



A review of International Counter-Terrorism strategy through a criminological assessment of the punitive model implemented in Europe

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ABSTRACT: Jihadist terrorism, especially since the Al-Qaeda attacks in 2001 and Daesh's consolidation as an autonomous group in the following decade, have been a major global political concern. In turn, the cruelty exhibited by the Daesh has had an undeniable impact on public opinion, which demands security above all else and has been exploited by the public authorities to promote military and security strategies, along with a restrictive policy on fundamental rights such as freedom of expression, pushing the criminal barrier to questionable limits. The objective of this article is to offer a critical vision of these policies, based on empirical data, about the phenomenon of foreign terrorist combatants.

KEYWORDS: Foreign terrorist fighter – terrorist indoctrination – right to freedom of expression.

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1. International commitment to a security strategy against jihadist terrorism¹

Since the Al-Qaeda attacks on September 11, 2001 and the consolidation of Daesh as an autonomous group during the following decade, jihadist terrorism has been one of the main political concerns globally. Along with the damage produced by specific attacks, jihadism has been able to articulate a ideological movement through its declared objectives: (i) to inflict the greatest possible damage on the enemy, on its own territory; and (ii) to establish a caliphate in which to impose an authoritarian political system, free of any dissidence through the physical destruction of heretics. The emergence of the Islamic state in Syria and Iraq confirms Daesh's goal to be territorial occupation. In June 2014, it controlled a pseudo-state structure, an area larger than the United Kingdom, with more than 27,000 fighters.² In addition to this territorial domain, the self-proclamation of the caliphate made it more attractive with unique features. Daesh became a kind of holy land, the starting point of a political entity capable of granting the "Ummah", the community of Muslims, the usurped territories and power.

In the West, the main concern has been the threat posed by the return of displaced persons who could commit terrorist attacks. Daesh's cruelty has had an undeniable impact on public opinion, which demands security above all. Consequently, although the idea of the "war on terror" had already been maintained following the 2001 attacks, the creation of the Islamic State in the context of the war in Syria has contributed to strengthening the consideration of jihadist terrorists as enemy fighters, susceptible to being killed if they are "in retreat". Thus, the most powerful countries have promoted military and security strategies, including military interventions or extrajudicial executions, after invoking their legitimate right to self-defense. The impossibility of reaching an agreement within the framework of the United Nations General Assembly has left in the hands of the Security Council the initiative, specified in Resolution 2178 (S/RES/2178, 2014), among others. It states the dangerousness of foreign terrorist fighters (FTFs) on the basis of their capacity to increase the intensity of conflicts, as well as to pose a serious threat to their States of origin. Based on these premises, the Resolution advances in two novel lines: (i) on the one hand, it directly addresses non-governmental actors, demanding FTFs to disarm; (ii) secondly, it "decides" that States should penalise a series of acts related to FTFs.

Despite recommendations included in the Resolution to approach the fight against FTFs from a comprehensive perspective that prevents marginalisation and favors rehabilitation, the promotion of specific measures to control the free movement of persons seems to consolidate a restrictive policy on migration and asylum for refugees. In line with this, some States, and also the European Union in 2017, have defined an expansive criminal strategy, but in practice its results might be questionable. Thus, States have expressly punished travel to territories controlled by terrorist organisations, or the preparation of such travel itself, provided that it is for *terrorist purposes*, a teleological requirement that is difficult to specify. Similarly,

¹ This paper represents part of the results obtained in the Research Project "UN Res 2178 and its transposition into national criminal law: proposals for balancing security and individual rights", Ministry of Economy and Competitiveness, Spain, Reference DER2016-77838-R.

² Jordi Torres Roselló, "El totalitarismo islámico. La ideología que sustenta el terrorismo", *Documentos de opinión*, Instituto Español de Estudios Estratégicos (2018), http://www.ieee.es/Galerias/fichero/docs_opinion/2018/DIEEO372018_Totalitarismo_Islamico_JordiTorres.pdf.

the criminal intervention barrier has overtaken the punishment of conduct of mere ideological support or acts of collaboration far removed from the terrorist acts themselves. In this way, independently of other assessments referring to the violation of the principle of minimum intervention in criminal law or of the principle of lesivity, through the punishment of conduct far removed from the damage to individual legal assets, the evaluation of this policy raises as its first objective a balance between its cost for the rule of law itself and the benefits.

In order to deal with this task, our methodology is not compatible with the philosophical or political approach of great interest, regarding the conflict between the rights to freedom of expression and freedom of movement, which are part of the minimum core of protection in a State of Law, on the one hand, and the defense of security as a collective interest, on the other. It aims to analyse the above-mentioned assessment of costs and benefits on the basis of a specific model, the European one in general and the Spanish one in particular. To this end, the research is divided into three blocks: (i) first, measures restricting freedoms of opinion, information and expression through the punishment of acts such as passive self-indoctrination, apology or glorification of terrorism; (ii) second, those concerning freedom of movement, through the punishment of travel for terrorist purposes; (iii) third, an evaluation of the model as a whole by contrasting it with the available empirical data and, conclusions and proposals.

2. Freedom of opinion and expression *versus* protection of security in the European counter-terrorism policy and their transposition into the Spanish Criminal Code

2.1. Counter-terrorism measures entailing jeopardy of freedom of opinion and information

What measures have European countries taken since the adoption of Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 and UN Security Council Resolution 2178? Assessments of the doctrine on policies pursued are not good. In this sense, and in relation to the legislation adopted in the United Kingdom, Pantazis and Pemberton (2012) argue that the exceptional legislation of an authoritarian nature implemented in the United Kingdom by the center-right political forces and supported by populist authoritarianism (the result of a political manipulation of public fears), has been in favour of security by limiting the fundamental rights of a minority.³

It can be stated that in Spain most criminal lawyers oppose the particularly punitive system of the Spanish Penal Code (hereinafter SPC) following various reforms, including those of 2010 and 2015.⁴ Not only have Spanish lawmakers followed the

³ Christina Pantazis and Simon Pemberton, "Reconfiguring security and liberty: political discourses and public opinion in the new century", *British Journal of Criminology*, no. 52 (2011): 651-652, doi: 10.1093/bjc/azr090.

