

JOINT CIVIL SOCIETY REPORT ON THE FUNDAMENTAL RIGHTS IMPACT OF THE EU DIRECTIVE ON COMBATING TERRORISM

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Foreword - Fionnuala Ní Aoláin

Impact of the EU Directive Combating Terrorism on Human Rights and Civil Society

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This important and stocktaking report brings much needed attention to the human rights and rule of law impact of EU Directive 2017/541 and its place in the broader European counter-terrorism landscape since 2001. The Report gives a comprehensive account of the production and implementation of this Directive, whose adoption was driven by the imperative of responding to specific and horrific terrorist attacks. In consequence, the haste to legislate meant that a key procedural step in the legislative process, namely a human rights impact assessment was not undertaken. The Directive's adoption thus lacked the kind of reflective appraisal that is sorely needed, when legislation with potentially profound impact on the rule of law and human rights, is adopted by European States.

One of the key themes this Report highlights is the failure to learn from the rule of law and human rights deficits of previous counter-terrorism regulation in Europe. A clear and damaging outcome is that flawed legislative process continues to exacerbate existing rule of law weaknesses rather than ameliorate them. The Directive constitutes an integral part of a security architecture that continues to expand domestically from the criminal to the pre-criminal arena, from administrative law to health and family regulation. The pervasive effects of counter-terrorism based securitization in which European and national law play complementary and reinforcing roles has had demonstrable deleterious consequences on individuals and communities. As this report highlights, it is minority religious and ethnic groups that have been the systematic target of counter-terrorism practices and the consequences for trust, inclusion, inter-community relationships and the rule of law have been substantial.

The Report makes positive and important recommendations which I heartily endorse. This includes the necessary requirement that all EU legislation should be preceded by a human rights impact assessment and that all subsequent legislation should comply with international human rights standards. It presses for a commitment to support the adoption of a universal definition of terrorism to prevent the widespread abuse of counter-terrorism aided and abetted by the shield of legitimacy that currently applies by simply 'doing' counter-terrorism, no matter its harm. It is also evident that resources must be spent collecting data on measuring the negative effects of counter-terrorism as an integral part of advancing human rights and sustaining a deeper understanding of the complexity of the security terrain better.

In short, this Report has much to commend it. It brings our attention to procedural and institutional deficits, but also offers concrete and specific measures to remedy them. The European Union has a critical role to play in defending the values of rule of law and human rights in counter-terrorism contexts across the globe. But, it will only have the legitimacy and authority to defend those values abroad if they are equally defended at home.

1 Executive Summary and Recommendations

The last 20 years have seen a fundamental shift in the global counter-terrorism architecture resulting in a major expansion of global, regional, and national counter-terrorism laws and policies challenging some of the basic principles of criminal law and re-defining the relationship between rights-holders and state power. The terrorist attacks of 11 September 2001, and subsequent attacks over the next two decades, in Europe and elsewhere, resulted in the tragic loss of lives and trauma across families and communities. The loss of life and ensuing security challenges rightly compelled law and policymakers to take action, but in many countries, the resulting laws and policies led to extreme securitisation and precipitated measures that stigmatised communities and undermined the rule of law. States failed to take an approach that was guided by human rights and instead presided over an unprecedented expansion of security policies that jeopardised the protection of rights and challenged long-established principles of criminal law.

The focus of this report is the **2017 EU Directive on Combatting Terrorism (the Directive)**, which was adopted by the European Union in response to the series of violent attacks in Paris at the end of 2015. In reflex mode, and within a context of increasing discriminatory discourse that has been tacitly legitimised by public figures,¹ states focused the discussions and drafting process largely on the nature of the Paris attacks. As a consequence, the resulting legislation is highly context specific, yet will likely remain on the statute books for decades and be applicable to very different, yet unknown, kinds of situations. In addition, based on a declared urgency for new legislation, the European Commission presented the text without an impact assessment.

At the time, human rights groups² raised significant concerns, exposing the numerous flaws in the text that could result in a range of human rights violations including violations of the right to freedom of expression, the right to privacy, and the right to freedom of movement. The groups also stressed that many of the provisions had the potential for misuse, enabling law

1 See European Network Against Racism, February 2021, ‘Suspicion, Discrimination and Surveillance: the impact of counter-terrorism law and policy on racialised groups at risk of racism in Europe’.

2 At the time the Directive was adopted an informal coalition of CSOs working on counter-terrorism and human rights worked to press for the legislation to include stronger human rights safeguards including Amnesty International, the European Network Against Racism, the European Digital Rights Initiative, the International Commission of Jurists, Human Rights Watch, and the Open Society Foundations.

enforcement agents to wrongfully target and constrain lawful conduct.³ The legislators failed to respond to the body of research and documented rights violations that stemmed from prior counter-terrorism legislation, and instead, in a rushed process, cemented in place existing flaws and added new criminal offences that threatened to undermine rights protections. A core, and ongoing concern was the fact that many of the existing and new offences were vague and over broadly drafted, and new offences continued to expand criminal law to include an increasing range of preparatory offences that are so remote that they would appear to have no connection to a principal, violent act.

Developments over the intervening years have only reinforced these concerns. Whilst many professionals within the criminal justice systems across Europe have made considerable efforts to ensure the protection of rights, persons from certain groups and communities have borne the brunt of legislation that has such potential for over-reach and misuse. For example, the case of Ahmed H. in Hungary, who was charged and found guilty of a terrorism offence for throwing objects during a skirmish at the border—an act that should have been prosecuted as an ordinary public order offence.⁴ Muslim communities cite across many member states increased stops and controls and, in certain countries, large numbers of organisations and places of worship have been closed.⁵

Some of these challenges relate to the specific articles of the Directive but also the broader security architecture within which the Directive is situated for which there are limited human rights benchmarks. Thus, the impacts on individuals and communities are not only a result of one particular piece of legislation but the cumulative impact of a range of measures—including a proliferation of administrative laws and policies that have been adopted over the last years.

Despite the flaws in the Directive itself, the EU-wide nature of the legislation and exchange among professionals has prompted greater scrutiny. For example, in a number of jurisdictions, including Spain and the Netherlands, the threshold to demonstrate intent has been litigated through the courts. This has resulted in clarifications through the case law, but no final EU-wide agreement that aligns with international human rights law.

3 See Open Society Foundations, July 2016: <https://www.opensocietyfoundations.org/newsroom/after-fast-track-process-european-parliament-takes-troubling-position>

4 Amnesty International: <https://www.amnesty.org/en/latest/press-release/2019/09/ahmed-h-what-happened/>

5 See European Network Against Racism, February 2021, ‘Suspicion, Discrimination and Surveillance: the impact of counter-terrorism law and policy on racialised groups at risk of racism in Europe’.

In sum, the Directive failed to provide clear leadership and rights-based legislative direction to EU-member states. Instead, it reinforced and magnified existing flaws in EU law and contributed to the rise of an increasingly preventive role for criminal law that does not align with core rule of law and criminal justice principles. At best, some legal questions have been taken up through the courts, but in many member states, and even in those where litigation has been partially successful in restoring rights, individuals, persons from marginalised communities and certain civil society organisations as well as human rights defenders, activists, protesters, artists, musicians, and others, have had to live with the negative consequences of vague and overly broad legislation and increased securitisation.

The below recommendations draw on the findings and recommendations of recent reports from a group of human rights organisations and collectively highlight a number of key recommendations, primarily targeted at EU institutions and EU-member states:

- All EU legislation should be preceded by an **impact assessment** including an evaluation of the impact of future legislation with respect to the Charter of Fundamental Rights. This is required under the European Council's internal guidance and confirmed through the jurisprudence of the Court of Justice of the European Union (CJEU).
- There should be a greater focus on detailed **data collection** and analysis, including, through Europol's annual EU Terrorism and Situation Trends Report (TE-SAT). There needs to be separate data on convictions and acquittals and other case dispositions, as well as data detailing arrest, charges and convictions based on different offences. Data should also be disaggregated to ensure the availability of **equality data**.
- **Key judgments should be shared by Eurojust ensuring access for all key justice sector practitioners, civil servants, and civil society organisations. The judgments should be published** in a number of languages and be made publicly available.
- The EU and member states should engage with the UN and regional bodies with a view to adopt a **universal, comprehensive, and precise definition of terrorism**, that is human rights and rule of law compliant, as has been called for by numerous experts over the last decades.
- The EU and member states should **review legislation** where there is a risk of **violations of rights to freedom of expression, association, or assembly to respect private life or freedom of movement**. In particular, the offence of public provocation should include language, as the UN recommends, limiting the offence to cases where the incitement is

‘directly, causally responsible for increasing the actual likelihood of an attack’.⁶

- The EU and member states should **review legislation regarding the potential for discriminatory application**, bearing in mind the broader legislative, policy, and media environment within which the Directive is situated.
- The European Commission and associated bodies should **develop a targeted range of actions** to support those implementing the Directive, as well as those monitoring its implementation, such as explanatory guidance and trainings. Actions should involve relevant professionals, such as legal professionals and civil servants, as well as civil society and impacted communities. The European Commission should continue to involve civil society organisations in transposition workshops ensuring a format that allows for exchange and learning.
- The European Commission should allocate **dedicated funding lines** to civil society organizations to monitor, document, and analyse the impact of counter-terror legislation.
- Greater focus should be placed on the creation, support, and funding of dedicated independent **oversight bodies with the power to handle complaints** as well as support for accessible, confidential, and **independent complaint mechanisms and access to legal advice and legal aid** for those affected by counter-terrorism legislation.

