of great significance"[341]. Thanks to this invocation, French could call on European solidarity and more practical support. Both in Europe and the United States, it has been highlighted that France relied on Article 42.7 instead on NATO collective defence clause[342]. One explanation could be that involving NATO could have negatively influenced the diplomatic relations with Arab partners and Russia. Furthermore, if France would have preferred to call for civilian support rather than overseas military operations, Article 42.7 could have been more useful.

On 14 December 2015, foreign affairs ministers discussed the "external dimension of the EU's counter-terrorism work"[343], especially in relation with countries in the Middle East and North Africa, Turkey and the Western Balkans. The meeting of EU leaders took place few days after and the need to strengthen counter-terrorism cooperation with the above-cited countries was strongly remarked.

Finally, on 16 November 2016, following the recent attacks in Paris and Ankara, G20 leaders adopted a statement that focuses on financing channels of terrorism, conditions conductive to terrorism, including radicalisation and recruitment, and the threat posed by the growing flow of FTFs.

According to this framework, the domestic legislation of Member States should focuses on preventing and combating radicalization, counter measures to address

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[340] *Ivi*

[341] L. Cendrowicz, K. Sengupta, *Paris terror: EU countries pledge military support as France and Russia launch new air strikes on Isis*, Independent, 17 November 2015, consultabile al sito http://www.independent.co.uk/news/world/europe/paris-terror-eu-countries-pledge-military-support-as-france-and-russia-launch-new-air-strikes-on-a6738511.html, visitato il 10/02/2017

[342] See *supra* note 337

[343] *Ibidem*

travel and return, and inter-agency and inter-states cooperation. These few topics can produce various possible responses to the threat.

3.2.2 THE COMPLEX RELATIONSHIP BETWEEN THE NEW COUNTERMEASURES AND THE FOUNDING PRINCIPLE OF EU

Aiming to stop the threat, European States adopted various measures, from blocking the validity of travel documents, revoking citizenship, blocking financial assets, to prosecution of recruitment, incitement and the planning of terrorist attacks. Even if States keep on updating their legal frameworks to better address threat, they have not succeeded on block the FTFs phenomenon[344]. On the contrary, the counter measures adopted pose some questions about their compliance with human rights.

The question this paragraph poses is whether the new counter measures addressed to the threat of FTFs, especially the ones in relation with prevention of terrorist acts, could undermine the principles of European Union. First of all, it is to bear in mind that, as stated in Article 2 of the Treaty on European Union,

> "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"[345].

[344] G. CAVALLONE, L. PAOLONI, V. SPINOSA. G. CAPPELLO, *supra* note 300

[345] Treaty on European Union (consolidated versions 2012), originally signed on 13 December 2007, art. 2

All legal and operative tools adopted against FTFs must respect fundamental rights and civil liberties of the individuals. The EU decided to include the rights of every individual within the EU in a single document, which is kept updated on the basis of changes in society, social progress technological development. Proclaimed in 2000[346], the Charter of Fundamental Rights of the European Union contains rights and freedoms, divided into six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, Justice. It enshrines "all the rights found in the case law of the Court of Justice of the EU; the rights and freedoms enshrined in the European Convention on Human Rights; other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments"[347]. Another important tool for the protection of human rights in the EU is the Convention for the Protection of Human Rights and Fundamental Freedoms, also know as European Convention on Human Rights, drafted in 1950 and came into force in 1953. This Convention has played an important role in the development of human rights in Europe and incorporation of the tradition of civil liberty.

Article 15 of ECHR allows States to make partial derogation from fundamental rights in time of emergency, in a "temporary, limited and supervised manner"[348], even thought certain fundamental rights should always be safeguarded[349]: the right to life, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and servitude and right to have a fair trail. Even if these fundamental rights are often strictly connected, among them, the most important is the prohibition of torture and other cruel, inhuman and degrading treatment.[350]. Few exceptions allow

[346] In December 2009, following the enter into force of the Treaty of Lisbon, the Charter became legally binding.

[347] Available at http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm, visited on 02/02/17

[348] European Convention on Human Rights, art. 15

[349] Both France and the United Kingdom have once invoked this Article.