⁴ Tomás Vives Antón, "La reforma penal de 2015: una valoración genérica", in *Comentarios a la Reforma del Código Penal de 2015*, 2nd ed., ed. José Luis González Cussac (Valencia: Tirant lo Blanch, 2015), 29-30; Ana Isabel Pérez Cepeda, "La criminalización del radicalismo y extremismo en la legislación antiterrorista", in *Terrorismo y contraterrorismo en el siglo XXI. Un análisis penal y político criminal*, ed. Ana Isabel Pérez Cepeda *et al.* (Salamanca: Ratio Legis, 2016), 27-30; Alberto Alonso Rimo, "La criminalización de la preparación delictiva a través de la parte especial del Código penal. Especial referencia a los delitos de terrorismo", in *Terrorismo, sistema penal y derechos fundamentales*, ed. Alberto Alonso Rimo *et al.* (Valencia: Tirant lo Blanch, 2018), 231-233; María Concepción Gorjón

indications of the UN, the European Union and those of the Council of Europe, but they have also gone a step further. In this way, the EU Directive drives the Member States to regulate together with the crimes of terrorism itself, the so-called *offences related to terrorist activities* (Articles 5, 6, 7 and 8 of Title III), including conducts widely referred to in the SPC. Specifically, the Directive refers to the following conduct: (i) public provocation to commit a terrorist offence (direct or indirect incitement of one of the types listed in Article 3); (ii) recruitment for terrorism (soliciting another person to commit or contribute to the commission of one of the offences listed in Article 3(1)(a) to (i) or Article 4); (iii) active training for terrorism, (providing instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing or contributing to the commission of one of the offences listed in Article 3(1)(a) to (i); and (iv) finally, reference is made to receiving terrorist or passive training (receiving instruction on the above-mentioned skills).

It should be noted that whilst the penalisation of some of these conducts is already dubious (for example, indirect incitement to commit these offences, since it implies raising to the category of authorship, preparatory acts of collaboration far removed from entailing jeopardy of the protected legal assets), Spanish regulation on terrorist offences goes beyond the European norm. Indeed, the Penal Code makes it a criminal offence to engage in any glorification, justification of terrorism, humiliation of the victims of these types of offences, but in contrast with Directive 2017, it does not require that these conducts involve direct or indirect incitement to commit terrorist offences. Furthermore, the SPC penalises, together with training/indoctrination, the so-called self-training and self-learning. In addition, for the Spanish criminal law, the penalty is the same regardless of the severity of these conducts (the difference is that the Directive enshrines only the most serious, including instruction on the making or use of explosives but excludes mere access to jihadist content).

In this way, Article 575 of the SPC establishes the same penalty (2 to 5 years' imprisonment) for conduct related to indoctrination (ideological training) and training. This aspect of the reform has been sharply criticised by lawmakers in Spain. In this regard, criminalisation of training is appropriate for most of the authors, as they conclude that it does contain a threat, albeit an abstract one, and therefore shows a certain degree of harmfulness.⁵ This is in line with the Directive's

Barranco, "El cibercrimen político. Especial referencia al ciberterrorismo en España: prevención y castigo", in *El terrorismo en la actualidad: un nuevo enfoque político criminal*, ed. Ana Isabel Pérez Cepeda et al. (Valencia: Tirant lo Blanch, 2018), 397-399; Elena Núñez Castaño, "Algunas consideraciones sobre la transposición al Derecho Penal español de la Directiva 2017/541/UE del Parlamento europeo y del Consejo, en materia de terrorismo: ¿una tarea necesaria?", in *Integración europea y justicia penal*, ed. María Isabel González Cano (Valencia: Tirant lo Blanch, 2018), 229-277; Jesús Carreras Aguerri, "La construcción del radical como enemigo en el Código Penal español: los elementos de los delitos aplicados para gestionar la radicalización islamista y sus implicaciones para el Estado de Derecho", *Revista Electrónica de Ciencia Penal y Criminología*, no. 21 (2019), <http://criminet.ugr.es/recpc/21/recpc21-09.pdf>.

⁵ Miguel Ángel Cano Paños, "Odio e incitación a la violencia en el contexto del terrorismo islamista. Internet como elemento ambiental", *InDret*, no. 4 (2016): 28-29, <https://indret.com/odio-e-incitacion-a-la-violencia-en-el-contexto-del-terrorismo-islamista-internet-como-elemento-ambiental/>; Juan Carlos Campo Moreno, *Comentarios a la Reforma del Código Penal en materia de terrorismo: la LO 2/2015* (Valencia: Tirant lo Blanch, 2015), 71-72; José David Moreno Huerta, "Terrorismo yihadista y los nuevos delitos de captación, adiestramiento y adoctrinamiento tras la LO 2/2015", *Quaderns de ciències socials*, no. 35 (2017): 27-29.

call for criminalisation of active and passive training, provided that it is carried out with the intention to commit or contribute to the commission of a terrorist offence (Recital 11).

However, the harshest criticisms have been directed against self-indoctrination offence, provided for in Article 575 section 2 of the SPC, which penalises anyone who usually accesses content on the Internet that is suitable to incite incorporation to a terrorist organization or group, or collaborate with any of them or in its ends. Likewise, it penalises anyone who acquires or has in his possession documents for the same purpose, a classification that clearly curtails the rights to freedom of information and opinion-forming.