⁶ See OHCHR factsheet: <https://www.ohchr.org/documents/publications/factsheet32en.pdf>

2 Introduction and Methodology

EU directive 2017/541 on combating terrorism (the Directive) was adopted on 15 March 2017. Following an 18-month transposition period, member states were required to transpose the Directive by September 2018 and by 8 September 2021. The Commission was required to submit a report to the European Parliament and Council assessing the added value of the Directive with regard to combating terrorism.⁷ The report is required to cover the impact of the Directive on fundamental rights and freedoms, including non-discrimination, on the rule of law, and on the level of protection and assistance to victims of terrorism. In 2019, the Commission also requested that the EU's Fundamental Rights Agency submit a report specifically focused on the fundamental rights impact of the Directive.

This civil society report mirrors the above timeline and aims to provide a human rights perspective on the passage and implementation of the Directive. It builds on concerns during the drafting process, that the text laid open to challenges and risks related to the violation of fundamental rights and looks at current experiences across a number of member states.

The report was commissioned by the Open Society Foundations, Amnesty International, the European Network Against Racism (ENAR), and the International Commission of Jurists (ICJ).⁸ It builds on joint advocacy during the drafting of the directive amongst these organisations as well as with the European Digital Rights Initiative (Edri) and Human Rights Watch.

The report aims to provide an overview of the fundamental rights challenges that emerged during the drafting and implementation of the Directive and makes recommendations for reform. It was not possible to carry out or commission a comprehensive research project in all implementing member states. This is a concerning gap, related not only to the implementation of the Directive, but more broadly to legislation and policies on counterterrorism and informs our recommendation that there is an urgent need to support independent documentation and research in this area.

The report draws key findings from ENAR's 2021 report 'Suspicion, Discrimination and Surveillance: the impact of counter-terrorism law and policy on racialised groups at risk of racism in Europe' and ICJ's 2020 'Guidance for Judges, Prosecutors and Lawyers on the Application of EU Directive 2017/541 on Combatting Terrorism' (published together with

⁷ The Commission's report was delayed from September to November 2021.

⁸ The report was drafted by Kersty McCourt, an independent human rights expert. In addition to the reports by Amnesty, ENAR, and ICJ the report also draws on a range of un-published research and documentation carried out by the Open Society Foundations during the drafting of the Directive.

Human Rights in Practice, Nederlands Juristen Comité voor de Mensenrechten [NJCM], and Scuola Superiore Sant'Anna di Pisa) as well as from a number of reports from Amnesty International and a recent 'Human Rights Guide for Researching Racial and Religious Discrimination in Counter-Terrorism in Europe' developed jointly between Amnesty International and the Open Society Foundations. An additional important source were the reports on the promotion and protection of human rights and fundamental freedoms while countering terrorism, issued by the current United Nations Special Rapporteur, Fionnuala Ní Aoláin, who was appointed in August 2017.⁹

This report aims to bring together different elements from the above reports, draws on the historic experience of these organisations during both the drafting process and in prior advocacy at the EU and in the Council of Europe and United Nations, and adds examples from countries not included in some of the above referenced research based on a number of interviews with practitioners, staff from civil society organisations, judges, lawyers, and prosecutors. It aims to provide a timely contribution at a moment when there is limited scrutiny of counter terrorism law and practice. It is important to note that many similar concerns and rights violations are being replicated in response to the COVID-19 pandemic, particularly with governments invoking states of emergency in response to the global health crisis. In 2018, the UN Special Rapporteur highlighted that '*states of emergency had become synonyms of sustained and extensive human rights violations*'¹⁰ and early in 2020 warned that there was already evidence that emergency powers were being widely promulgated in a manner that goes far beyond a tailored response to a health crisis.¹¹

This report does not look at implementation of the articles on Victims' Rights as other organisations have focused on this important aspect including Victim Support Europe. The European Commission, together with Victim Support Europe, also developed an EU Handbook on Victims of Terrorism.¹²

⁹ References to the UN Special Rapporteur are all to the current Special Rapporteur—when referring to former Special Rapporteurs or those covering different mandates this will be clearly indicated in the text.

¹⁰ See Human Rights Council discusses the protection of human rights while countering terrorism, and cultural rights:
<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22742&LangID=E>

¹¹ See *Just Security*, April 2020: <https://www.justsecurity.org/69806/assessing-emergency-powers-during-covid-19/>

¹² See: (fix this line break)https://ec.europa.eu/info/sites/default/files/law/eu_handbook_on_victims_of_terrorism_2021_01_15_en.pdf

3 Directive 2017/541

EU Directive 2017/541 on combating terrorism was adopted on 15 March 2017 following an expedited drafting period. The Commission put forward its new proposal for a directive on combating terrorism on 2 December 2015 citing the ‘*urgent need to improve the EU framework to increase security in the light of recent terrorist attacks*’. As a consequence, the draft legislation was presented without an impact assessment.¹³

The Directive was designed to close perceived gaps in the harmonisation of EU law on combating terrorism. It replaced Council Framework Decision 2002/475/JHA, which harmonised Member State laws on combating terrorism in the aftermath of the 2001 terrorist attacks in the United States and Council Decision 2005/671/JHA designed to improve cooperation on terrorism following the terrorist attacks in London and Madrid in 2005. The Directive incorporated international obligations into EU law such as the provisions of UN Security Council Resolution 2178(2014) on Foreign Terrorist Fighters, the recently adopted Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism and the Financial Action Task Force Recommendations on terrorist financing.

EU member states had an 18-month transposition period until September 2018 to transpose the Directive into national law.

¹³ Commission Proposal - COM(2015) 625 final December 2015: https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/european-agenda-security/legislative-documents/docs/20151202_directive_on_combatting_terrorism_en.pdf

4 The Passage of the Directive: Drafting to Implementation

The passage of the Directive, from the first proposal to agreement on the text, took less than a year—a record speed compared to most directives, which can take two to three years for the full negotiation process.

Figure 1. Passage of the Directive from Proposal to Implementation



02/12/2015	Commission proposal for a new Directive
11/03/2015	Council adopted a general approach
04/07/2016	European Parliament adopted report on the proposal together with a mandate for opening inter-institutional negotiations
07–11/2017	Seven trialogue negotiations to agree the draft text
15/03/2017	Directive 2017/541 adopted
08/09/2018	Deadline for transposition into national law
08/09/2020	Commission reported on the transposition of the Directive
08/09/2021	Commission to report on the impact of the Directive

In addition to the speed, the rest of the process was deeply flawed. The negotiations went ahead without a full impact assessment, justified by the Commission on the basis of the urgency of the Directive, but contrary to guidance from the European Council and jurisprudence from the CJEU. Throughout the process, access for civil society was exceptionally limited and at that time organisations raised concerns. In July 2016, Amnesty International, the International Commission of Jurists, and the Open Society Foundations noted that:

Throughout the drafting process, the EU has bypassed crucial democratic steps. From the start, the legislative process has been characterised by undue haste and closed-door meetings: no impact assessment was carried out to inform the Commission’s proposal; there was no public hearing in the European Parliament to discuss the draft with experts and practitioners; and negotiations will now start without parliamentary-wide review of the LIBE text.¹⁴

¹⁴ See Open Society Foundations July 2016: <https://www.opensocietyfoundations.org/newsroom/after-fast-track-process-european-parliament-takes-troubling-position>

Despite the challenges, civil society continued to provide expert analysis and assessments of existing counter-terrorism laws. Human rights groups also facilitated a number of roundtable meetings ahead of the trilogue negotiations. However, despite these efforts, when the text was agreed on at the end of 2016, it was necessary to conclude that the Directive ran the risk of *‘undermining fundamental rights and having a disproportionate and discriminatory impact on ethnic and religious communities’*.¹⁵

The Commission took a rare step during the transposition phase by inviting a small group of civil society organisations to participate in some parts of the transposition workshops, based on a tightly agreed agenda between the Commission and the groups. Across a number of workshops, civil society groups shared experiences related to the drafting of counter-terrorism laws, including compliance with international human rights standards. They also facilitated a number of case-study discussions focusing on human rights violations that resulted from overly broad and vague counter-terrorism laws and/or measures and practices that disproportionately affected certain individuals and communities. Whilst the approach did not compensate for the lack of meaningful consultation during the drafting phase, it is a practice that could be reviewed and built on.