[350] See G. CAVALLONE, L. PAOLONI, V. SPINOSA. G. CAPPELLO, *supra* note 301; R. HIGGINS, *Derogations under Human Rights Treaties*, in British Yearbook of International Law, Vol.48, 1977; A. MOWBRAY, *Cases, Material, and Commentary on the European Convention on Human Rights*, Oxford,

derogating these fundamental rights and only in exceptional circumstances: for instance, the right to life could be derogated during armed conflicts for acts that comply with IHL[351]. It is worth underling that such measures cannot be adopted as preventive ones, but only against an effective and present threat. Against this background, for instance, European Court of Human Rights jurisprudence prohibits extradition or expulsion of international terrorist to third States, when there is the risk that the individual could be exposed to torture or inhuman treatment. Furthermore, Member States shall not use information gathered by such treatments[352]. It should be remarked that also the secret rendition operations violate such fundamental rights and cannot be justified by the so-called war on terror or covered by State secrecy[353]. In addition, States could derogate from other fundamental rights in emergency situations, since a balance between the prevention of terrorist acts and the safeguard of human rights is needed[354]. For instance, the asset freezing system against blacklisted terrorists, which includes ISIS foreign terrorist fighters, might conflict with fundamental rights. On the other hand, a temporary derogation of the right of liberty could be operated when a suspected terrorist is deprived of its liberty due to a public emergency connected to a terrorist threat[355].

Bearing in mind the ideological motivation and the extremist narratives of the FTFs, the European judicial cooperation might conflict with the freedom of religion, expression and association. Nowadays, this framework acquires far greater importance in relation with Internet providers and social media, since they are the new means used for the extremist narratives. Thus, State facing this threat should respect the above-cited freedoms as well. In addition, against this background, it became

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[351] L. ZAGATO, *L'eccezione per motivi di emergenza nel diritto internazionale dei diritti umani*, in DEP. Deportate, Esuli, Profughe, vol. 5-6, p.143

[352] This scenario is strictly connected to the right of a fair trial.

[353] G. CAVALLONE, L. PAOLONI, V. SPINOSA. G. CAPPELLO, *supra* note 300

[354] For instance, the right of liberty could be temporarily suspended if the derogation is manifestly proportionate to the situation, not discriminatory.

[355] G. CAVALLONE, L. PAOLONI, V. SPINOSA. G. CAPPELLO, *supra* note 300

crucial the purpose of terrorism that an act should reflect in order to be considered as a terrorist act[356].

Lastly, the travel bans and the cancellation of passports undermine the right of freedom of movements. Even if limitations of this right could be carried out, they must be "lawful, pursue a legitimate aim, [...] be necessary to achieve that aim"[357] and respect the principle of proportionality. As stated above, this is one the fundamental rights and a principle of the EU.

In its 2011 Resolution on EU counter-terrorism policy, the European Parliament highlighted the importance of the Charter of Fundamental Rights, which "should always be the compass for EU policies in this field and for Member States in the implementation thereof, as well as in cooperation with third parties and third countries"[358]. Currently, the risk is that fundamental rights could be marginalized [359].

[356] It is not enough to show on-line support to FTFs (*actus reus*), but it is decisive the intention (*mens rea*).

[357] GLOBAL CENTER ON COOPERATIVE SECURITY, *supra* note 79, p.60

[358] European Parliament resolution of 14 December 2011 on the EU Counter-Terrorism Policy, CE 168/45, consideration n. 4

[359] EUROPEAN PARLIAMENT, *Briefing, Foreign fighters – Member State responses and EU action*, 9 March 2016, available at http://www.europarl.europa.eu/thinktank/it/document.html?reference=EPRS_BRI(2016)579080, visited on 15/01/2017

CONCLUSION

The FTFs' phenomenon is not new, but it has acquired an unprecedented size and significance in recent years, as already remarked, mostly due to the Syria and Iraq conflict that has witnessed the highest mobilization of FTFs ever occurred. This phenomenon is one of the most complex and deeply debated on international level and was analyzed by different points of view in order to pursue a better understanding because of the high impact that this issue has on the international community and the threat it poses. In this framework, various countermeasures have been taken in order to fight and limit this phenomenon, both at a national and international level, and by now the issue of FTFs has become a priority for the UN and the EU. However, the threat of FTFs is far from being over, as the recent terrorist attacks (or attempted ones) have shown and the several counter-actions carried out worldwide seem not to be as effective as expected.

