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Towards an EU counter-terrorism policy after the Paris attacks

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Les llengües de treball son castellà, català, anglès i francès

Esta colección recoge una selección de investigaciones realizadas por estudiantes del Máster Universitario en Integración Europea. Previo a su publicación, los trabajos de investigación han sido tutorizados por profesores con grado doctor de diversas especialidades y han sido evaluados por un tribunal compuesto por tres docentes distintos del tutor.

Les langues de travail son catalán, castellano, inglés y francés

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Working languages: Catalan, Spanish, English and French

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Langues de travail: catalan, castillan, anglais et français

TOWARDS AN EU COUNTER- TERRORISM POLICY AFTER THE PARIS ATTACKS

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Abstract:

The object of this research is to study the new counter-terrorism measures which are being adopted in the EU after the terrorist attack that occurred in Paris (January 2015). Due to the fact that the EU is a supranational organization with primarily economic goals instead of political ones, its Member States keep their competencies on security matters, leaving the role of the EU as a mere coordinator of Member States' security policies. However, the reactions caused by this new attack suggest that the situation could change in the coming years. The issue is very important as it is not only our safety at stake, but also our fundamental rights, which are in conflict with some of the new measures proposed.

Keywords: Counter-terrorism, Paris attacks, 9/11, Area of freedom, security and justice, Jihadism, Human rights, Security, European Union.

Resum:

L'objecte d'aquesta investigació és l'estudi de les noves mesures que estan essent adoptades a la UE per a la lluita contra el terrorisme, després dels atemptats terroristes comesos a París (al gener de 2015). Pel fet que la UE és un ens supraestatal de caràcter eminentment econòmic més que no pas polític, encara els seus estats membres mantenen les seves competències en matèria de seguretat, deixant a la UE el paper de simple coordinador entre les polítiques de seguretat d'aquests. Tot i això, les reaccions que ha provocat aquest nou atemptat fan preveure que la situació podria canviar als anys vinents. La qüestió és molt important, ja que no només està la nostra seguretat en joc, sinó també els nostres drets fonamentals, els quals entren en conflicte amb algunes de les noves mesures proposades.

Paraules clau: Lluita contra el terrorisme, Atemptats de Paris, Àrea de llibertat, seguretat i justícia, Gihadisme, Drets humans, Seguretat, Unió Europea.

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I. LIST OF ABBREVIATIONS

9/11	September 11, 2001 terrorist attacks on the US
AFSJ	area of freedom, security and justice
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the EU
Charter	Charter of Fundamental Rights of the European Union
CIS	Customs Information System
CTC	Counter-terrorism Coordinator
CTS	Counter-terrorism Strategy
DRD	Data Retention Directive
EU	European Union
EP	European Parliament
ETA	Euskadi Ta Askatasuna
IRA	Irish Republican Army
ISF	Internal Security fund
ISIS	Islamic State
JHA	Justice and Home Affairs
LIBE	Civil liberties committee of the European Parliament
MEP	member of the European Parliament
MLA	Treaty on extradition and mutual legal assistance
NSA	National Security Agency
PEC	Political European Cooperation
PNR	Passengers Name Record
SIS	Schengen Information System
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TEU	Treaty on European Union
TFUE	Treaty on the Functioning of the European Union
TFTP	Terrorist Finance Tracking Program
US	United States of America

II. INTRODUCTION

"Their prophet is Satan. There is no connection between the Islamic faith and this minority"

Hassan Chalghoumi (an imam of the Paris suburb of Drancy), after Charlie Hebdo attacks.

The threat of Islamic terrorism is increasing every day. Several hideous actions committed in the last decade by terrorist groups such as Al-Qaeda, the Islamic State (ISIS), Boko Haram, and Jabhad al-Nusra have horrified the entire world. Now terrorism is one of the major global concerns and increasing security standards a general will.