During the implementation phase, there was very little engagement with civil society, bar a number of informal meetings to discuss the process around implementation. NGOs advocated that EU funding should be dedicated to civil society to monitor the implementation of the Directive and work with relevant stakeholders to address fundamental rights concerns. One group of NGOs secured EU funding to support the implementation of the Directive under a wider programme of EU funding on criminal justice co-operation.¹⁶ However, despite some initial positive signs, specific funding on the implementation of the Directive never materialised. As a consequence, there has been limited ability to systematically monitor and document the impact of the directive, or to engage with justice sector actors around implementation. Despite the significant fundamental rights concerns that were evident during the drafting phase, no new initiatives were instigated by the European Commission, or to our knowledge, member state governments, to mitigate the clear risks. This could have involved dedicated trainings, the development of tools and

¹⁵ Euractiv December 2016: <https://www.euractiv.com/section/justice-home-affairs/news/rights-groups-expose-flaws-in-counterterrorism-directive/>

¹⁶ See the JUSTICE project, co-ordinated by International Commission of Jurists–European Institutions: <https://www.icj.org/wp-content/uploads/2018/10/JUSTICE-project.pdf>

materials, or guidance around oversight—all with clear involvement from affected communities and civil society groups.¹⁷

In contrast to the impetus to rush through the Directive, member states pushed for an 18-month transposition period. However, when it came to the deadline in September 2018, only seven member states notified transposition of the Directive, with two further member states following shortly after. In November 2018, the Commission launched infringement procedures against 16 member states for failing to communicate the transposition of the Directive. By July 2020, nearly two years after the transposition deadline and five years after the initial call for urgency, 15 out of those 16 member states communicated transposition.

In June, July, and September 2021, the Commission launched three sets of infringement proceedings for incorrect transposition of certain elements of the directive against Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Germany, Greece, Lithuania, Luxembourg, Poland, Portugal, and Spain. The member states have two months to respond and allay the concerns of the Commission otherwise a reasoned opinion (the second step in the infringement process) could follow.¹⁸

The delays in transposition show that the impetus to jettison an impact assessment and pursue a rushed drafting process was misplaced and that ensuring a more thorough consultative process might have been more beneficial.

17 The Academy of European Law in Trier organised a number of trainings on counter-terrorism and counter-radicalisation but not solely on implementation of the Directive. See, for example: https://www.era.int/cgi-bin/cms?_SID=dd9484336c490fce0b959f8ff18d827f9c35c56400605016049867&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=127588

18 See infringements package in June 2021: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743, July 2021 https://ec.europa.eu/commission/presscorner/detail/en/INF_21_3440 and September 2021 https://ec.europa.eu/commission/presscorner/detail/en/inf_21_4681

5 The EU's Fundamental Rights Obligations

As highlighted above, the Commission was explicitly required to report on the fundamental rights impact of the Directive and the EU's obligations are reinforced under Article 23(1) which states that:

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

This affirms the overarching obligations that EU member states are committed to and upon which the union is founded.¹⁹ In particular, the EU Charter of Fundamental Rights and Freedoms (the Charter) provides a key source of human rights protection under EU law, which is complemented by a wide framework at the regional and international levels, including rights under the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), case law of the European Court of Human Rights (ECtHR),²⁰ and guidance on the application of human rights standards such as the Council of Europe Guidelines on Human Rights and the Fight Against Terrorism.²¹

A. General principles

The preamble to the Directive confirms that the general principles of human rights law apply:

*The implementation of criminal law measures adopted under this Directive should be proportional to the nature and circumstances of the offence, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness, racism or discrimination.*²²

These overarching principles are of key importance in the implementation of the Directive particularly as they relate to some of the core fundamental rights concerns regarding the lack of precision and legal certainty in the final text of

¹⁹ Articles 2 and 6 TEU

²⁰ See, for example, the 2012 compilation of ECtHR caselaw: <https://book.coe.int/eur/en/european-court-of-human-rights/4966-counter-terrorism-and-human-rights-in-the-case-law-of-the-european-court-of-human-rights.html>

²¹ (2005) <https://book.coe.int/eur/en/terrorism-and-law/3209-human-rights-and-the-fight-against-terrorism-the-council-of-europe-guidelines.html>

²² Recital 39 of the Preamble to the Directive

the Directive. Case law and guidance can be instructive in clarifying these principles.²³

i. Principle of legality

The principle of legality comprises a number of key elements, namely: non-retroactivity, clarity, precision and foreseeability, strict construction of criminal law in favour of the accused, and criminal responsibility that is individual and based on conduct and intent.²⁴

Of particular concern during the drafting phase of the Directive was the question of precision and foreseeability. Civil society organisations warned at every stage about the risks of overly broad and vague definitions. The principle of legal certainty requires that laws are clear and precise. Specifically, criminal conduct should be set out in precise and unambiguous language. Offences must be narrowly defined and distinguishable from conduct that is either not punishable, or punishable by other penalties, enabling individuals to regulate their conduct in conformity with the established laws. The principle has been further clarified by the European Court of Human Rights:

*The law should be accessible to the persons concerned and formulated with sufficient precision to enable them—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances the consequences which a given action may entail.*²⁵

The other major concern was that the Directive forms part of a broader trend towards an increasingly ‘preventive’ role for criminal law, through broad and vaguely defined ancillary offences that allow for application in ways that are discriminatory or otherwise violate human rights and which entail speculation that a person might commit an offence in the future. In accordance with well-established principles of criminal law, individuals should only be prosecuted for their own conduct and intent. Criminal law should not punish abstract or theoretical danger, or actions where there is no proximate link between the conduct of the offender and the ultimate harm.

²³ See Article 49 EU CFR and OHCHR Factsheet No 32 on Human Rights and Counter-Terrorism, p.39: <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>

²⁴ See ICJ Counter Terrorism and Human Rights in the Courts. Guidance for Judges, Prosecutors and Lawyers on the Application of EU Directive 2017/541 on Combatting Terrorism.

²⁵ ECtHR, *Sunday Times v. United Kingdom*, 26 April 1979, para 49.

ii. Legitimate justification, necessity, and proportionality

Certain rights may be restricted to avoid a real danger as long as the restrictions are based on a legitimate purpose and are necessary and proportionate to that justification. For the purposes of the Directive, the legitimate grounds for limiting rights are set out in the Charter and the ECHR under articles related to freedom of expression and association and assembly and include limitations based on national security, public safety, and prevention of disorder or crime.²⁶

Secondly, the restriction must be necessary and proportionate and serve a pressing social need.²⁷ The measures should be the least intrusive possible, be for the shortest possible period, and follow due process rights. The Charter also requires that the severity of the penalties must not be disproportionate to the offence.²⁸

iii. Non-discrimination

The preamble to the Directive also confirms that the implementation of the Directive should exclude any form of arbitrariness, racism or discrimination. This means that at all stages of the criminal justice process, care should be taken to ensure that actions are not directly or indirectly discriminatory on any grounds and that all persons are equal before the law.

The right to non-discrimination is also underscored in Article 21 of the Charter and Article 14 of the ECHR and Article 1 of Protocol 12 ECHR.

B. Regional obligations

As an instrument of EU law, the Directive itself must be compliant with the Charter and when transposing the directive, member states, must ensure that their implementing legislation also complies with the Charter. As such, both the Directive and its transposition or implementation in domestic law may be challenged before the Court of Justice of the European Union (CJEU) if there are violations of fundamental rights. In the past, the CJEU has been rigorous

²⁶ Articles 11 and 12 of the Charter and Articles 10(2) and 11(2) of the ECHR

²⁷ ECHR, *Ceylan v. Turkey* [GC], no 23556/94, para 32, ECHR 1999-IV

²⁸ Article 49 of the Charter

in its assessment of the compliance both of EU law²⁹ and relevant national law³⁰ with the Charter on issues relating to national security and terrorism.

Whilst the EU itself is not yet a signatory to the European Convention on Human Rights (ECHR),³¹ member states are separately bound by their obligations under the ECHR and case law has confirmed that member states cannot circumvent their obligations under the ECHR when implementing EU law.³² Thus in interpreting the Charter, the jurisprudence of the ECtHR may be of relevance as well as the jurisprudence of the CJEU.

C. Interaction with international humanitarian law and international criminal law

The scope of the Directive intersects, in some cases, with crimes under international law. In such cases, criminalisation and cooperation in the prosecution of those crimes should include, where necessary, asserting universal jurisdiction, and bringing those responsible to justice in fair proceedings.³³ This goes beyond the requirements of the Directive on jurisdiction and prosecution set out in Article 19.

International humanitarian law (IHL) governs conduct carried out during, and in connection with, an armed conflict as defined within the meaning of IHL. Terrorist crimes must be distinguished from those arising from participation in an armed conflict, where violations of IHL can be prosecuted, including prosecution for war crimes.³⁴ The threshold for when a situation of disturbance or instability rises to the level of a non-international armed

29 For example, Kadi-In Joined Cases C-402/05 P and C-415/05 P CJEU judgment of 3 September 2008 and Kadi II-In Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, CJEU judgment of 18 July 2013.

30 For example Watson judgment of 21 December 2016—JOINED CASES C-203/15 AND C-698/15 (previous citation of this used “Joined Cases.” All caps or no all caps?)

31 Negotiations on EU accession to the ECHR are currently ongoing in the Council of Europe Steering Committee on Human Rights (CDDH) ad hoc negotiation group (“47+ 1”). See 10th Meeting report of the CDDH ad hoc negotiation group, 47+1(2021)R10, 2 July 2021: <https://rm.coe.int/cddh-47-1-2021-r10-en/1680a30e49>

32 See *Sharifi and Others v. Italy and Greece*, App no. 16643/09, (EUR. Ct. H.R. Second Chamber, Judgment of 21 October 2014, para 232.