To better address the evolving threat of FTFs for a long-term sustainable approach, several lines of action could be taken into considerations. First of all, a deep analysis of the FTFs' figure and their motivations is needed in order to understand the phenomenon. A special focus should be addressed towards the new recruiting methods. In fact, since radicalization could lead to violent consequences, i.e. the so-called blowback phenomenon, this complex and multifaceted process must be addressed through a comprehensive response. Since the online propaganda is becoming easily available and is effectively creating a new generation of terrorist, efforts to eliminate terrorist contents on social media must be carried out. On the other side, an incisive counter-narrative policy should be started aiming to delegitimize the FTFs' communication. In this respect, a counter-narrative provided by former terrorists or victims of terrorism could result to be more effective. In the same vein, developing reintegration programs for FTFs could prevent the potential threat they

pose when returning to their State of nationality. Secondly, an agreement on a comprehensive definition of terrorism should be found to unambiguously identify the acts that should be prosecuted. The problem arises in particular when a terrorist group is involved in an armed conflict. In fact, it is important to highlight that IHL prohibits acts whose primary purpose is spreading terror, while acts lawful under IHL should not be considered as terrorist. From this dichotomy, several controversial may arise, in particular concerning fighters involved in NIACs. In fact, as explained before, for instance, due to the absence of combatant status during NIACs, FTFs could be punished for acts that are lawful under IHL. Therefore, such comprehensive definition of terrorism would clarify the relationship between IHL and the regime governing terrorism, in particular concerning the acts considered as terrorist: it should be certain which legal regime must be applied in every situation.

Lastly, since the international community is facing a major security challenge due to the FTFs' phenomenon, a common and cooperative approach is required to realize an incisive policy. In this sense, the strengthening of information sharing may play a particularly important role in prosecute FTFs, especially due to the transnational nature of the phenomenon. In fact, the current legal framework is not adequate to fight this evolving phenomenon, while the responses and countermeasures adopted by States are often inadequate or disproportionate. States, EU and UN have adopted measures aiming to combat and prevent this threat, but such measures does not always comply with human rights law. On the contrary, they have the potential impact to undermine fundamental human rights, both in relation with national citizens and with suspected FTFs. In this framework, it is worth underling that States must comply with human rights obligations under customary international law and international treaties. This problematic issue mainly concerns travel bans or disruption of travels, asset freezing and withdraw of citizenship, all measures that aim to restrict and stop the movement of FTFs. In fact, what may happen is that a government exceeds its authority in order to prevent a suspected terrorist attack.

In order to carry out effective measures, the EU and the UN should play a leading role in harmonizing the responses to this threat, and, at the same time, to protect the human rights as well. In conclusion, this challenging issue must be correctly

addressed by international community in order to develop a coherent international response and to obtain effective results against FTFs in general and eventually to ensure the security and stability of the populations and the international community.

LIST OF ABBREVIATIONS

ANF – al-Nusra front

EAW – European Arrest Warrant

EU – European Union

FTF – Foreign Terrorist Fighter

ICC – International Criminal Court

ICTY – International Criminal Tribunal for the former Yugoslavia

IAC – International armed conflict

ICRC – International Committee of the Red Cross

IHL – International Humanitarian Law

IS / ISIL / ISIS – Islamic State in Iraq and the Levant

NIAC – Non-international armed conflict

PNR – Passenger Name Record

UN – United Nations

BIBLIOGRAPHY

R. BARTELS, *Timelines, borderlines and conflicts, the historical evolution of the legal divide between international and non-international armed conflicts,* in International Review of the Red Cross, vol. 91, No. 873, March 2009

S. BARTOLE*, B.* CONFORTI*, G.* RAIMONDI*, Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2001

A. BIANCHI, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, in European Journal of International Law, No. 17, 2006

A. BIANCHI, Y. NAQVI, *International Humanitarian Law and Terrorism*, Portland, 2011

CENTER FOR SECURITY STUDIES*, Foreign Fighters: An Overview of Responses in Eleven Countries*, Zurich, March 2014