The Spanish Supreme Court (hereinafter, SSC) has finally imposed a restrictive interpretation in the application of Article 575 section 2 SPC, as can be seen in its Judgment 354/2017 (*STS 354/2017*) of 17 May. It does not put conduct involving mere ideological training on a level with training, obtaining of practical military knowledge or skills or handling weapons. Similarly, Judgment 306/2019 (*STS 306/2019*), 11 June, waives the application of Article 575 section 2, arguing that criminalisation of self-indoctrination represents a restriction on freedom that has not been included in the EU and UN instruments. Within the Council of Europe, the Additional Protocol to the Convention on the Prevention of Terrorism, opened for signature in Riga on 22 October 2015, calls for the criminalisation of participation in an association or group for the purpose of terrorism (Article 2); receiving training for terrorism (Article 3), but not self-education; travelling abroad for the purpose of terrorism (Article 4); funding travelling abroad for the purpose of terrorism (Article 5); organising or otherwise facilitating travelling abroad for the purpose of terrorism (Article 6).

However, the aggravation of criminal intervention in Spain has also affected limitations on the right to freedom of expression through the criminalisation of the glorification of terrorism offences which are broadly defined. It represents a unique feature of the SPC compared to the European model.⁶

2.2. Counter-terrorism legislation and freedom of expression

While the EU Directive states that the apology may directly incite the commission of terrorist offences in order to be punishable, Article 578 of the SPC establishes a sentence of one to three years' imprisonment for merely publicly glorifying or justifying terrorism, or its perpetrators, or carrying out acts that involve discredit, disdain or humiliation of the victims. Article 578 section 2 of the SPC increases the penalty for such acts carried out through the dissemination of services or contents accessible to the public through the media, the Internet or electronic communications services. It implies the criminalisation of any act of protest through the Internet or "*any humorous expression, far from the destabilizing political purpose of terrorism*".⁷

⁶ Patricia Tapia Ballesteros, "Transposición de la directiva 2017/541, de 15 de marzo, relativa a la lucha contra el terrorismo, al ordenamiento español: el delito de enaltecimiento del terrorismo", *Revista de Estudios Europeos*, no. 1 (2019): 317-319. In a similar vein, Fernando Miró Llinares, "Derecho penal y 140 caracteres. Hacia una exégesis restrictiva de los delitos de expresión", in *Cometer delitos en 140 caracteres. El derecho penal ante el odio y la radicalización en Internet*, ed. Fernando Miró Llinares (Madrid: Marcial Pons, 2018), 30-32.

⁷ María Concepción Gorjón Barranco, "La inflación penal del discurso discrepante: un análisis a través de la jurisprudencia más reciente", *Revista Brasileira de Ciências Criminais*, no. 147 (2018): 634-635.

According to Amnesty International⁸ the Spanish National High Court (*Audiencia Nacional*) handed down only 25 convictions against 28 people for glorification of terrorist offences between 2016 and 2017, among them the so-called “Casandra Case” or the case of César Strawberry of the “Def Con Dos” rock band, sentenced to prison for a series of tweets. In the Casandra Case (Judgment *AN* 9/2017, March 29), the National High Court sentenced to one year in prison a subject for 13 satirical tweets about the murder of Admiral Luis Carrero Blanco, Prime Minister of Spain assassinated by the Basque separatists ETA in 1973. The singer of “Def Con Dos” rock band was sentenced to one year in prison by the Spanish SC (Judgment *AN* 31/2017, 18 January), for glorifying terrorism after publishing a series of tweets such as “*how many should follow Carrero Blanco’s flight?*” (who was killed in an ETA car bomb attack). In 2018, the country’s Supreme Court (Judgment *AN* 397/2018, February 15) condemned the rapper Valtonic, arguing that the lyrics of his songs were an indirect incitement to the reiteration of the attacks carried out by the terrorist groups such as the Basque separatists ETA and Spanish Maoist group GRAPO, at a time when these groups no longer even exist. In the face of this, many authors note that these condemnations represent an unbearable interference with freedom of expression, when paradoxically, terrorist attacks have decreased considerably in Spain.⁹

In the conflict between freedom of expression and other interests, the case-law of the United States Supreme Court has taken the lead on standing up for freedom of expression as an essential presupposition of democracy. This is also the prevailing view in the United Kingdom and other Anglo-Saxon countries. However, in a range of countries in so-called continental Europe and, most especially, in those from the former USSR, the solution has not been as clear. In Spain, the authors invoke the supremacy of freedom of expression and ideological freedom, but the courts have not supported the same criterion.¹⁰

In this area, there is a need to review the case law of the courts responsible for ensuring the defense of fundamental rights and freedoms. Since this research aims at evaluating the European model, and more specifically the Spanish one, we are going to analyse the case law of the European Court of Human Rights (hereinafter, ECHR) and the Spanish Constitutional Court (*Tribunal Supremo*, hereinafter SCC) in this regard. Like the U.S. Supreme Court, the ECHR and the SCC have defended the predominant value of freedom of expression since the 1970s (*Handyside v. United Kingdom case*, ECHR 7 December 1976; SCC Judgment no. 6/1981, of March 16; no. 77/1982, of December 20; no. 12/1982, of March 31; no. 177/2015, of July 22). However, the contours of this fundamental right have not always been clearly delimited, different authors hold that the framework of effective protection of the United States goes beyond that of European countries.¹¹

⁸ See: <https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/espana-ley-antiterrorista-utilizada-para-aplastar-la-satira-y-la-expresion-creativa-online/>.