33 See Rome Statute of the International Criminal Court, Articles 17, 54, 59, 86-89; Convention against Torture, Articles 6, 7; International Convention for the Protection of All Persons from Enforced Disappearances, Articles 3, 6, 11; International Court of Justice, Questions concerning the obligation to prosecute or extradite (*Belgium v. Senegal*), judgment of 20 July 2012, paras 92-95.

34 See Rome Statute of the International Criminal Court, Articles 7 and 8, Convention against Torture, Article 1; International Convention for the Protection of All Persons from Enforced Disappearances, Article 2.

conflict is set out in well-settled jurisprudence and relates to the degree of organisation of the parties and intensity of any hostilities.³⁵

6 Fundamental Rights Impact of Specific Articles of the Directive

As highlighted, the Directive was designed to close perceived gaps in the harmonisation of EU law on combating terrorism. Many of the articles were taken from the previous Framework Decision and a number of new offences added, notably on the financing of terrorism, receiving training for terrorism, travelling abroad for terrorism, and facilitating travel for the purpose of terrorism. Some member states had transposed the Framework Decision word-for-word into their domestic legislation and again replicated the Directive. However, gaps and further imprecisions remain in domestic legislation—replicating the concerns related to the Directive, and in some cases creating further challenges—for example regarding the limited inclusion of wording on intent.

In many instances, cases are not prosecuted based on specific articles under the Directive and corresponding national legislation. In **France**, for example, many cases are prosecuted under the broad offence of ‘*criminal association*’ or ‘*association de malfaiteurs terroriste criminelle*’ as in a 2020 case where two brothers and their cousin were convicted of criminal association and for planning to make bombs.³⁶ One of the challenges in this and other cases, is a lack of clarity regarding the evidence needed to meet the threshold for criminal association, and even where intent is explicitly required, it is often determined based on very loose criteria, such as perceived religiosity.³⁷

A. Definition of directing and participating in a terrorist group (Articles 2 and 4)

The Directive defines a ‘*terrorist group*’ as ‘*a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences.*’ A ‘*structured group*’ means ‘*a group that is not randomly formed for the immediate commission of an offence and*

35 See International Criminal Tribunal for Yugoslavia, *Prosecutor v. Tadic*, Case No. IT-94-I_T 562, para.562.

36 France 3 January 2020: <https://france3-regions.francetvinfo.fr/paris-ile-de-france/seine-saint-denis/clichy-bois-peines-10-15-ans-requises-contre-deux-freres-qui-projetaient-attentat-1782029.html>

37 Interview with a French defence lawyer May 2021.

that does not need to have formally defined roles for its Members, continuity of its Membership or a developed structure.'

It requires member states to criminalize a) directing a terrorist group and b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.

The definition of a terrorist group is important because it forms the basis for other offences and has direct impacts on the right to freedom of association as set out under article 12 of the Charter and article 11 of the ECHR. The overly broad definition raises immediate questions of legal certainty including:

- whether the designation of a terrorist group is clearly established, according to publicly available, defined criteria. If not, there is a risk that groups, which may be controversial, or an irritant to the state, but are not terrorist groups, fall under investigation and prosecution; and
- in relation to the precise meaning of a 'structured group'. The text does not, for example, set out the degree of organisation required, or the duration of time, that would indicate a group was not randomly formed.

Regarding the direction of, or participation in, a terrorist group the article is drafted in such a way that any criminal activities, regardless of their terrorist nature could be included in the scope of criminality. This is because 'criminal activities' mentioned maybe broader than 'terrorist offences' under the Directive or under national laws. The level of involvement required to constitute 'membership', 'direction' or 'participation' is not set out and the text does not ensure that incidental or unintentional contributions to a terrorist group are excluded.

The implementation of these articles has raised concerns. The UN Special Rapporteur examined in her 2019 report to the Human Rights Council how civic space is directly affected when overly broad definitions are used to target members of civil society organisations. She noted that qualifying a wide range of acts as impermissible '*support for terrorism*' can result in '*harassment, arrest and prosecution of humanitarian, human rights and other civil society actors*'.³⁸

In the report of her country visit to **Belgium**, the Special Rapporteur found that the scope of membership of a terrorist group had recently been expanded, to encompass not only support that is known to contribute to terrorist offences, but also to cases where the perpetrator knew, or should have known, that their

38 2019 Annual Report A/HRC/40/52 para. 43.

conduct ‘may contribute’ to the commission of crimes by the group. Subsequent case law interpreted the new legislation, such that the contribution may be ‘*extremely modest*’ or ‘*relatively remote*’ from the field of terrorist operations,³⁹ including activities such as proselytism and even cooking.⁴⁰ The Special Rapporteur further stressed that:

‘construing support of terrorist organizations in an over-broad manner may effectively result in criminalizing family and other personal relationships’. And that ‘ensuring that a person enjoys “minimum essential levels” of economic and social rights, including the rights to food, health and housing, should not be criminalized as support to terrorism.’

Whilst these cases in **Belgium** were decided prior to the entry into force of the Directive, the legislation has not been further amended and so the risks to the protection of fundamental rights remain.

In some countries judicial interpretation has been useful in refining the scope of the offence of participation in a terrorist organisation. In **Italy**, the courts confirmed that Article 270bis of the Criminal Code requires ‘*effective integration*’ of someone into an association—meaning that the person should take part in the activities of the association and that ‘*contribution*’ must be an ‘*effective contribution to the existence, the survival or the operation of the association*’.⁴¹

B. Terrorist offences (Article 3)

The Directive requires States to criminalize certain intentional acts as well as threats to commit those acts⁴² when committed with one or more

39 Francophone Correctional Tribunal of Brussels, decision of 25 November 2015.

40 Eurojust, *Terrorism Convictions Monitor*, Issue 23 (October 2015), p. 7.

41 ICJ Counter Terrorism and Human Rights in the Courts. Guidance for Judges, Prosecutors and Lawyers on the Application of EU Directive 2017/541 on Combatting Terrorism.

42 Article 3 (1) Directive: (a) Attacks upon a person’s life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological, radiological, or chemical weapons, as well as research into and development of such weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; (i) illegal system interference, as referred to in Article 4 of Directive 2013/40/EU on attacks against information systems in cases where Article 9, paragraph (3) or (4)(b) or (c) of the said Directive apply, and illegal data interference, as referred to in Article 5 of Directive 2013/40/EU on attacks against information systems in cases where Article 9, paragraph (4)(c) of the said Directive applies; (j) threatening to commit any of the acts listed in points (a) to (i).

of the following aims: (a) *seriously intimidating a population; (b) unduly compelling a government or international organisation to perform or abstain from performing any act; and (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.*

The Directive reinforced the existing broad definitions of terrorist offences, thus perpetuating problems regarding the broad scope, purpose and lack of intent inherent in prior definitions, for example under the Framework Decision. Successive UN Special Rapporteurs have expressed concern that *‘the absence of a universal, comprehensive and precise definition of ‘terrorism’ is problematic for the effective protection of human rights while countering terrorism’*⁴³ and the current Special Rapporteur has highlighted that vague definitions allow for legislation to be *‘deliberately misused to target a variety of civil society groups’*.⁴⁴

In the continuing absence of a more precise definition, concerns about non-rights compliant applications of ad-hoc definitions will remain across all jurisdictions. Some states such as **Belgium** and the **Netherlands** maintained their definitions of principal offences. Others have definitions that are even broader than Article 3. In **Spain**, for example, the terrorist purposes specified in Article 573 of the criminal code include *‘seriously disturbing the public peace’* and *‘instilling fear among citizens’* both of which allow for very wide interpretation and are not included under Article 3. **Bulgaria** has one of the broadest definitions of terrorism stating under the criminal code that *‘anyone who, in view of causing disturbance or fear among the population or of threatening or forcing a competent authority, a representative of a public institution or of a foreign state or international organization to perform or omit part of his/her duties commits a crime ... shall be punished for terrorism by deprivation of liberty from five to fifteen years...’*⁴⁵

C. Public provocation to commit a terrorist offence (Article 5)

The Directive requires states to criminalise *‘the distribution, or otherwise making available by any means, whether on or offline, of a message to the public, with the intent to incite the commission of one of*

⁴³ 2010 Annual Report UN Doc A/HRC/15/51

⁴⁴ 2019 Annual Report UN Doc A/HRC/40/52

⁴⁵ Criminal Code of the Republic of Bulgaria, article 108a:

<http://www.legislationline.org/documents/section/criminal-codes/country/39>

the offences listed in Article 3(1)(a) to (i), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed.” It requires such acts are punishable when committed intentionally.

Recital 40 states that “nothing in this Directive should be interpreted as being intended to reduce or restrict the dissemination of information for scientific, academic or reporting purposes. The expression of radical, polemic or controversial views in the public debate on sensitive political questions, falls outside the scope of this Directive and, in particular, of the definition of public provocation to commit terrorist offences”.