V.D. COMRAS, *Flawed Diplomacy: the United Nations and the War on Terrorism*, Washington, 2010

E. GREPPI, G. VENTURINI, *Codice di diritto internazionale umanitario*, Torino 2003,

S. DAVIS, *Responding to Foreign Terrorist Fighters - A Risk-Based Playbook for States and the International Community*, Goshen, November 2014

J. DE ROY VAN ZUIJDEWIJN, *The Foreigners' Threat: What History Can (not) Tell Us* in *Perspective on Terrorism*, Vol.8, n.15, 2014

D. FLECK (ed.), The Handbook of International Humanitarian Law, Oxford, 2013

GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, *Foreign Fighters under International Law: Academy Briefing no.7*, 2014

T. D. GILL, *Yearbook of International Humanitarian Law*, Vol. 18, Asser Press, 2015

GLOBAL COUNTERTERRORISM FORUM, *Foreign Terrorist Fighters" (FTF) Initiative – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon*, The Hague, 2014

C. HAMILTON, *The European Union: Sword or shield? Comparing counterterrorism law in the EU and the USA after 9/11*, in SAGE Journals, 11th January 2017

W. P. HEERE, From Government to Governance. The Growing Impact of Non-State Actors on the International and European Legal Systems, New York, 2004

T. HEGGHAMMER, *Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting* in *American Political Science Review*,Vol. 107, No. 1, 2013

T. HEGGHAMMER, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, in *International Security*, Vol. 35, No. 3, 2010

R. HIGGINS, *Derogations under Human Rights Treaties*, in British Yearbook of International Law, Vol.48, 1977

M. HMOUD, *Negotiating the Draft Comprehensive Convention on International Terrorism*, Oxford, 2006

F.B. HUYGHE, *The Impurity of War*, in "International Review of the Red Cross", vol. 91, No. 873, 2009

E. HUMUD, C.M. BLANCHARD, M. D. NIKITIN, *Armed Conflict in Syria: Overview and U.S. Response*, Congressional Research Service, Washington, 6 January 2017

B. M. JENKINS, *The New Age of Terrorism* in D. Kamien, *The McGraw-Hill*

Homeland Security Handbook , New York, 2005

I. JOHNSTONE, *The UN Security Council, Counterterrorism and Human Rights*, in A. BIANCHI, A. KELLER, *Counterterrorism: Democracy's Challenge*, Portland, Hart Publishing, 2008

T. KEATINGE, *Identifying Foreing Terrorist Fighters*, ICCT, The Hague

E. KOHLMANN, L. ALKHOURI, *Profiles of foreign fighters in Syria and Iraq*, Combating Terrorism Center, New York, 29th September 2014

D. MALET, *Why Foreign Fighters? Historical Perspectives and Solutions*, Orbis Journal of Foreign Affairs, Vol. 54, No. 1, 2010

M. MANCINI, *Defining acts of International Terrorism in Time of Armed Conflict: Italian case Law in the Aftermath of September 11, 2001 Attacks*, in Italian Yearbook of International Law, vol. XIX, 2009

A. MARCHESI, *Diritti Umani e Nazioni Unite. Diritti, obblighi e garanzie*, Milano, 2007

B. MENDELSOHN, *'Foreign Fighters – Recent Trends'* in *Orbis,* vol. 55, no.2, 2011

T. MERON, *Human Rights in International Law: Legal and Policy Issues*, Oxford, 1984

A. MOWBRAY, *Cases, Material, and Commentary on the European Convention on Human Rights*, Oxford, 2012

D. O'DONNELL, *International treaties against terrorism and the use of terrorism during armed conflict and by armed forces*, in International Review of the Red Cross, Vol. 88-864, 2006

QURESHI, *Blowback – Foreign Fighters and the threat they pose*, CAGE Report, 2014

C. PAULUSSEN, *Testing the Adequacy of the International Legal Framework in Countering Terrorism: The War Paradigm*, The Hague, August 2012

M. PEDRAZZI, *The beginning of IAC and NIAC for the purpose of the applicability of* IHL, in XXXVIII Round table on current issues of international humanitarian law: the distinction between international and non-international armed conflicts: challenges for IHL?, Sanremo September 2015