⁹ Miguel Ángel Cabellos Espírruez, “Opinar, enaltecer, humillar: respuesta penal e interpretación constitucionalmente adecuada en el tiempo de las redes sociales”, *Revista Española de Derecho Constitucional*, no. 112 (2018): 78-80, <https://doi.org/10.18042/cepc/redc.112.02>. In a similar vein, Germán M. Teruel Lozano, “Cuando las palabras generan odio: límites a la libertad de expresión en el ordenamiento constitucional español”, no. 114 (2018): 36-38, <https://doi.org/10.18042/cepc/redc114.01>.

¹⁰ Cano Paños, “Odio e incitación a la violencia”, 23-24.

¹¹ Teruel Lozano, “Cuando las palabras generan odio”, 19. In a similar vein, Rafael Alcácer Guirao, “Víctimas y disidentes. El ‘discurso del odio’ en EEUU y Europa”, *Revista Española de Derecho Constitucional*, no. 103 (2015): 48-50; Ana Aba Catoira, “Protección de las libertades de expresión

It is difficult to say that ECHR case-law has a unanimous but not broad support, however we can observe that in general, the European Court has supported the limitation of freedom of expression against the so-called “*hate speech*”. In this way, not only does the ECHR penalise speech inciting the commission of violent acts (as is the U.S. case law), but it also legitimises the criminalisation of any act or form of expression that implies incitement to hatred directed to certain vulnerable groups, involving discrimination and/or hostility (*Norwood v. United Kingdom, judgment of 16 November 2004*). However, the application of this doctrine has followed different paths. Although the ECHR has been forceful on Holocaust denial, it has allowed historical revisionism (*Garaudy v. France case, judgment of 24 June 2003*). In the case of *Soulas vs. France, judgment of 10 July 2008*, the ECHR narrowly incorporates new requirements for the legitimisation of the restriction of freedoms, submitting the assessment to the principle of balancing or proportionality of the limitation, although it ends up recognising a “margin of appreciation” to the Member States (case of *Vejdeland vs. Sweden, judgment of 9 February 2012*). With regard to political speeches, the ECHR has taken a more protective interpretation of freedom of expression than in other areas (cases of *Féret v. Belgium, judgment of 16 July 2009*; *Mariya Alekhina and others (Pussy Riot) v. Russia, judgment of 17 July 2018*). However, the ECHR did not find any violation of freedom of expression by the Austrian authorities in the case of *E.S. v Austria (38450/12) of 23 October 2018*. The applicant, whose statements were disparaging Muhammad, was convicted for insult to religious feelings.

Among the most forceful ECHR decisions in favour of freedom of expression are those against Spain, which reviewed previous restrictive judgements from the SCC. It is worth mentioning the ECHR judgment of 15 March 2011 in *Otegui Mondragón v. Spain* (Otegui had been sentenced to prison for calling the Head of State “head of the torturers”); ECHR judgment of 13 March 2018, *Stern Taulats and Roura Capellera v. Spain* (there was a conviction for insulting the Crown by setting fire to a photograph of the royal couple); ECHR judgment of 20 November 2018, case of *Toranzo Gomez v. Spain (26922/14)*, (there was a conviction for slander after accusing police officers of torture.) The ECHR ruled that Spain has violated the freedom of expression under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), having regard to circumstances surrounding the different cases, and that such interference was not necessary, fair or proportional.

The Spanish Constitutional Court has gradually absorbed this case-law in its decisions. With regards to the glorification or apology of terrorism, the ECHR Decision of 20 January 2020, *Hogefeld v. Germany*, establishes as a priority criterion that freedom of expression can be limited when it is an incitement to commit violent terrorist acts. The SCC took that decision into account when overruling the country’s Supreme Court decision and acquitting the rock singer César Strawberry (*STC 35/2020*, of February 25). The Constitutional Court argues that despite the fact that the prosecuted conduct could be reprehensible from any point of view (evaluating a terrorist attack in a positive and indirect way), it presupposes the exercise of freedom of expression.

We can conclude that both the ECHR and the SCC provide more guarantees on this point, in line with Anglo-Saxon case-law. This seems to consolidate a tendency

y sanción del discurso del odio en las democracias occidentales”, *Anuario da Facultade de Dereito da Universidade da Coruña*, no. 19 (2015): 202-207, <http://hdl.handle.net/2183/16829>.

towards restrictive penalisation not only of hate crimes in general,¹² but also of expressions that condone or glorify terrorism and do not incite the commission of violent acts. Consequently, those offences referred to by the SPC (Articles 578, sections 1 and 2) that typify acts of disdain of victims or glorification of the acts, but do not represent a form of provocation to the commission of terrorist offences themselves, should be decriminalised or, at most, punished as slander (in the most serious cases). In short, counter-terrorism legislation is not an adequate tool for dealing with this conflict, within the framework of the rule of law.

3. Contradictions of the model with the definition of foreign terrorist fighters (“FTFs”)

3.1. Criminal policy towards FTFs as evidence of the enemy’s criminal liability

UN Security Council Resolution 2178, in view of “*the acute and growing threat posed by foreign terrorist fighters*”, calls upon “*all States (...) to establish serious offences sufficient to provide the ability to prosecute and penalize (...) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other persons travelling or attempting to travel from their territories to a State other than their State of residence or nationality, for the purpose of the perpetration, planning, preparing or participation in terrorist acts*”. The EU Directive of 2017 also states that “*Each Member State shall take the necessary measures to ensure that, when committed intentionally, the following are punishable as a criminal offence: travelling to a country other than that Member State for the purpose of committing or contributing to the commission of a terrorist offence pursuant to Article 3*”, or the “*participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group*”. Finally, in its new section 575.3, the SPC criminalises anyone who, for the purpose of being trained to carry out any terrorist acts, or to collaborate with a terrorist organisation or group, or to directly commit terrorist offences, travels to or gets established in a foreign territory.