The European Union (EU) is no stranger to this menace. European jihadists returning from the Middle East represent a considerable threat to the EU. As a matter of fact, of all different kinds of terrorism, jihadi terrorism is the most threatening one to Western societies. Terrorist attacks such as those occurred in Madrid (March 2004), London (July 2005), Toulouse and Montauban (March 2012), the murder of a British Army soldier in Woolwich (May 2013), and of course the most recent in Paris and in Copenhagen (January and February 2015 respectively), are examples of attacks that occurred in the last decade that have brought the issue of "home-grown" Islamist extremism to the forefront of European political debate. While freedom of movement of capital, goods, services and labor are welcomed features of the common European market, free movement of criminals and terrorists is clearly an unwanted corollary.

After the Paris and Copenhagen attacks, numerous debates have risen at the national and the EU level for the prevention of further jihadist attacks within the EU borders. According to *the Guardian*, since mid-2014 and March 2015 the number of foreign fighters spiked 71%, coming from at least half of the countries of the world.¹ Taking into account the increasing number of Islamic extremist fighters with an EU passport currently joining ISIS and Al-Qaeda, it is noticeable that the problem is getting worse day after day. This is the reason why several Ministers of the Interior from the Member States have pushed for the adoption of new counter-terrorist measures since the

¹ The Guardian. *Iraq and Syria are 'finishing schools' for foreign extremists, says UN report*. [Online] www.theguardian.com. Consulted on 02/04/15.

Charlie Hebdo attacks. There is a general will to enhance cooperation between EU Members States to confront more efficiently this global threat. In the last years, with the rise of the Islamic extremism and the returning jihadists, the Commission has tried to put in place a battery of measures which either the European Parliament (EP) or some Member States have opposed. Now however, Paris attacks are helping to unblock some of these measures.

It is worth noting that the EU has traditionally preserved high standards of the rights of its citizens, especially in comparison to the practice of the United States of America (US) since the terrorist attacks of September 11, 2001 (hereinafter referred as to 9/11). Despite the rights of the EU citizenship are one of the greatest achievements of Europe, this situation might change after the Paris shootings.

The present research will examine if the EU is experiencing a new approach in the field of security after the Charlie Hebdo attacks. In order to do this, this study will establish a comparison between the possible new EU security legal framework and the scheme existing in the US. In addition, it will analyze what rights of the EU citizenship could be jeopardized in case new EU security measures are eventually adopted.

This research is divided into three main sections: First, the EU current legal framework and the evolution of the counter-terrorism measures adopted by the EU (and its predecessor, the European Communities) are described. Second, the most significant consequences of these measures are highlighted. Finally, specific measures that are currently being discussed by the EU institutions after the Paris attacks are analysed. There are forecasted as part of the new EU counter-terrorism legal framework.

III. EVOLUTION OF THE EU COUNTER-TERRORISM POLICY

a) Origins of the EU counter-terrorism policy

Prior to 9/11, the EU practically could not be considered as a counter-terrorism actor, despite its relatively long history of police cooperation. The European integration project, which started in the 1950s, was born only with exclusive and explicitly written economic goals: The gradual creation of a customs union and a common market. The political union was an objective left aside with the intention to work on it progressively in a later stage.

When the former Political European Cooperation (PEC) began in the early 1970s, the Member States of the then-European Communities started to experience higher terrorism threats, and therefore they began to strengthen their cooperation. These threats manifested themselves in incidents instigated by Western Europeans, such as of the Red Brigades² in Italy, the Red Army Fraction³ in Germany, the ETA⁴ in Spain and France, the IRA⁵ in Ireland, as well as other Middle Eastern organizations, in the late 1960s and the beginning of the 1970s.⁶ As a result, the TREVI group was created as a counter-terrorism forum, under the impetus of the Rome European Council in 1975. TREVI was an informal body which worked as an intergovernmental network, outside the European Communities legal framework. It was composed by Ministers for the Interior of the Communities, or ministers with similar responsibilities. Initially it was intended to coordinate counter-terrorism responses among Member States by exchanging information and mutual assistance on terrorist threats while creating

² The Red Brigades was a Marxist-Leninist left-wing terrorist group founded by students, active in Italy between the 1970s and the early 1980s.

³ The Red Army Fraction was an anti-fascism radical left-wing terrorist group. It was founded in 1968 after a student protest in West Germany, and it ceased to exist in 1998.