This Article caused substantial consternation during the drafting process and raised immediate concerns around freedom of expression under article 10 of the Charter and article 11 of the ECHR. Despite important jurisprudence, including a decision issued during the drafting process by the French Constitutional Court, there was strong resistance to ensuring further precision. The French Constitutional Court held that criminalising the ‘*habitual consultation*’ of websites, which make available messages which directly provoke terrorism, was unconstitutional and ‘*jeopardised freedom of communication in a way that is not necessary, appropriate and proportionate*’.⁴⁶

The Directive sets a very low threshold by considering an act punishable when it causes danger that an offence *may* be committed and criminalizes conduct *directly or indirectly* advocating terrorist offences. Recital 40 goes some way to outlining the types of statements that should fall outside of the scope of the Directive, but is non-binding as opposed to a reference to the protection of free expression that existed in the operative part of the 2008 Framework Decision.⁴⁷

In 2018 the Council of Europe Commissioner for Human Rights published a human rights comment on how the misuse of anti-terror legislation threatens freedom of expression. She noted that the terms used are often vague or unduly broad and that notions such as glorification or propaganda are not

⁴⁶ See European Digital Rights Initiative: <https://edri.org/our-work/french-avia-law-declared-unconstitutional-what-does-this-teach-us-at-eu-level/>

⁴⁷ Council Framework Decisions 2008/919/JHA, Article 2: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0919&from=EN>

clearly defined. The comment sets out four steps for action including a review of relevant legislation.⁴⁸

Among the most invoked elements of the Directive, are those articles in national legislation implementing Article 5 on public provocation, raising concerns regarding disproportionate application and violations of freedom of expression. According to the report of the UN Special Rapporteur following her country visit to **France** in 2018, apology for terrorism was the most frequently used counter-terrorism measure by the authorities. Data shows that there was a leap from three convictions for apology for terrorism in 2014 to 306 in 2016 – and that these convictions stemmed from 1,850 police investigations.⁴⁹ In one case, following an attack in 2018 on a supermarket, in which the shop's butcher was killed, a vegan activist posted on social media: *'It shocks you that an assassin is killed by a terrorist? Not me, I have zero compassion for him. There is justice after all.'* The activist was given a seven-month suspended sentence. While it is clear that the comments were insensitive and hateful, they did not directly incite violence and the prosecution raised flags regarding the broad applicability of the legislation.⁵⁰ As Ben Emmerson, the former UN Special Rapporteur noted:

'The peaceful pursuance of a political, or any other, agenda – even where that agenda is different from the objectives of the government and considered to be 'extreme'—must be protected.'

In **Spain** similar legislation has been used to crush satire and creative expression online. Article 578 of the Spanish Criminal Code prohibits *'glorifying terrorism'* and *'humiliating victims of terrorism'*. Again, there are no clear definitions of these terms and of particular concern, and contrary to the Directive, the Article makes no provision requiring intent or causation of any danger or violence.

Article 578 was first introduced in 2000 and amended in 2015. At that time, five UN independent experts (Special Procedures) of the UN Human Rights Council, raised concerns highlighting that **Spain** would potentially *"criminalise behaviours that would not otherwise constitute terrorism and could result in disproportionate restrictions on the exercise of freedom of*

48 Human Rights Comment 2018: <https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fcounter-terrorism>

49 Nadim Houry, France's Creeping Terrorism Laws: Restricting Free Speech', *Just Security* 30 May 2018: <https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Fcounter-terrorism>

50 *Ibid.*, 25.

expression, amongst other limitations".⁵¹ No heed was paid to these warnings and after 2015 prosecutions and convictions rose sharply. According to Amnesty International, 84 people were convicted for glorifying terrorism between 2015 and 2017, a nearly four-fold increase compared to the previous two years.⁵² Rights International Spain analysed 49 judgments of the National Court and Supreme Court related to Article 578 between 2015 and 2019. Of these 67% were for the offence of glorification.⁵³

One case of note is that of 'César Strawberry', a Spanish singer and song writer. In 2017 he was sentenced to one year in prison and six months' disqualification from the public sector, for '*glorifying terrorism*' and '*humiliating its victims*' through a series of tweets asking '*how many more should follow the flight of Carrero Blanco*' – the prime minister during Franco's dictatorship who was killed by an ETA car bomb. In 2020 the Constitutional Court reversed the Supreme Court's ruling considering that the prison sentence violated César Strawberry's right to freedom of expression. The Constitutional Court did, however, maintain the Supreme Court's stance that it was irrelevant to consider whether the messages had a provocative intent – but noted that sarcastic and metaphorical speeches are part of the right to freedom of expression.⁵⁴

In another case a 22-year-old student Cassandra Vera was convicted of humiliating the victims of terrorism for jokes and memes that she posted on Twitter, again related to Prime Minister Carrero Blanco. She was sentenced to one year in prison and seven years' disqualification from the public sector but successfully appealed and was acquitted by the Supreme Court in 2018.⁵⁵ Again, the court didn't distinguish between whether a message is objectively humiliating to the victims of terrorism or whether any actual victim was affected by the message. Thus, whilst the Spanish courts have handed down important decisions, there is still a lack of clarity regarding intent and the potential harm caused.

Similar questions regarding intent arose in a series of **Belgian** cases. In 2018, in a case introduced by the League des Droits de l'Homme, the Constitutional

51 See: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597>

52 Amnesty International, *Tweet If You Dare*, March 2018.
<https://www.amnesty.org/en/documents/eur41/7924/2018/en/>

53 Rights International Spain, Legal Standards on Glorification – Case Analysis, January 2021:
<http://www.rightsinternationalspain.org/uploads/publicacion/6b06a5a8ad6c2f7c9b408091b87d0b3c7dffd219.pdf>

54 Columbia University Global Freedom of Expression Index, accessed August 2021:
<https://globalfreedomofexpression.columbia.edu/cases/the-case-of-cesar-strawberry/>

55 See *Huffington Post* 2018: https://www.huffingtonpost.es/2018/03/01/el-supremo-absuelve-a-la-tuitera-cassandra-por-sus-chistes-sobre-carrero-blanco_a_23374210/

Court annulled the broad-reaching provisions on ‘*indirect*’ incitement that had been introduced into the Belgian Criminal Code in 2016. The Court held that, where there were no serious indications of a risk that a terrorist offence could be committed, the provisions placed a disproportionate limit on the right to freedom of expression. The 2018 amendments to the criminal code were considered important in a subsequent case in 2020, of the Court of First Instance in West Flanders, where a Syrian national was acquitted of public provocation to commit a terrorist attack. The court held that while the defendant upheld and made public his dogmatic and anti-Semitic ideology, he did not directly or indirectly incite the commission of terrorist offences. His propaganda did not seem to create a real risk that one or more terrorist offences could be committed, and his messages did not appear to be taken seriously by at least part of his audience. Therefore, the court found him not guilty.⁵⁶

In 2015, the District Court of the Hague in **the Netherlands** considered a case where the question of whether re-tweeting messages could be considered endorsement of its content and thus public incitement to terrorism. The Court of Appeal held that tweets and re-tweets could be considered as incitement as, read together, they glorified the violence, martyrdom and fight of a terrorist group active in Syria in such a way that they could incite someone to participate in the armed conflict. The case, known as the ‘Context’ case, considered in-depth the threshold between freedom of expression and criminal incitement. The defence argued that the six who were charged with incitement to commit terrorist crimes were being prosecuted not for their acts, but for their ideas. The judgment considered the justification, necessity and proportionality in relation to article 10 of the ECHR and included a list of acts that are not punishable. It explained that ‘*incitement is not compelling someone to perform an act, but rather provoking the thought of an act, trying to establish the opinion that this is desirable or necessary and to rouse the desire to bring it about*’. Thus, posting a picture of a decapitation would not be considered incitement but adding a caption directly calling for violence would when also considering the context of the tweet. The implication is that there should be a realistic chance that the incited crime will occur, but this is not clearly articulated.⁵⁷

Not all of the case law stems only from the most recent legislative changes following the transposition of the Directive, but it is clear that despite existing concerns the Directive provided no incentive to ensure greater precision in

⁵⁶ Extract from the Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism- PAD request 2021/A/10 received on 9 August 2021 following an access to information request.

⁵⁷ See: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:16102>

existing or new legislation. Recent case law provides important insights but across different Member States there still remains a lack of clarity which now stems from the Directive. As recommended by the Commissioner for Human Rights at the Council of Europe legislation on public provocation should be reviewed and aligned with international law which does recognise that governments may – and in some cases must - lawfully restrict incitement to violence. However, for a person’s expression to amount to incitement to violence, there must be (a) subjective intent on the part of that person to incite violence through that expression; and (b) an objective danger that the person’s expression will cause violence—according to the ECHR ‘s recent jurisprudence this danger must be *‘clear and imminent’*.⁵⁸

Despite concerns regarding this Article of the Directive, before the transposition period had even expired, the European Commission introduced new, related legislation on terrorism content online. The Regulation, adopted in April 2021, requires internet companies to monitor content, with grave implications for freedom of expression, and concerns regarding the outsourcing and privatisation of law enforcement.⁵⁹ Again the legislators failed to heed the ruling of the French Constitutional Court, which in June 2020, struck down most of a controversial bill requiring online platforms to remove hateful content. The Court held that the legislation *‘undermines freedom of expression and communication in a way that is not necessary, adapted nor proportionate’*.⁶⁰

D. Recruitment (Article 6)

The Directive requires states to criminalise *‘soliciting another person to commit or contribute in the commission of’* offences listed as a terrorist offence or offences relating to a terrorist group. The Directive explicitly states that recruitment is punishable only when committed intentionally.