However, the EU Directive establish that the purpose of the travelling must be the commission of a terrorist offence under Article 3 (that is to say, terrorist offences in a narrowest sense), the participation in the activities of a terrorist group (which would correspond to the offence of participation in a terrorist organisation), and the training or receiving of training for terrorism. But, pursuant to Article 575 section 3 of the SPC, the mere fact of travelling with the purpose of carrying out any of the offences as referred to in the same Chapter, not only to commit terrorist offences but any act of collaboration, glorification, etc., even in the preparatory phase, shall suffice for the criminalization purposes. In this way, the SPC once again is one of the most resolute defenders of a criminal policy that prioritises security and opts for the anticipation of criminal law. This approach, which has been criticised by the majority of criminal doctrine,¹³ is nevertheless in line with part of public opinion and other opinions issued by political science.

¹² Matthew L Williams, Pete Burnap, Amir Javed, Han Liu and Sefa Ozalp, “Hate in the Machine: Anti-Black and Anti-Muslim Social Media Posts as Predictors of Offline Racially and Religiously Aggravated Crime”, *The British Journal of Criminology*, no. 60 (2020): 112-114, <https://doi.org/10.1093/bjc/azz064>.

¹³ Manuel Cancio Meliá, “El concepto jurídico-penal de terrorismo entre la negación y la resignación” in *Terrorismo, sistema penal y derechos fundamentales*, ed. Alberto Alonso Rimo *et al.* (Valencia: Tirant lo Blanch, 2018), 96.

These legal instruments have raised considerable amounts of criticism, especially from criminal law and public international law commentators,¹⁴ on the basis of the following arguments. On the one hand, criminalisation of travelling is a step forward in criminal intervention until the stage of individual preparation, that clashes with the requirement of harmfulness and the exclusion of criminalisation for mere wishes.¹⁵ Second, the punishment for displacement is a restriction on freedom of movement. It should be better explained on the basis of the seriousness of the act rather than the generic danger of the conduct, or on the possible connection with terrorist acts committed by others or that might be committed in the future by the individual.¹⁶ Third, we observe some issues in interpreting the accuracy of the displacement for “terrorist purposes”. This subjective requirement poses a significant problem of proof, besides, a no less important issue in most cases where FTFs travel to a country of armed conflict involving different parties, making use of violence that on many occasions has exceeded legitimacy, even when it is exercised by the State. As John Vervaele points out, final decision on this matter is not taken on the basis of the facts, but on the consideration of the parties involved as “enemies”.¹⁷

Thus, war in Syria is a clear example of this issue. It begun after protests from sectors of the population against Al-Assad’s regime, which triggered a brutal retaliatory repression from the incumbent. It has reached a considerable complexity to the extent that different factions are involved [the militias of the Syrian Democratic Forces, whose initial objective is to overthrow the regime; People’s Protection Units (YPG), under the Kurdish autonomy; Al Qaeda factions; Daesh; the Syrian Armed Forces; Turks; Western forces; Russian forces etc.]. Can terrorist purposes only be determined if the group in question is on an international list as such? Shall a person only be considered as a terrorist if he/she commits crimes against the civilian population to cause terror, if he does so with the ultimate aim to overthrow an authoritarian regime?

¹⁴ Francisco Jiménez García, “Combatientes terroristas extranjeros y conflictos armados: utilitarismo inmediato ante fenómenos no resueltos y normas no consensuadas”, *Revista Española de Derecho Internacional*, no. 68 (2016): 280-281; Inmaculada Marrero Rocha, “Los combatientes ‘terroristas’ extranjeros de la Unión Europea a la luz de la Resolución 2178 (2014) del Consejo de Seguridad de las Naciones Unidas”, *Revista de Derecho Comunitario Europeo*, no. 54 (2016): 559-560; Elena Górriz Royo, “Contraterrorismo emergente a raíz de la reforma penal de LO 1/2019 de 20 de febrero y de la Directiva 2017/541/EU: ¿europeización del Derecho penal del enemigo?”, *Revista Electrónica de Ciencia Penal y Criminología*, no. 22/01 (2020): 14, <http://criminnet.ugr.es/recpc/22/recpc22-01.pdf>; Alejandro Sánchez Frías, “From dangerous citizens to foreign criminals: effects on human rights and state sovereignty of recent international and european responses to the terrorist threat”, *Revista de Estudios Europeos*, no. 75 (2020): 130; Carlos Fernández Abad y Julia Roperó Carrasco, “Ante la encrucijada del no Derecho y la excepción penal normalizada: una reflexión crítica y propositiva a partir de la situación actual de los ‘combatientes terroristas extranjeros’ europeos”, *Revista de Derecho Penal y Criminología*, no. 23 (2020): 113-116.

¹⁵ Elena Núñez Castaño, “Algunas consideraciones sobre la transposición al Derecho Penal español de la Directiva 2017/541/UE del Parlamento europeo y del Consejo, en materia de terrorismo: ¿una tarea necesaria?”, in *Integración europea y justicia penal*, ed. María Isabel González Cano (Valencia: Tirant lo Blanch, 2018), 236.

¹⁶ Alberto Alonso Rimo, “La criminalización de la preparación delictiva a través de la Parte Especial del Código penal. Especial referencia a los delitos de terrorismo”, in *Terrorismo, sistema penal y derechos fundamentales*, ed. María Luisa Cuerda Arnau *et al.* (Valencia: Tirant lo Blanch, 2018), 215.