A. REINISCH, *The Action of the European Union to Combat International Terrorism*, in A. BIANCHI (ed.), *Enforcing International Law*, Oxford, 2004

N. RONZITTI, Introduzione al Diritto Internazionale, Giappichelli, Torino, 2013

B. SAUL, *Research Handbook on International Law and Terrorism*, Cheltenham, 2014

M. SASSOLI, *Terrorism and War, in Journal of the International Criminal Justice*,, Vol.4 No. 5, 2006

M. SASSOLI, A. BOUVIER, A. QUINTIN, *How does Law protect in War?*, ICRC, Geneva, 2006

M. SASSOLI, L. M. Olson, *The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts*, in International Review of the Red Cross, vol. 90 No. 871, 2008

T. SINKKONEN, *Counterterrorism in external action*, FIIA briefing paper 129, May 2013

T. SINKKONEN, *War on two fronts, the EU perspective on the Foreign Terrorist Fighters of ISIL*, FIIA briefing paper 166, January 2015

K. W. STILES*, The Power of Procedure and the Procedures of the Powerful: Anti-Terror Law in the United Nations*, in Journal of Peace Research, Vol. 43, No. 1, 2006

S. TALMON, *The Security Council as World Legislature*, American Journal of International Law, Vol. 99:175, 2005

B. VAN GINKEL, *Prosecuting Foreign Terrorist Fighters: What Role for Military?*, ICCT Policy Brief, May 2006

B. VAN GINKEL,E. ENTENMANN, *The Foreign Fighters Phenomenon in the European Union. Profiles, Threats & Policies*, ICCT, April 2016

S. VITÉ, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situation*, in International Review of the Red Cross, vol. 91, No. 873, 2009

G. TESAURO, Il Diritto dell'Unione Europea, Cedam, Padova, 2010

D. WEGGEMANS, E. BAKKER, P. GROL, *Who are they and why do they go? The radicalization and preparatory processes of Dutch jihadist foreign fighters* in *Perspectives on Terrorism*, vol. 8, no. 4, 2014

L. ZAGATO, *La protezione dei civili nei conflitti armati,* in DEP. Deportate, Esuli, Profughe, vol. 13-14, 2010

L. ZAGATO, *L'eccezione per motivi di emergenza nel diritto internazionale dei diritti umani*, in DEP. Deportate, Esuli, Profughe, vol. 5-6

Y. ZELIN, *The War between ISIS and Al-Qaeda for Supremacy of the Global Jihadist Movement*, Research Notes No. 20, Washington Institute for Near East Policy, 2014

SITOGRAPHY

V. ALESSANDRELLI, *L'11 settembre ed il cambiamento globale,* Istituto di Politica, 9 September 2011, at http://www.istitutodipolitica.it/wordpress/2011/09/09/857/

D. AKANDE, M. MILANOVIC, *The Constructive Ambiguity of the Security Council's ISIS Resolution*, EJIL: Talk!, 21 November 2015, at http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/

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!, 2nd October 2014, at http://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/

AMNESTY INTERNATIONAL, *Preliminary public observations on the terms of reference to draft an Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism*, 2015, at http://www.amnesty.eu/content/assets/Doc2015/Submission_COD-CTE_AI_ICJ_public.pdf

M. BIRNBAUM, *Europe may face a grim future with terrorism as a fact of life*, 24 December 2016, The Washington Post, at https://www.washingtonpost.com/world/europe/after-berlin-market-attack-europe-faces-grim-future-with-terrorism-as-fact-of-life/2016/12/23/6f2f6536-c84c-11e6-acda-59924caa2450_story.html?utm_term=.ef5bbf9ac53b

G. BLUM, D.A. LEWIS, N.K. MODIRZADEH, *Key concepts in the laws of armed conflict and counterterrorism frameworks*, Harvard Law School Program on International Law and Armed Conflict , September 2015, at https://pilac.law.harvard.edu/mcac-

report//2-key-concepts-in-the-laws-of-armed-conflict-and-counterterrorism-frameworks#_ftnref59

D. L. BYMAN, *What happens when Arab foreign fighters in Iraq and Syria go home?*, Brookings, 7th May 2015

S. CHESTERMAN, *Dogs of War or Jackals of Terror? Foreign Fighters and Mercenaries in International Law*, National University of Singapore - Law, August 2016, at http://law.nus.edu.sg/wps/pdfs/007_2016_Simon%20Chesterman.pdf