These articles again raise concerns engaging the rights to freedom of association as well as the right to privacy (Article 7 of the Charter and Article 8 of the ECHR), freedom of religion or belief (Article 10 of the Charter and 9 of the ECHR) and the right to political participation (Article 6 of the Charter and Article 5 of the ECHR).

58 ECHR Guide to Article 10: https://www.echr.coe.int/documents/guide_art_10_eng.pdf

59 European Digital Rights Initiative (EDRI): <https://edri.org/our-work/terrorist-content-regulation-document-pool/>

60 *Politico*, June 2020: <https://www.politico.eu/article/french-constitutional-court-strikes-down-most-of-hate-speech-law/>

Concerns largely relate to the issue of intent. For example, recruitment to a terrorist group should require knowledge of the fact that the group is likely to carry out criminal offences and intent that the person will contribute to the criminal activities of the group. Given the potentially wide scope of the offences, particular concern arises regarding the investigatory phase and the risk that the police cast an excessively wide net and in the process risk unnecessary and disproportionate intrusion on the right to privacy and legitimate religious practice.

In a number of countries, intent is clearly specified as a necessary element – including in **Germany** and the **Netherlands**.⁶¹ In **Italy**, it is for a judge to determine whether a particular organisation has a terrorist purpose. The **Belgian** Criminal Code goes further than Article 6 and criminalises the act of recruiting a third person and does not explicitly require that the recruitment be committed intentionally. There have, however, been very few cases, especially in the last years, relying on the crime of recruitment which would seem to indicate challenges in prosecuting crimes that are redundant or poorly formulated.

E. Providing and receiving training (Articles 7 and 8)

Article 7 requires states to ‘take the necessary measures to ensure that providing instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances’ for the purpose of committing a terrorist offence is punishable when committed intentionally.

The newly introduced Article 8 requires states to criminalize the receipt of instruction, from another person, ‘the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques’, for the purpose of committing a terrorist offence (excluding the threat to commit a terrorist offence). The training must be undertaken intentionally.

Articles 7 and 8 on providing and receiving training particularly engage the right to receive information as well as the right to education and free expression. Again, concerns relate to the issue of intent, the very wide nature of the offences and the fact that facially neutral acts, such as online learning, could be criminalised. Legislation in both the **Netherlands** and **Spain** include

⁶¹ See ICJ, *Counter Terrorism and Human Rights in the Courts. Guidance for Judges, Prosecutors and Lawyers on the Application of EU Directive 2017/541 on Combatting Terrorism*.

‘self-training’ and, in Spain, cover ‘self-indoctrination’ and repeatedly accessing material online—which, as highlighted in the section on Article 5 was found, by the French Constitutional Court, to be in violation of the right to freedom of expression. The **Spanish** Court considered an appeal by an individual who was convicted in 2016 for the offence of ‘self-indoctrination’. The court highlighted the lack of clarity in the legislation noting that the Directive does not include ‘indoctrination’ as an offence in itself. The court held that a restrictive interpretation of the legislation is necessary in order not to violate the right to freedom of thought and the right to information. Only when self-indoctrination is clearly for terrorist purposes can it be considered a crime.⁶²

In 2020, the **Swedish** Court of First Instance also considered the application of new legislation on receiving training for terrorism. The defendant was accused of acquainting himself online with instructions in the making or use of explosives, weapons or hazardous substances that are likely to be used in a serious crime. The information had a clear link to the terrorist organisation ISIL (Da’esh). The court found that there was no evidence to establish that the defendant had taken any steps that would suggest a concrete intention to use the materials to commit or participate in a serious crime or terrorist act and was acquitted. The prosecution has appealed.

Again, the cases coming before national courts highlight the challenges regarding the imprecise and broad nature of the legislation and tendency to focus on an increasing range of pre-emptive offences. As researchers have noted, the pre-crime offences are so wide ranging that simply being in possession of a book (even if unread) could result in prosecution.⁶³

F. Travelling (Articles 9 and 10)

Article 9 of the Directive introduces a new offence which requires states to criminalize ‘travelling to a country other than that Member State for the purpose of the commission or contribution to a terrorist offence referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving training for terrorism referred to in Articles 7 and 8’.

62 Extract from the Eurojust contribution to the evaluation of Directive (EU) 2017/541 of 15 March 2017 on combating terrorism- PAD request 2021/A/10 received on 9 August 2021 following an access to information request.

63 European Network Against Racism, February 2021, ‘Suspicion, Discrimination and Surveillance: the impact of counter-terrorism law and policy on racialised groups at risk of racism in Europe’.

Subparagraph (a) of paragraph 2 requires states to criminalize travelling to their territories for the above purposes. Subparagraph (b) punishes *'preparatory acts undertaken by a person entering that Member State with the intention to commit or contribute to a terrorist offence, as referred to in Article 3'*. For all these acts to be punished, they must be committed intentionally.

Article 10 is a new provision and requires states to criminalize *'any act of organisation or facilitation that assists any person in travelling for the purpose of terrorism'* knowing that the assistance thus rendered is for that purpose. This offence is punishable only when committed intentionally.

These are both new offences and were part of the main impetus for the Directive, as set out in Recital 12. States were particularly concerned about the threat of the acts of 'foreign fighters'. The offence has its roots in UN Security Council Resolution 2178 and the Additional Protocol of the Council of Europe Convention on the Prevention of Terrorism,⁶⁴ but goes further extending criminalisation to travel for the purpose of *'participation of a terrorist group as referred to in Article 4'*. Given the broad definitions in Article 4, Article 9 further adds to the lack of clarity as travel for these purposes is even further removed from an act of terrorism. Article 10 criminalises facilitation or other forms of organisation, again raising flags regarding the lack of definition and criminalisation of activities, which are even further removed from the principal offences of terrorism.

Alongside other rights, the right to freedom of movement is core to these articles. Free movement is one of the fundamental freedoms recognised by the European Union, and a right protected under international law, including the right to leave and return to one's own country.⁶⁵ The right can only be limited where strictly necessary and proportionate. Prior to the Directive, the **German** Federal Court considered the case of a woman accused of severely endangering the state when she travelled to Syria. The court found that, in order to be convicted, active participation in fighting was needed. Mere sympathy for a terrorist organisation, while living in a war zone and possessing weapons for self-protection, was not enough for a conviction of severely damaging the state.⁶⁶

64 See Security Council Resolution 7178 para 6.a and Additional Protocol of the Council of Europe Convention on the Prevention of Terrorism Article 4.

65 Protected under Article 12 of the International Covenant on Civil and Political Rights and elaborated in General Comment 27 of the UN Human Rights Committee.

66 Case "Allgäuer Islamistin" Judgment of 27 October 2016, Case 3StR 218/15: <https://ra.de/urteil/bgh/urteil-3-str-21815-2015-10-27>

Not all countries have included a specific article on travel in their legislation. The **Netherlands**, for example, considered that travelling for terrorist purposes is already covered under conduct to carry out preparatory acts to participate in armed conflict or other terrorist offences. Of note is the fact that Belgium includes a specific offence, but important that it also includes an exemption regarding acts defined by international humanitarian law (see section 5C).

G. Financing terrorism (Article 11)

In a newly introduced provision, the Directive requires states to criminalize ‘providing and collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, to commit or to contribute to any of the offences referred to in Articles 3 to 10.’⁶⁷ There is no requirement that the funds in fact be used, in full or in part, to commit or to contribute to a terrorist offence, nor that the offender knows for which specific offence(s) the funds are to be used.

This provision promotes a potentially arbitrary or discriminatory application of criminal law as it sets a very low threshold of intent and no necessity for a principal offence to be actually committed. In certain cases, it would allow for deliberate misuse of the Article to close down opposition and civil society groups—thus creating a chilling effect and diminishing the space for civic engagement. The UN Special Rapporteur has raised concerns about the impact on civil society noting that organisations may be maliciously targeted or financially marginalised, forcing them to scale-down activities or close altogether.⁶⁸ The impacts of the Directive may also be intensified due to a multitude of ‘soft-law’ standards related to the financing of terrorism. For example, until recently, and before extensive advocacy by civil society organisations, the Financial Action Task Force (FATF) classified not-profit organizations in civil society as ‘particularly vulnerable to terrorism financing’. FATF has since modified that stance in response to concerns raised by the Global NPO Coalition on FATF.⁶⁹ In a similar vein, in 2019, the European Commission’s own Supra National Risk Assessment maintained a threat level of three even though the assessment explicitly stated that the

⁶⁷ Terrorist offences (Article 3); Offences relating to a terrorist group (Article 4); Public provocation to commit a terrorist offence (Article 5); Recruitment for terrorism (Article 6); Providing training for terrorism (Article 7); Receiving training for terrorism (Article 8); Travelling abroad for terrorism (Article 9); Organising or otherwise facilitating travelling abroad for terrorism (Article 10).