¹⁷ John A. Vervaele, “¿La asociación organizada terrorista y sus actos anticipativos: un derecho penal y política criminal sin límites?”, in *Integración europea y justicia penal*, ed. María Isabel Gonzalo Cano (Valencia: Tirant lo Blanch, 2018), 222.

On the basis of this reasoning, the criminalisation of FTFs as carried out, represents an expression of what is considered “Enemy Criminal Law”, a term coined by Günther Jakobs to describe a criminal law that gives exceptional treatment to those individuals who question the very structure of society, the legal-political assembly that supports the State, operating outside the law.¹⁸ This perception is favored by the very definition of the phenomenon carried out by the United Nations, which refers to these individuals who move around as “*foreign terrorist fighters*”. As Jiménez García remarks, “*symbiosis*” between fighters and terrorists, which are divergent concepts, “*disrupts the application and the raison d’être*” of the principles of International Humanitarian Law (IHL). *It does little to address current difficulties in agreeing on a convention against international terrorism, precisely because they derive from the insistence on differentiating between fighting forces (as part of the armed conflict, and therefore, under the application of IHL) and terrorists (to whom anti-terrorist law should be applied)*”.¹⁹

3.2. The worst thing of all: the disengagement of the law in addressing jihadist terrorism

After the fall of the caliphate, the international community has entered another phase, in which the Western powers have chosen to ignore the law. After the States and international institutions pointed out the need to implement controversial penal provisions, we would expect them to restore justice (through retributive justice), reinforce the rule of law and to reintegrate the offenders. However, FTFs in Syria are an example of the failure of the law in the fight against terrorism: Western States have preferred to renounce the repatriation of FTFs so that they may be tried by the Syrian Democratic Forces, the Al-Assad regime, or that they may be abandoned in prison camps. Such a situation is incompatible with International Human Rights law. This position could be a short-term solution for States that are exclusively concerned with their security, but it represents an immorality that does not even guarantee, in the medium and long term, an effective counter-terrorism policy. According to Luigi Ferrajoli, “*terrorist violence (...) is in fact recognizable as an offence, and as such politically impotent and legally delegitimized, only if it is read and treated in the language and with the forms of law: with the determination of those responsible, the guarantees of due process and, the application of the penalties provided by law*”.²⁰

In addition to this generalised disengagement, some European States have prosecuted individuals who have travelled for terrorist purposes, mainly to Syria and Iraq. Has the new offence been applied in these processes or has its usefulness been minimal when replaced by other offences previously existing in legislation? The next section deals with this issue.

3.3. FTFs in the Spanish case-law

The express criminalisation of travelling to other countries for terrorist purposes has been included in the SPC after the reforms of 2015 and 2019. Under Article 575

¹⁸ Günther Jakobs and M. Manuel Cancio Meliá, *El Derecho penal del enemigo*, 2nd ed. (Madrid: Civitas, 2006), 23-30.

¹⁹ Francisco Jiménez García, “Combatientes terroristas extranjeros y conflictos armados: utilitarismo inmediato ante fenómenos no resueltos y normas no consensuadas”, *Revista Española de Derecho Internacional*, v. 68 (2016): 280.

²⁰ Luigi Ferrajoli, “Guerra y terrorismo internacional. Un análisis del lenguaje político”, *Anuario Mexicano de Derecho Internacional*, no. 9 (2009): 10, <https://revistas.juridicas.unam.mx/index.php/derecho-internacional/article/view/282/488>.

section 3, its application depends on two elements: an objective nature, travel to a foreign country (which, therefore, does not in itself contain an indication of concrete harmfulness or even of abstract threat); and a subjective nature, that the subject carries out the travel objectively for terrorism. According to the entire wording of Article 575, the definition of “*terrorist purposes*” is too broad and vague, since the travel can be aimed to commit any of the offences typified in the Chapter, which in generic terms, refers to terrorist offences (not only those related to a restricted concept but any act of collaboration, glorification, etc., even in the preparatory phase), or collaboration (without any other specification) with a terrorist organisation.

In the comments to the reform, a sector of the doctrine has warned that Article 577 SPC could already have penalised these acts through the crime of collaboration.²¹ The truth is that this is so, and this consideration deserves attention when making any assessment. As analysed above, criminalisation of the act of moving raises reasonable criticism of the application of an offence for which the law foresees imprisonment of two to five years. However, it should be noted that if the questioned conduct could already be prosecuted for constituting conduct of collaboration (penalty of 5 to 10 years) or membership (penalty of 6 to 12 years), the reform could still have a mitigating or restrictive effect of criminal law intervention. That issue cannot be ignored.

Under Article 577 of the Penal Code, *any act* of collaboration with the activities or purposes of a terrorist organization, group or element shall be punished with imprisonment from 5 to 10 years. Although it then states that those acts of collaboration include “*information on or surveillance of persons, property or installations; construction, conditioning, assignment or use of accommodation or storage facilities; concealment or transport of individuals; organization or attending of training practices; and provision of technological services*”, it finally concludes that “*any other equivalent form of cooperation or aid or mediation, in the activities of those terrorist organizations or groups*”. The same penalties shall be imposed on whoever carries out any activity for terrorist purposes without belonging to a group, including any recruitment, indoctrination or training activity.