⁴ Acronym for Euskadi Ta Askatasuna. It is a paramilitary organization with the goal of gaining independence from Spain and France for the Greater Basque Country. It was founded in 1958 and announced a definitive ceasefire in 2011.

⁵ The IRA (also denominated PIRA: Provisional Irish Republican Army), was an Irish republican paramilitary organization with the goal of unify Ireland. It was re-founded in 1969 and it ceased to exist in 2005.

⁶ BURES, Oldrich. *EU Counterterrorism Policy. A Paper Tiger?* Ashgate, Farnham, 2011, p. 60.

complementary strategies between Member States. In the mid-1980s, the group's purpose was extended to address issues such as cross-border policing, illegal immigration, police cooperation and the fight against organized crime. The group ceased to exist when it was integrated into the Justice and Home Affairs (JHA) pillar of the EU in 1992.⁷

The creation of TREVI was followed by other intergovernmental meetings for the combat against terrorism in 1971-1972. Despite the positive impact of TREVI, the fight against terrorism was an almost exclusive domestic competence of the Member States. Bilateral or multilateral cooperation between Member States was established to deal with singular cases; however, there were few EU initiatives at that time. The EU merely discussed terrorism matters on a political level. In fact, cooperation in the Justice and Home Affairs area may be considered a recent EU policy, mentioned for the first time in the Treaty of Maastricht (TEU) in 1992.⁸ The TEU pushed further and introduced the fight against terrorism in the former third pillar⁹ clearly identifying that the notion of terrorism was no longer an exclusive matter of the Member States. However, in the subsequent years the EU made slow progress, and only the Tampere European Council in 1999 tried to develop the JHA pillar.¹⁰ Nevertheless, few of the measures discussed in the Tampere European Council were implemented prior to the 9/11 attacks.

b) Counter-terrorism measures adopted between 9/11 and the Lisbon Treaty

The 9/11 attacks changed the perception of security of the overall society. After 9/11, Al-Qaeda cells were discovered in the EU, especially in Germany. In order to

⁷ TEASDALE, Anthony. BAINBRIDGE, Timothy. *Trevi Group*. [Online] <http://penguincompaniontoeu.com>. The Penguin Companion to European Union. Consulted on 02/05/15.

⁸ Title VI TEU.

⁹ The TEU divided European actions into three different categories: the "European Communities" pillar, the "Common Foreign and Security Policy (CFSP)" pillar, and the above-mentioned JHA pillar. Supra-nationalism was strongest in the first pillar, while intergovernmental cooperation was present in the second and third pillar. This structure was abandoned after the entry into force of the Treaty of Lisbon in 2009.

¹⁰ Council of the EU. *Living in an Area of Freedom, Security and Justice*. 2005, p.11. [Online] www.consilium.europa.eu/en. Consulted on 03/05/15.

prevent future terrorist attacks on EU soil, the EU adopted a significant number of counter-terrorism measures, with the aim to rapidly grow the EU competence for counter-terrorism. In some cases, the EU adopted those measures exceeding its own legal competences, such as the first EU-US Passenger Name Record agreement (PNR) concluded in 2004.¹¹ However in practice, those measures did not end up being as ambitious as it originally seemed. This may be due to the fact that the EU has traditionally considered as non-negotiable the necessity of a legal basis for the adoption of new security measures.

Already in November 2001, the European Council adopted an Action Plan on Combating Terrorism.¹² This Plan served as the basis for the policy of legal instruments adopted in the course of the following months. Among these legal instruments, the most significant ones are the two Council Framework Decisions of June 2002 on Combating Terrorism and the European Arrest Warrant.¹³ These Council Framework Decisions included a definition of the term terrorism.¹⁴ Therefore, the definition of terrorism formulated by the EU refers to “*intentional acts that were committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization*”.¹⁵ The issue is important as there is no a generally accepted definition of the term terrorism among scholars, policy-makers, politicians, and experts. According to Alex Schmid, this lack of consensus is

¹¹ BLASI CASAGRAN, Cristina. *The future EU PNR system: Will passenger data be protected?* European Journal of Crime, Criminal Law and Criminal Justice, Vol. 23, Issue 3, 2015. p.243.