⁶⁸ UN SR Report to the Human Rights Council 2019 A/HRC/40/52

⁶⁹ See Global NPO Coalition on FATF: <https://fatfplatform.org/>

collection and transfer of funds by non-profit organisations was not a method frequently exploited by terrorist groups.⁷⁰

A recent case from the **Netherlands** demonstrated the perils of expansive and unfocused investigations. Known as the Baby Care case, the accused were board members of a Dutch mosque and the Baby Care foundation. They were accused of providing material and financial support to the Islamic State and Jabhat al-Nusra, but they claimed to be providing humanitarian support to the families of fallen fighters. In July 2021, after over four years on trial, they were acquitted of financing terrorism and of participating in a terrorist group. The judge criticized the investigation highlighting that it was guided by ‘tunnel vision’.⁷¹

H. International humanitarian law

With regard to the Directive’s application to conduct taking place as part of an armed conflict, Recital 37 clarifies that it ‘should not have the effect of altering the rights, obligations and responsibilities of the Member States under international law, including under international humanitarian law. The activities of armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, activities of the military forces of a State in the exercise of their official duties are not governed’ by the Directive.

Recital 38 states that the ‘provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive.’

Confirmation that the Directive does not apply in an armed conflict should have been included in the operative part of the text, as included, for example, in the Council of Europe Convention on the Prevention of Terrorism.⁷² It is also concerning that whilst the Directive protects the activities of recognised humanitarian organisations, it does not expressly extend this to individuals

70 Input to the European Commission in December 2020 by the civil society coalition:

https://civilsocietyeurope.eu/wp-content/uploads/2021/03/2021_SNRA_NPOs_Coalition_DECEMBER_Comments_FINAL.pdf

71 Summary of the judgment (in Dutch): <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Limburg/Nieuws/Paginas/Vrijspraken-in-de-Moskee-zaak-Geleen.aspx>

72 Council of Europe Convention on the Prevention of Terrorism (2005) Article 26(4) and Article 26(5)

providing medical or other life-saving activities that are protected by IHL in times of armed conflict.

Belgium is one of the few countries to include a specific IHL exclusion clause. Article 141bis of the Penal Code confirms that ‘*acts by armed forces in a situation of armed conflict as defined in and subject to international humanitarian law*’ and ‘*acts by the armed forces of a State in the context of their official tasks, insofar as those tasks are subject to other provisions of international law*’ are excluded from the scope of application of general criminal law. Affirming again the importance of applying IHL, in 2019 the Ghent Court of Appeal stated that ‘*if participants in an armed conflict fight in the knowledge that they will in any case be subject to prosecution under common criminal law or under terrorism legislation, there is no incentive to comply with (at least) international humanitarian law.*’⁷³

7 Over-arching Fundamental Rights Concerns

As the above analysis highlights, in addition to fundamental rights concerns associated with specific clauses of the Directive, a number of over-arching issues arise. These stem both from the varying provisions of the Directive, singularly and collectively, as well as from the array of associated counterterrorism and counter-radicalisation laws and policies—together creating an environment lacking in legal certainty and open to misuse.⁷⁴

A. Expansion of criminal law and the use of administrative measures

The Directive forms part of a trend in counter-terrorism towards an increasingly ‘preventive’ role for criminal law. While criminal law can play a crucial role in addressing conduct that contributes in various ways to acts of terrorism, the expansive scope of offences also poses serious challenges to basic criminal law principles governing the essential mental and material

⁷³ Ghent Court of Appeal, Decision of Case 939/2019, 8 March 2019

⁷⁴ See for example the EU’s new Counterterrorism strategy: https://ec.europa.eu/home-affairs/what-we-do/policies/counter-terrorism-and-radicalisation_en as well as review in ENAR’s recent report of [counter-radicalisation policies](#).

elements of offences, individual responsibility, and the justification for resort to criminal law.⁷⁵

The Directive moves further towards criminalising preparatory acts that may never result in the commission of a primary offence—and where the act is so remote that proving that a violent offence was an intended, or at least a foreseen consequence, becomes increasingly difficult. These provisions include some of the most widely applied articles of the Directive, as well as those that are broadly worded and thus open to wide interpretation including articles on public provocation, travel and training, where these are ‘related to’ terrorist activities.

Using criminal law in such a ‘preventive way’ is compounded by an expansion of the use of administrative measures; measures granted through executive power, outside of the criminal justice system. The use of administrative measures results in a loss of the attendant procedural safeguards, embedded in the criminal justice process, resulting in lower standards of proof and limited possibilities for review and oversight. Common administrative measures include restrictions on freedom of movement and association, including assigned residency, in-house curfews from evening to morning, reporting to the police, prohibition on access to various types of technologies, special clearance for certain visitors, confinement to a specified neighbourhood or region, electronic tagging, travel bans, freezing of bank accounts, and withdrawal of social benefits—all of which have a significant and disruptive impact on the life of an individual and their family—a large risk given the potential for discrimination or misapplication. The state typically has no intention of formally charging or prosecuting a person who is subjected to such measures, taking them out of the criminal justice system and excluding them from the safeguards that apply in ordinary criminal processes and procedures.

In the UN Special Rapporteur’s 2018 country report on **France**, she warned of ‘*the cumulative effects of layered and multifaceted administrative and individual measures taken over several years against specific individuals*’.⁷⁶ Following the extended state of emergency, first declared in November 2015, there was an extensive use of exceptional powers. Over two dozen mosques and Muslim associations were closed, 700 people subjected to assigned residency, and over 4000 administrative searches carried out, yet according to statistics from the French Ministry of Interior, only one tenth of

⁷⁵ See ICJ Guidance p. 15 ICJ Counter Terrorism and Human Rights in the Courts. Guidance for Judges, Prosecutors and Lawyers on the Application of EU Directive 2017/541 on Combating Terrorism.

⁷⁶ A/HRC.40/52/Add.4: <https://daccess-ods.un.org/TMP/7363680.00507355.html>

the judicial proceedings for emergency searches were for terrorism related offences (61 out of 670).⁷⁷

A further third layer has emerged beyond administrative measures to cover a range of non-criminal powers and broader surveillance. These include a variety of ‘counter-radicalisation’ programmes set out in policy frameworks with minimal oversight and administered by a range of professionals with no or limited relevant training.

Obviously these second and third layers are not a direct impact of the Directive, but as an important instrument in the EU’s counter-terrorism architecture, the Directive does set a tone and precedent that may serve to influence other instruments.

These far-reaching and cumulative concerns have been raised by the UN Special Rapporteur, as well as by many experts and academics. There is an increasing trend of targeting dangerous persons rather than acts— exemplified by the German term *Gefährder*—literally an endangerer,⁷⁸ the overall result being an expansion and erosion of criminal law and emergence of a parallel system of preventive measures that lack safeguards or oversight.

⁷⁷ See also Amnesty International report on France:

<https://www.amnesty.org/en/documents/eur21/9349/2018/en/>

⁷⁸ Kai Ambos, *Just Security*: <https://www.justsecurity.org/70264/the-terrorist-as-a-potentially-dangerous-person-the-german-counterterrorism-regime/> May 2020.

B. Rights of suspects

International human rights law provides a series of protections and safeguards for all those suspected or accused of a crime. They range from rules around the gathering of evidence, which are particularly applicable given the broad scope of many crimes under the Directive to surveillance, detention and fair trial rights. The International Commission of Jurists sets out in more detail guidance related to the rights of suspects in the Directive in their ‘Guidance for Judges, Prosecutors and Lawyers on the Application of EU Directive 2017/541 on Combatting Terrorism’.

Of particular note, in the EU’s own legislative sphere, is a series of directives adopted between 2010 and 2016 to assure procedural defence rights in criminal proceedings. The directives cover the right to information, the right to interpretation and translation, access to a lawyer and to legal aid, the presumption of innocence, and the rights of child suspects. Recital 36 of the Directive on Combating Terrorism confirms that that Directive is without prejudice to the Member States’ obligations regarding the procedural rights of suspects and accused persons in criminal proceedings but there are concerns, particularly raised by defence lawyers, around the right to confidential communication with a lawyer and around access to evidence.⁷⁹

The expansion of criminal law towards a pre-emptive approach generally leads to greater surveillance and far-reaching data collection where crimes are so broadly defined and pre-emptive in nature that it can be difficult to determine the boundaries of proportionate and justifiable data collection.

As highlighted in the UN Special Rapporteur’s report on France, under the state of emergency authorities carried out a huge number of searches—mostly using administrative powers. Amnesty International, in its report *Dangerously Disproportionate*, highlighted concerns regarding indiscriminate mass surveillance or the bulk collection of data that fails to conform with human rights standards and violates in particular the right to privacy.⁸⁰ In a Dutch case (discussed above in section 6C), the court held that if the investigative method entails a risk to the integrity and involvement of the investigation and the suspect’s right to privacy, then the police must request the public prosecutor to issue an order.⁸¹

⁷⁹ Amicus brief filed by the UN Special Rapporteur in the ECHR case of Muhammad v Romania here: <https://www.ohchr.org/EN/Issues/Terrorism/Pages/AmicusBriefsExpertTestimony.aspx>

⁸⁰ Amnesty International, 2017, *Dangerously disproportionate: the ever-expanding national security state in Europe* <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR0153422017ENGLISH.pdf>

⁸¹ Ibid. 57

C. The right to non-discrimination

Recital 39 of the Directive states that ‘The implementation of criminal law measures adopted under this Directive should be proportional to the nature and circumstances of the offence, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness, racism or discrimination.’