After consulting judicial decisions collected in the database of the Spanish Centre for Judicial Documentation (*Centro de Documentación del Poder Judicial*, CENDOJ), for the period from January 1, 2016 to September 30, 2019, we have found the following results. The most important figure is that from 2015 onwards, most of decisions deal with the integration into a terrorist organisation, collaboration or other activities related to terrorism (in accordance with EU Directive 2017), and not with terrorist offences in the strict sense (attacks on life or physical integrity, kidnapping or other damage). It is also interesting that in most cases, policing starts with the investigation of conduct involving the access to Daesh propaganda material and the dissemination of such material through social media, with approval or praise comments. In other words, through the criminalisation of self-indoctrination, the 2015 reform of the SPC led to the opening of police procedures aimed at the interception of communications on social networks, resulting in increased legal proceedings. Moreover, due to the broad description of the conduct of belonging to a terrorist organisation or group (Article 572) and of collaboration (Article 577), the vast majority of moving cases in court (by attempt or successful travel after return) are penalised under these provisions, and their application replaces the offence of moving. Thus, in the period under

²¹ Juan Carlos Campo Moreno, *Comentarios a la reforma del Código Penal en materia de terrorismo* (Valencia: Tirant lo Blanch, 2015), 66.

review, only two convictions on moving have been handed down by the National Court. By decision, *SAN 31/2018* of 15 October, it sentences an individual who had travelled to Turkey to join the ranks of Daesh, but had been arrested at the Syrian-Turkish border in Kilis. Breaking the majority trend, the National Court dispenses with the offences of integration or collaboration and, being particularly singular, it admits the conviction for the attempt of travel, to which it adds the responsibility for self-indoctrination in concurrent offence. For its part, in its decision *SAN 29/2017* of 30 November, the National Court sentences to a prison term of two years in a trial of conformity, a female who had attempted to travel to Syria with her partner on two occasions (October and November 2015), but had been arrested in Istanbul (the man had already been convicted of terrorist activities in Morocco).

The conclusions from this jurisprudential study are clear. First, it cannot be ruled out that the express criminalisation of travel for terrorist purposes has contributed to an expansion of criminal intervention, as well as other offences in the 2015 reform, especially that of self-indoctrination. However, this is not only the result of the application of these offences, especially with regard to travels. As it is based on conduct consisting of access to certain content online (as a starting point), self-indoctrination penalisation has led to numerous investigations based on the interception of communications that have given rise to indictments, which have sometimes favored punishment for glorification or self-indoctrination. Although, in the case of the moving, our study shows that facts could have been investigated and tried on the basis of the offence of collaboration. Therefore, it can be inferred that the increase of prosecutions from 2014 onwards has more to do with the promotion of a security policy aiming to address the phenomenon of travel and return of FTFs.

In short, the conclusion, shared by most analysts of the Spanish criminal policy²² on terrorism is that the successive reforms of the SPC have contributed to a confusion about the concept of terrorism to such extent that, the invocation of the trend element (terrorist aims, largely understood) allows any behaviour to be considered as terrorist. This is not only contrary to the principles of minimum intervention or proportionality, but also represents a starting point towards authoritarianism and injustice.

It is time to take stock of the situation and offer proposals for change.

4. Assessment of the analysis results and proposals

I. Concerning FTFs, the displacement of foreigners to conflict territories is the key argument in why it has been necessary to create new legal instruments and, develop a more intensive security policy against jihadist terrorism, after the creation of the caliphate in Syria and Iraq. Indeed, the moving of foreigners for terrorist

²² José Manuel Paredes Castañón, “Una modesta proposición para derogar los delitos de terrorismo (o casi)”, in *Terrorismo y contraterrorismo en el siglo XXI. Un análisis penal y político criminal*, ed. Ana Isabel Pérez Cepeda *et al.* (Madrid: Ratio Legis, 2016), 82-85.; Manuel Cancio Melia, “El concepto jurídico-penal de terrorismo entre la negación y la resignación”, in *Terrorismo, sistema penal y derechos fundamentales*, ed. Alberto Alonso Rimo *et al.* (Valencia: Tirant lo Blanch, 2018), 130-134; Elena Núñez Castaño, “Algunas consideraciones sobre la transposición al Derecho Penal español de la Directiva 2017/541/UE del Parlamento europeo y del Consejo, en materia de terrorismo: ¿una tarea necesaria?”, in *Integración europea y justicia penal*, ed. María Isabel González Cano (Valencia: Tirant lo Blanch, 2018), 234-237; Ana Isabel Pérez Cepeda, *El Pacto Antijihadista: criminalización de la radicalización* (Valencia: Tirant lo Blanch, 2018), 280-284.

purposes (including membership or collaboration with a terrorist organisation), has thus far reached major proportions that are particularly harmful.

However, it is not easy to verify this hypothesis, due to the lack of official data for a rigorous quantification not only of the displacements but of other variables, such as those individuals actually integrated in groups or involved in terrorist activities, or the number of returnees. However, the existing evidence and analyses carried out do help us to conclude that there is a qualitative difference: the expansion of jihadist terrorism from 2014 onwards, when Al Baghdadi proclaimed the caliphate. With very significant propaganda acts, he promoted the removal of the Syria-Iraq border, which symbolised the restoration of a unity destroyed by the westerners when establishing an artificial border line, the Sykes-Picot, which merely served their interests. The establishment of the caliphate represented a different aspect from all the previous movements. It was no longer just a call to fight, but also to shape a new country, since it appealed for the creation of a network of families.