¹² WOUTERS, Jan. DUQUET, Sanderjin. *Managing the Unmanageable: The European Union and Terrorism*. Leuven Centre for Global Governance Studies, N° 122, Leuven, 2014. [Online]: <https://ghum.kuleuven.be/ggs/publications/wp122-wouters-duquetupdateapril2014.pdf>. Consulted on 12/04/15. p. 3.

¹³ The European Arrest Warrant was adopted in June 2002, replacing the extradition system, to simplify and accelerate procedures, replacing the administrative and political phase by a judicial mechanism. See also: GARCÍA-MALTRÁS, Elsa. *Judicial cooperation in criminal matters and fight against terrorism: the Council Framework Decisions on combating terrorism and the European Arrest Warrant*. [Online] <https://infoeuropa.euroid.pt>. Consulted on 10/05/15.

¹⁴ BAKKER, Edwin. *Jihadi terrorists in Europe: Their characteristics and the circumstances in which they joined the jihad: an exploratory study*. Netherlands Institute of International Relations. Clingendael, The Hague, 2006. p. 2.

¹⁵ Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

caused by four reasons: the fact that terrorism is a contested concept, linked to delegitimization and criminalization, the existence of many types of “terrorism” with different forms and manifestations, and finally that the term is undergone changes in meaning in more than 200 years of existence.¹⁶ Therefore, having an EU definition of terrorism is essential, as one man’s terrorist may be another man’s freedom fighter.

Nevertheless, the EU counter-terrorism actions suffered from a lack of coherence. Trying to establish a more comprehensive approach to counter-terrorism, the European Council adopted a European Security Strategy in December 2003. In this strategy, terrorism was listed as the major threat that Member States had to confront, and proclaimed that European actions against terrorism were indispensable.

One of the measures adopted by the European Council which has become one of the most important counter measures of Islamist terrorism to date was the creation of a blacklist in 2001.¹⁷ Such blacklist included persons, groups, and entities whose financial assets would be frozen, and to whom financial services would henceforth be denied. Therefore the EU hampered the terrorist to operate and raise funds in the EU.¹⁸

Following the terrorist attacks in Madrid (2004)¹⁹ and London (2005),²⁰ the next action to preserve EU safety was an EU Counter-terrorism Strategy (CTS),²¹ agreed upon in December 2005, which also contained a definition of terrorism based on the risks of the threat presented. Before the CTS, just six of the then 15 Member States recognized terrorism as a special offense. This definition included radicalization and terrorist recruitment as part of terrorism. It is important to highlight that the London

¹⁶ SCHMID, Alex. *Perspectives on Terrorism*. Volume 6, Issue 2. Handbook of Terrorism Research, London, 2011. p. 158.

¹⁷ SULLIVAN, Gavin. HAYES, Ben. *Blacklisted: Targeted sanctions, preemptive security and fundamental rights*. European Center for Constitutional and Human Rights. Berlin, 2009. p. 11.

¹⁸ MCNAMARA, Sally. *The EU–U.S. Counterterrorism Relationship: An Agenda for Cooperation*. The Heritage Foundation, 2011. [Online] <http://www.heritage.org>. Consulted on 6/05/15.

¹⁹ On March 11, 2004, an Al-Qaeda affiliated group planted ten bombs which were remotely detonated on four trains, killing 191 people and injuring more than 1.800.

²⁰ On July 7, 2005, four British Islamist terrorist detonated four bombs in three subways and in a bus, killing 56 people, and injuring more than 700.

²¹ Council of the EU. *The European Union Counter-Terrorism Strategy*. [Online] <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST+14469+2005+REV+4>. Consulted on 17/06/15.

attacks confronted the EU with the reality of homegrown Islamic terrorists for the first time, which reinforced the EU's strategy of focusing greater attention on the root causes of terrorism.

The fatal events that occurred in Madrid heightened the sense of vulnerability of the EU and proved that a deeper coordination between Member States was needed. Therefore, the European Council created the position of EU Counter-terrorism Coordinator (CTC), and appointed Gijs de Vries as the first one.²² The CTC was structured as a component of the external dimension of the EU counter-terrorism policy to work within the Council Secretariat, increasing the role of the EU in the fight against terrorism on the international stage. Nevertheless, the powers of the CTC have not increased at all since its creation, which seems like a missed opportunity to enhance cooperation in counter-terrorism, taking into consideration that aside from persuasion, the CTC does not have any real power.