The risk of discriminatory application was one of the core concerns of human rights organisations prior to the adoption of the Directive, stating, upon agreement of the text that:

The directive’s punitive measures... pose the risk of being disproportionately applied and implemented in a manner that discriminates against specific ethnic and religious communities... Time and again we’ve seen governments adopt abusive counterterrorism laws without assessing their effectiveness, and then implement them in ways that divide and alienate communities.⁸²

While the Directive is facially neutral, in that the text itself does not target specific groups, the political and public discourse around the Directive, at the EU level and within individual member states, created an environment where specific groups were and continue to be stereotyped resulting in a great risk of discriminatory application. For example, in **Hungary**, Prime Minister Viktor Orban described the arrival of asylum seekers as ‘a poison’ and said that ‘every single migrant poses a public security and terror risk’.⁸³ In **Poland**, during the drafting of the 2016 Anti-Terrorism Act, a list of activities deemed to be ‘terrorist related’ was included in a ‘catalogue of terrorist incidents’. These included plans for establishing an Islamic University and visits to prisons by Islamic clerics. Whilst these were not included in the final text, they highlight the environment within which legislation is drafted and implemented.⁸⁴ In August 2021, a group of UN Special Rapporteurs drew attention to **Austria’s** recently enacted anti-terrorism law, which introduces ‘religiously motivated extremist association’ as a basis for criminalisation raising concerns that the legislation will result in the infringement of multiple rights including the rights to freedom of thought, conscience, religion and

⁸² See Open Society Justice Initiative November 2016: <https://www.justiceinitiative.org/newsroom/new-european-union-directive-counterterrorism-seriously-flawed>

⁸³ *Politico* July 2016: <https://www.politico.eu/article/viktor-orban-migrants-are-a-poison-hungarian-prime-minister-europe-refugee-crisis/>

⁸⁴ ENAR 2021, *Suspicion, Discrimination and Surveillance: The Impact of Counter-Terrorism Law and Policy on Racialised Groups at Risk of Racism in Europe*.

belief, freedom of expression and association, the right to privacy, and the right to education.⁸⁵

In research carried out by the European Network Against Racism (ENAR) during the course of 2019 and 2020, there was a widespread perception among interviewees that Muslims are profiled and selected for questioning by police and security officials on the grounds of their perceived race, ethnicity, and religion. Interviewees stated that ‘*just by the fact of being and declaring that I am a Muslim, I become a suspect*’. For some, the increased focus on Muslims has become a normalised part of life.⁸⁶ Amnesty International’s 2018 report on France found that all individuals interviewed for the report expressed the view that they were targeted for their religious practice and identity. This was bolstered by the fact that when reviewing the files for the interviewees, each of the justifications for imposing an administrative control order, was—among others—the individuals’ religious practice.⁸⁷

Given the concerns and known difficulties in proving discrimination, Amnesty International and the Open Society Foundations developed a *Human Rights Guide for Researching Racial and Religious Discrimination in Counter-Terrorism in Europe*, published in February 2021. The guide sets out the relevant international and regional human rights standards, looks at how they apply in the counter-terrorism context in Europe, and makes a number of key recommendations. Of particular relevance, in the increasingly prevalent pre-emptive counter-terrorism context, are the recommendations around the use of stereotypes associating Muslims with ‘*extremism*’ and ‘*terrorism*’. Where preparatory criminal offences require no evidence of a specific planned act of violence, there is a high risk, in the absence of concrete actions, that a person’s identity and beliefs become ‘evidence’ of potential engagement in acts of terrorism.⁸⁸ From ENAR’s research, many Muslims that the organisation spoke to felt worn down and exhausted from living under suspicion. One said you ‘grow up wanting to justify why you aren’t guilty’.

The **Hungarian** case of Ahmed H. illustrates how the broad definition of terrorism creates the potential for discriminatory application and misuse of counter-terrorism laws. In September 2015, Ahmed H. was at the Serbian-Hungarian border. After Hungarian guards used tear gas and water cannons

85 See:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26590>

86 Ibid, 82.

87 Amnesty International, *France: Punished without Trial: The Use of Administrative Control Orders in the Context of Counter-Terrorism in France, 2018*:

<https://www.amnesty.org/en/documents/eur21/9349/2018/en/>

88 Amnesty International and Open Society Foundations, February 2021:

https://www.opensocietyfoundations.org/publications/a-human-rights-guide-for-researching-racial-and-religious-discrimination-in-counterterrorism-in-europe#publications_download

against the refugees, Ahmed H., who spoke multiple languages, tried to direct and calm the crowd. A number of people, including Ahmed H., also threw stones at the guards in response to the use of tear gas and water cannons. Ahmed H., as someone who was identifiable among the crowd, was arrested, accused and convicted of committing ‘*acts of terror*’ and initially sentenced to 10 years’ imprisonment, which was reduced to 5 years after a re-trial. What is notable is that the Hungarian prosecution service decided to charge Ahmed H. with a terrorism offence rather than an ordinary public order offence—move that was widely criticized by human rights groups and international governments.⁸⁹

D. Threats to civic space

Civil society organisations have documented the misuse of counter-terrorism legislation against independent human rights organisations, in particular those that are outspoken and critical of government policies or those working with targeted minority groups. They have also been profoundly impacted as counter-terrorism policies have contributed to, and have been identified as a driving force behind the global reduction in the space for civil society. According to the CIVICUS Monitor, a civil society initiative to monitor, document, and analyse trends in civic freedoms, civic space is closed, repressed or obstructed in 111 countries across the globe, leaving only 4 per cent of the global population living in areas where civic space is deemed to be fully open. Within the EU, 14 countries are ranked as open, 12 as narrowed, and 1 as obstructed.⁹⁰

There is a clear link between this broad global trend and the misuse of counter-terrorism legislation. In cases documented by Front Line Defenders in 2018, 58 per cent of human rights defenders who were charged with a crime were charged under security legislation. From 2015-2018, 67 per cent of all communications related to civil society that were sent to the UN Special Rapporteur were related to proceedings under counter-terrorism legislation or other broad security-related charges. The UN Special Rapporteur concluded that these findings ‘*demand a fundamental review of the use (and misuse) of counter-terrorism law and practice around the globe, and the implementation of robust oversight and of accountability for attendant human rights violations.*’⁹¹

89 Amnesty International: <https://www.amnesty.org/en/latest/press-release/2019/09/ahmed-h-what-happened/>

90 CIVICUS Monitor: <https://monitor.civicus.org/> accessed September 2021

91 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (1 March 2019) UN Doc A/HRC/40/52

In **France** in 2020, the government ordered the closure of the leading anti-racism organisation, and ENAR member, the Collective Against Islamophobia in France (CCIF).⁹² The decision was confirmed in September 2021 and will likely have a chilling effect on freedom of expression and association for those working on non-discrimination in France and elsewhere in Europe.⁹³

As discussed in the section on financing terrorism, actions by bodies such as the Financial Action Task Force have further stigmatised civil society and severely curtailed their work by labelling them as inherently vulnerable to terrorism financing. Instead of ensuring that civil society performs a vital watch-dog role, counter-terrorism measures have the opposite effect of hollowing out democracy and undermining the rule of law.⁹⁴

As the Special Rapporteur warned, counter-terrorism measures are having a widespread and sustained impact:

Rooted in the primacy of security imperatives, sustained measures to silence and even choke civil society have been taken. It is essential to grasp the serious impact of the cumulative sustained effect that such measures, which have proliferated under the internationalized security framework, have had across civil society, locally and globally, individually and collectively, and how they have undermined civil society and civic space.

E. Links with crimes against humanity and war crimes

As noted above, states are required to exercise their obligations to prosecute war crimes, crimes against humanity, and other crimes under international law, where necessary, asserting universal jurisdiction, and bringing those responsible to justice. As such, gathering of evidence and prosecution of such crimes should be prioritised. In appropriate cases, prosecutions for war crimes or crimes against humanity should be pursued rather than relying on a lesser ancillary terrorist offence where the evidence might be more accessible, or the elements of the offence more easily established.

There have been a small number of important cases that have been prosecuted in Europe. In September 2021, the Court of Cassation in **France** overturned a

⁹² <https://www.hrw.org/news/2020/12/04/france-dissolving-anti-discrimination-group-threatens-rights>

⁹³ See Human Rights Watch September 2021: <https://www.hrw.org/news/2021/09/27/french-court-confirms-dissolution-anti-discrimination-group>

⁹⁴ Bond Webinar September 2021: <https://www.youtube.com/watch?v=7eg5oOMD-No>

decision by the lower court to dismiss charges brought against the French cement company Lafarge for complicity in crimes against humanity in Syria. The lower court ruled that the company could be prosecuted on other charges of financing terrorism, violating an EU embargo, and endangering the lives of others. However, a number of Syrian employees, supported by human rights organisations, challenged the decision. The court of cassation found that *‘one can be complicit in crimes against humanity even if one doesn’t have the intention of being associated with the crimes committed’*. It added, *‘knowingly paying several million dollars to an organisation whose sole purpose was exclusively criminal suffices to constitute complicity, regardless of whether the party concerned was acting to pursue a commercial activity’*.⁹⁵

95 <https://www.aljazeera.com/news/2021/9/7/frances-lafarge-loses-ruling-in-syria-crimes-against-humanity>