COLLEGE OF EUROPE, Scope of Application of International Humanitarian Law, Proceedings of the 13th Bruges Colloquium, in Collegium No. 43, 2013

A. CONTE, *An Old Question in a New Context: Do States Have to Comply with Human Rights When Countering the Phenomenon of Foreign Fighters?*, Ejil: Talk, 19 March 2015, at http://www.ejiltalk.org/an-old-question-in-a-new-context-do-states-have-to-comply-with-human-rights-when-countering-the-phenomenon-of-foreign-fighters/,

L. CARACCIOLO, *Ripensare il mondo. Le provvisorie lezioni dell'11 settembre*, 2011, at http://www.treccani.it/enciclopedia/ripensare-il-mondo-le-provvisorie-lezioni-dell-11-settembre_(Il-Libro-dell'Anno)/

CONSILIUM, at http://www.consilium.europa.eu/en

EUROPEAN COUNCILL ON FOREIGN RELATIONS, at http://www.ecfr.eu

EUROPEAN COMMISSION, at http://ec.europa.eu

EUROPEAN PARLIAMENT, *Briefing, Foreign fighters – Member State responses and EU action*, at http://www.europarl.europa.eu/thinktank/it/document.html?reference=EPRS_BRI(2016)579080

G. CAVALLONE, L. PAOLONI, V. SPINOSA. G. CAPPELLO, *Foreign fighters: a new challenge for the EU counterterrorism strategy How to tackle effectively foreign fighters. Existing and innovative legal tools*, EJTN, 2016, at http://www.ejtn.eu/Documents/THEMIS%202016/Semi%20A/Italy_TH_2016_01.pdf

L. Cendrowicz, K. Sengupta, *Paris terror: EU countries pledge military support as France and Russia launch new air strikes on Isis*, Independent, 17 November 2015, at http://www.independent.co.uk/news/world/europe/paris-terror-eu-countries-pledge-military-support-as-france-and-russia-launch-new-air-strikes-on-a6738511.html

E. DE CAPITANI, *"Foreign Fighters" and EU implementation of the UNSC resolution 2178. Another case of "Legislate in haste, repent at leisure…" ?*, at https://free-group.eu/2015/04/06/foreign-fighters-and-eu-implementation-of-the-unsc-resolution-2178-another-case-of-legislate-in-haste-repent-at-leisure-1/

K. DÖRMANN, *The legal situation of "unlawful/unprivileged combatants"*, 2003, at https://www.icrc.org/eng/assets/files/other/irrc_849_dorman.pdf

EUROJUST, Foreign Fighters: *Foreign Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response*, at http://www.statewatch.org/news/2015/feb/eu-eurojust-foreign-fighters.pdf

K. FALLAH, *Corporate actors: the legal status of mercenaries in armed conflict*, vol. 88 n.863, 2006, at https://www.icrc.org/eng/assets/files/other/irrc_863_fallah.pdf

S. FELICIAN BECCARI, The European Post, 5th November 2015

A. GARRIDO-MUÑOZ, *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*, European Papers, 22 April 2016, at http://www.europeanpapers.eu/it/europeanforum/additional-protocol-council-europe-convention-prevention-terrorism#A1

A. GARRIDO-MUÑOZ, *Not Only a Matter of Lex Specialis: IHL, the European Union and Its Two Definitions of Terrorism*, EJIL: Talk!, 1 December 2014, at

http://www.ejiltalk.org/not-only-a-matter-of-lex-specialis-ihl-the-european-union-and-its-two-definitions-of-terrorism/

M. GIRO, *La sfida che ci lancia lo Stato Islamico*, Limes, 29th November 2014, at http://www.limesonline.com/la-sfida-che-ci-lancia-lo-stato-islamico/67586

GLOBAL COUNTERTERRORISM FORUM, *"Foreign Terrorist Fighters"(FTF) Initiative, The Hague – Marrakesh Memorandum on Good Practices for a more Effective Response to the FTF phenomenon*, 2014, at https://www.thegctf.org/documents/10162/140201/14Sept19_The+Hague-Marrakech+FTF+Memorandum.pdf