On March 2007, a memorandum from the Commission listed 51 adopted and 33 proposed pieces of legislation in the field of security. Also 22 communications and 21 reports were released under the heading of the fight against terrorism.²³ Furthermore, specialist antiterrorist teams within Europol and Eurojust were established. External action in the field of law enforcement cooperation with third-party countries was also strengthened throughout the Europol-US agreement on the exchange of personal data, and the EU-US agreements on extradition and mutual legal assistance, among others.

During that period, the EU also decided to amend several databases storing data for border management and security purposes. In many cases, the shift of the purpose of the EU measures was noticeable, from border control functions to law enforcement purposes. For instance, that "function creep" was seen in Eurodac, Customs Information System (CIS) and Schengen Information System (SIS).

Eurodac database is the European fingerprint database for the identification of asylum seekers and irregular border-crossers. It has been operating since January 2003

²² In 2007 Gijs de Vries resigned and Gilled de Kerchove was appointed to replace him. See also: PHILIP, Christian. *L'Europe face au terrorisme. Quelle valeur ajoutée?* Assemblée Nationale. Rapport d'information n° 2123, 2005. p.61.

²³ European Commission website. *Commission Activities in the Fight against Terrorism*. [Online] <http://ec.europa.eu>. Consulted on: 19/05/15.

to determine whether asylum seekers have already applied for asylum in another Member State or have illegally transited through another one. Another database amended was the CIS. This database centralizes customs information in order to ensure the correct application of the customs and agricultural legislation,²⁴ but it was later amended to allow access to law enforcement authorities too. Finally, with regard to SIS, it is a large-scale information system with the purpose of maintaining and distributing information on individuals and objects of interest. Its intended use was originally to support the external border control in the Schengen area. Now it has extended its scope to law enforcement, with the adoption into force of the second generation of SIS (SIS II) in 2013.²⁵ All of these databases allow today the access to law enforcement authorities for the prevention and combating of crimes.

The collection of information is a vital factor in counter-terrorism. For this reason, the Data Retention Directive (DRD)²⁶ was created in the aftermath of the Madrid and London attacks. The objective was to harmonize the EU efforts to fight the most serious crimes, including terrorism. That Directive obliged Member States to store citizens' telecommunications data for a period of time between 6 and 24 months. Under the Directive, law enforcement agencies were able to request access to certain categories of traffic data, such as IP addresses, time of use of every email, phone calls made and text messages sent or received. However in April 2014, the DRD was annulled by the CJEU.²⁷

In addition, a series of PNR international agreements have been adopted in the EU.²⁸ PNR agreements' allow Member States to access to data provided by airline companies during the reservation and booking of tickets, and when checking in on

²⁴ Official website of the European Union. CIS System. [Online] http://europa.eu/legislation_summaries/customs/111037_en.htm. Consulted on 05/04/15.

²⁵ The SIS II have replaced and improved the former SIS. However, it continues being a measure that might conduct to infringements of the EU fundamental rights.

²⁶ Formally: Directive 2006/24/EC of the European Parliament (EP) and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

²⁷ The DRD decision will be developed in the fifth section of the present study.

²⁸ GEOFFROY, Guy. *Utilisation des données des dossiers passagers (PNR) à des fins répressives*. Assemblée Nationale. Rapport d'information n° 1447, 2009.

flights. The EU adopted PNR sharing agreements with the US and Australia (a PNR agreement with Canada was proposed but never set into action, and it is currently being reviewed by the CJEU, as it will be explained below). Moreover, following the entry into force of the Treaty of Lisbon, the Commission proposed the adoption of an EU PNR,²⁹ which will be object of analysis below as well.

c) The Treaty of Lisbon: A new scenario

The Treaty of Lisbon was signed in December 2007, and entered into force on the December 1, 2009. It stipulates that one of the key objectives of the EU is to provide citizens with a high level of safety within an area of freedom, security and justice (AFSJ).³⁰ Likewise, the article 6 TUE gave binding effects to the Charter of Fundamental Rights of the European Union (hereinafter referred as to the Charter). This new legal status of the Charter implied a change of paradigm and created a new legal basis for a higher protection of fundamental rights within the EU. Consequently, the Treaty of Lisbon implied a new scenario in the realm of counter-terrorism.