As stated by Pokalova,²³ the consolidation of this territorial power was a key factor for the Jihad when it came to answering the call to *Hijrah*. In this way, the flow of FTFs peaked in 2015 and stopped in 2016. Due to the military advance of foreign forces (the coalition led by the USA, the Russian intervention in favor of Al Assad) and the control of borders initiated by Turkey (as opposed to the previous quasi-passive), the Islamic State started and this led to the incoming of FTFs. According to the data from different analyses, FTFs could have been between 30,000 and 42,000 in 2015. Based on the United States Institute of Peace, Crenshaw estimates the origin of FTFs as follows: 8,717 from the former Soviet republics; 845 from the Balkans; 5,778 from Western Europe; 444 from North America; 1,568 from South and Southeast Asia; 5,356 from the Maghreb and 7,054 from the Middle East (that is, a significant majority from MENA).²⁴

The second aspect that emphasises the specific dangerousness of FTFs in Syria and Iraq has been the risk of attacks in the West, upon their return. However, the data also reveals that terrorist attacks occur in substantially greater numbers in other regions of the world than in Europe or the United States.²⁵ The “*Global Terrorism Index*”, published by the Institute for Economics & Peace,²⁶ provides a classification among the countries most affected by terrorism (following a decreasing order). It uses four parameters to calculate each country’s annual score, including total number of fatalities, injuries and terrorist incidents. From 2001 to 2018, the countries with the highest impact from terrorism were: Afghanistan, Iraq, Nigeria, Syria, Pakistan, Somalia, India, Yemen, Philippines and Democratic Republic of the Congo. Among the most important findings of this study were the following: between 2002 and 2007, attacks increased steadily, correlating with an increase in violent conflict in Iraq. After 2007, the trend decreased steadily, and deaths from terrorism dropped by 35 per cent between 2007 and 2011. However, from 2011 to 2014, there was a surge in

²³ Elena Pokalova, *Returning Islamist Foreign Fighters. Threats and Challenges to the West* (Cham: Palgrave Macmillan, 2020), 53.

²⁴ Martha Crenshaw, “Rethinking transnational terrorism. An integrated approach”, *Peaceworks, United States Institute of Peace*, no. 158 (2020): 8.

²⁵ José Luis de la Corte Ibáñez, “La yihad de Europa. Desarrollo e impacto del terrorismo yihadista en los países de la Unión Europea (1994-2017)”, *Informe del Centro Memorial de las Víctimas del Terrorismo*, no. 4 (2018): 51, http://www.memorialvt.com/wp-content/uploads/2018/03/Informe04_180212.pdf.

²⁶ Institute for Economics & Peace, “Global Terrorism Index 2019: Measuring the Impact of Terrorism”, Sydney, 2019, <http://visionofhumanity.org/reports>.

terrorist activity with deaths increasing by more than 350 per cent in just three years. It coincides with the rise of Daesh, the civil war in Syria and the re-emergence of Boko Haram in Nigeria. From 2014 onwards, there is a decline in terrorist activities and fatalities, with the largest number of cases occurring in Iraq and Afghanistan.

As Crenshaw suggests,²⁷ it is essential to adopt a holistic approach to appraising terrorism. Also, she notes that armed conflicts have maintained a close feedback relationship with jihadist terrorism. Consequently, it makes no sense to approach terrorism strategy exclusively around 'Western' security and the concept of 'deradicalization', as a programme focused on the individual, similar to the thinking under way in most countries of Europe. From a holistic approach, the unavoidable first step is the dismantling of conflicts at international level. This approach demands a deeper reflection on the origins of conflicts that helps us see that we are not only facing a fanatical interpretation of a religious thought, but also a complex movement with a collective resentment towards the West that is seen as an oppressor.

Therefore, in spite of the fact that the legal instruments created to deal with international terrorism invoke the significance of the culture of peace and the defense of human rights as guiding criteria to be followed, their drafting and implementation may, paradoxically, support a partial and reductionist view that thwarts their objective.

II. With regard to the conflict between freedoms and security protection, it can be concluded that there is no room for the criminalisation of conduct that only represents the expression of feelings or opinion, but does not promote the commission of terrorist acts. This approach is built on the supremacy of freedom of expression as a pillar of democracy, maintained especially by the American courts in interpreting the First Amendment to the Constitution. However, if such conduct entailed immediate jeopardy of protected legal assets through the criminal phenomenon examined here, the conditions would be given to legitimize interference in freedom of expression, a right protected by the ECHR and the Spanish Constitution of 1978, that is, direct incitement to the commission of terrorist offences. Offensiveness and harmfulness principles, which should govern criminal intervention, would be respected in these cases.

For the reasons set out above, we propose to repeal the new offences referred to in Articles 575.1 and 575.2 of the SPC (training, indoctrination as criminal behaviors raised to the category of authorship), and to submit to a deep reform of other types that exceed international agreements: behaviors described in Article 577.3 (imprudent collaboration with terrorist groups), those foreseen in Article 579. 1 and 579.2 (public dissemination of messages or incitement, since section 3 stipulates the same penalty), offences of exaltation, justification or humiliation of victims, provided for in Article 578, and the conduct contained in Article 510 (hate crimes), since it is considered an exercise of freedom of expression (SPC articles).

As the SCC has held in relation to freedom of expression and thought, the democratic system cannot be militant. The Constitution must defend ideas, even when they question the democratic system itself (judgments, *SSTC* 176/1995 of 11 December; 5/2004 of 16 January; 235/2007 of 7 November; 12/2008 of 29 January; 126/2009 of 21 May; and 42/2014 of 25 November). Also, in line with the ECHR, conduct expressing certain ideas or feelings must be governed by general rules. Therefore, it must constitute an offence only to the extent that it can fall within the

²⁷ Crenshaw, "Rethinking Transnational Terrorism", 9.

scope of provocation or proposal, that is to say, when it involves direct incitement to commit a crime. The principles that protect criminal law and fundamental rights would thus be respected.

Therefore, this would be the time to consider to what extent it makes sense to create criminal offences in order to punish the movement of FTFs, if these conducts can already be penalised through other offences. Or if, in the end, Western states prefer to renounce the application of the law. Now is the time to implement a rational policy which does not submit to populist impulses, but builds a comprehensive, more effective and elaborate response to the phenomenon of international terrorism, without forgetting the principles of guarantee underpinning the rule of law.