Z. GOLDMAN, *The Foreign Fighter Resolution: Implementing a Holistic Strategy to Defeat ISIL*, Just Security, 29 September 2014, at https://www.justsecurity.org/15721/foreign-fighter-resolution-implementing-holistic-strategy-defeat-isil/

M. HASHIM, Iraq and Syria: who are the Foreign Fighters?, BBC News, 3rd September 2014, at http://www.bbc.com/news/world-middle-east-29043331

ICRC, *31st Report on International humanitarian law and the challenges of contemporary armed conflicts*, 2011, at https://app.icrc.org/e-briefing/new-tech-modern-battlefield/media/documents/4-international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts.pdf

ICRC, *32nd Report on International humanitarian law and the challenges of contemporary armed conflicts*, 2015, at https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts

ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf

ICRC, *Customary IHL*, at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1

ICRC, *The Geneva Conventions of 1949 and their Additional Protocols*, 29 October 2010, available at https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm

ICRC, *What does IHL say about terrorism?,* 22 January 2015, at https://www.icrc.org/en/document/what-does-ihl-say-about-terrorism

ICRC, *What is International Humanitarian Law?*. 2004, at https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf

F. IRSHAID, *Isis, Isil, IS or Daesh? One group, many names*, BBC News, 2nd December 2015, at http://www.bbc.com/news/world-middle-east-27994277

D. LEIMBACH, *UN Security Council Sanctions Six Terrorists Operating in Iraq and Syria*, at http://www.passblue.com/2014/08/17/un-security-council-sanctions-six-terrorists-operating-in-iraq-and-syria/

D. LI, *A universal enemy?: "foreign fighters" and legal regimes of exclusion and exemption under the "global war on terror"*, Student Scholarship Papers Yale Law School, 2009, at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1092&context=student_papers

LIVEMINT, *What is the Comprehensive Convention on International Terrorism?*, available at http://www.livemint.com/Politics/Ee84kLhbyP5NJ9mFnMzkKO/Will-Sushmas-speech-at-the-UNGA-give-fresh-push-to-antiter.html,

LYNCH, *What Are Foreign Terrorist Fighters? UN World Leaders Resolve To Stop Western Terrorists*, IBT, New York, 26th September 2014, at http://www.ibtimes.com/what-are-foreign-terrorist-fighters-un-world-leaders-resolve-stop-western-terrorists-1695599

F. MEJDINI, *Albania to Host NATO Centre on Foreign Fighters*, Balkan Insight, 23 June 2016, at http://www.balkaninsight.com/en/article/albania-will-host-nato-center-on-foreign-terrorist-fighters-06-23-2016

M. MILANOVIC, *UN Security Council Adopts Resolution 2178 on Foreign Terrorist Fighters*, EJIL: Talk!, 24 September 2014, at http://www.ejiltalk.org/un-security-council-adopts-resolution-2178-on-foreign-terrorist-fighters/

J. NOSSITER, *La violenza nei video dello Stato islamico nasce da Holliwood*, in Internazionale, 4 January 2016, at http://www.internazionale.it/opinione/jonathan-nossiter/2016/01/04/video-stato-islamico-hollywood

S. OJEDA, *Global counter-terrorism must not overlook the rules of war*, at http://blogs.icrc.org/law-and-policy/2016/12/13/global-counter-terrorism-rules-war/

A. PETERS, *Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person, Part I*, EJIL: Talk!, 20 November 2014, at http://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/

G. RONA, *Foreign Fighters, Mercenaries, and Private Military Companies Under International Law*, at https://www.justsecurity.org/27732/foreign-fighters-mercenaries-pmscs-ihl/

M. SCHEININ, *A Comment on Security Council Res 2178 (Foreign Terrorist Fighters) as a "Form" of Global Governance*, Just Security, 6th October 2014, at https://www.justsecurity.org/15989/comment-security-council-res-2178-foreign-fighters-form-global-governance/,

M. SCHEININ, *Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters*, Just Security, 23th September 2014, at https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/

M. SCHEININ, *ISIS/ISIL remains associated with Al-Qaida because the UN Security Council says so?*, Just Security, 15 September 2014, at https://www.justsecurity.org/15014/isisisil-remains-al-qaida-security-council-so/

L. SLY, K. DEYOUNG, *Syria's Jabhat al-Nusra splits from al-Qaeda and changes its name*, The Washington Post, 28th July 2016, at https://www.washingtonpost.com/world/middle_east/syrias-jabhat-al-nusra-splits-from-al-qaeda-and-changes-its-name/2016/07/28/5b89ad22-54e6-11e6-b652-315ae5d4d4dd_story.html

M. SASSÒLI, *Transational armed groups and international humanitaria law,* HPCR Occasional Paper Series, 2006, at http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf

M. SOSSAI, *UN SC Res.1373 (2001) and International Law-making: A Transformation in the Nature of the Legal Obligations for the Fight against Terrorism?, 2004, at http://www.esil-sedi.eu/sites/default/files/Sossai_0.PDF*

Terrorist Information Portal, *ICCT Commentaries: The New Security Council Resolution 2178 on Foreign Terrorist Fighters: a missed opportunity for a holistic approach*, 8 November 2014, at https://terroristinformation.wordpress.com/2014/11/08/icct-commentaries-the-new-security-council-resolution-2178-on-foreign-terrorist-fighters-a-missed-opportunity-for-a-holistic-approach/

UN, at https://www.un.org/counterterrorism/ctitf/en/about-task-force

UN, at http://www.un.org/en/sc/documents/resolutions/

UNITED NATIONS OFFICE ON DRUG AND CRIME, at https://www.unodc.org

THE USA DEPARTMENT OF JUSTICE, *Interpol Washington Spearheads Foreign Terrorist Fighter Program, Serves as Catalyst for Global Information Sharing*

Network, 24th September 2014, at https://www.justice.gov/opa/pr/interpol-washington-spearheads-foreign-terrorist-fighter-program-serves-catalyst-global

C. WALTER, *Defining Terrorism in National and International Law,* at https://www.unodc.org/tldb/bibliography/Biblio_Terr_Def_Walter_2003.pdf

J. C. Yoo, J. C. Ho, *International law and the war on terrorism*, Berkley University, 2003, at https://www.law.berkeley.edu/files/yoonyucombatants.pdf

JURISDICTIONAL SOURCES

Geneva Conventions of 12 August 1949

Additional Protocol I of the Geneva Conventions of 8 June 1977

Additional Protocol II of the Geneva Conventions of 8 June 1977

Draft of Comprehensive Convention against International Terrorism A/59/894,

UN General Assembly Declaration on Measures to Eliminate International Terrorism, A/RES/49/60, 9 December 1994

UN General Assembly Resolution 60/288, A/RES/60/288, adopted on 20 September 2006

UN Security Council Resolution 1456, S/RES/1456, adopted on 20 January 2003

UN Security Council Resolution 2170, S/RES/2170, adopted on 15 August 2014

UN Security Council Resolution 2178 S/RES/2178, adopted on 24 September 2014

UN Security Council Resolution 2249, S/RES/2249, adopted on 20 November 2015

UN Security Council Resolution 2253, S/RES/2253, adopted on 17 December 2015

International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly in Resolution A/RES/54/109 of 9 December 1999

Treaty on European Union (consolidated versions 2012), originally signed on 13 December 2007

Universal Declaration on Human Rights, adopted on 10 December 1948

EU Framework Decision 2002/475/JHA of 13 June 2002

The Council of European Convention on the Prevention of Terrorism, CETS196, 16 May 2005

Council Framework Decision 2008/919/JHA of 28 November 2008

Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, CETS No 217, 19 May 2015

European Parliament resolution of 14 December 2011 on the EU Counter-Terrorism Policy, CE 168/45

ICTY*, The Prosecutor v. Tadic* (Appeal Judgment), IT-94-1-A, 2 October 1995

ICTY, *The Prosecutor v. Tadic* Judgment (Trial Chamber), IT-94-1-T7 May 1997

ICTY, *Prosecutor v. Tadić*, Judgment (Appeals Chamber), Case No.IT-94-1-A 15 July 1999

ICTY, *Prosecutor v. Galič*, Judgment (Trial Chamber), Case No. IT-98-29-T, 5 December 2003

The Rome Statute of International Criminal Court, entered into force on 1 July 2002