The Lisbon Treaty also provided competences in the field of security to the EU. The new legal framework raised a debate on whether the EU should increase the security measures, or otherwise it should adopt measures to more efficiently protect the rights of the EU citizenship. However, the binding force of the Charter did not imply a change of the EU priorities, but rather a new and more powerful legal basis to defend the rights of the EU citizenship.

The Treaty of Lisbon had a much bigger impact in counter-terrorism internally as opposed to externally. This phenomenon was due to the change of structure of the EU. The abolition of the three pillar structure implied that foreign policy and JHA began to be considered as part of the EU matters, with the application of the so called

²⁹ European Commission website. *Police Cooperation*. [Online] <http://ec.europa.eu>. Consulted on 06/04/15.

³⁰ Preamble and article 3 TUE.

“community method”.³¹ The EU now formally enjoys shared competence together with the Member States in the JHA area, and the EU role in counter-terrorism policymaking has been supra-nationalized. Because of this, the EU started to have a greater role in security matters post-Lisbon Treaty, giving the new decision-making process the same powers to the EP than to the Council of the EU.³²

The Lisbon Treaty also entailed a series of institutional changes that must be taken into consideration, as they have enhanced the actorness of the EU in the area of counter-terrorism. For instance, the role of the EP became more relevant as it reinforced its powers, acquiring co-decisional powers together with the Council.³³ This is an important point as the EP has traditionally shown distinct views from the ones of the Commission and especially the Council (i.e. the Member States) on many issues related to security and fundamental rights.

Another important change was the fact that the Court of Justice of the EU (CJEU) extended its jurisdiction to cover also security measures part of the former third pillar.³⁴ The importance of this new situation has been demonstrated by the recent DRD decision.³⁵ The DRD decision³⁶ has major significance as it might have implications for other security measures, such as the SWIFT agreement or the various PNR agreements adopted in the EU. In fact, the CJEU has already annulled the first EU-US PNR for not being adopted under the proper legal basis.³⁷ It is worth concluding that the EP voted in

³¹ The community method is characterized by the central role of the Commission in formulating proposals; qualified majority voting in the Council (may be exceptions); involvement of the EP (with varying intensity); and the role of the CJEU in ensuring judicial accountability.

³² RENARD, Thomas. *EU Counterterrorism Policies and Institutions After the Lisbon Treaty*. Center on Global Counterterrorism Cooperation. Policy Brief, Brussels, 2012, p.15.

³³ Article 218 TFUE.

³⁴ Although this new competence of the CJEU effectively began on November 30, 2014, after a five-year transitional period. This is the reason why it did not had an impact on counter-terrorism policies until that date. See also: Article 263 TFUE.

³⁵ Despite it was formally part of the first pillar, the DRD was a third pillar measure “masked” as a first pillar decision.

³⁶ Judgment of the Court of Justice of the European Union (Grand Chamber) of April 8, 2014. Joined Cases C-293/12 and C-594/12. Digital Rights Ireland Ltd (C-293/12) v Minister for Communications, Marine and Natural Resources and others and Kärntner Landesregierung (C-594/12) and others.

³⁷ *EU-US passenger data transfer deal annulled by European Court*. [Online] <http://www.genewatch.org>. Consulted on 16/05/15.

favor to refer the EU-Canada PNR to the CJEU, and the Court is currently deciding about its compliance with the Charter.³⁸

³⁸ All these CJEU decisions will be further explained below.

IV. EU LEGAL ASSESSMENT FROM 9/11 TO THE PARIS ATTACKS

a) The leading role of the US

After 9/11, increasing security became a priority for the western world. It became evident that the Islamic terrorism was a global threat and that terrorists could strike again, not only in the US but also in Europe. Since the 9/11, both the EU and the US recognize that they need each other to fight this global threat. Despite this, there has been some confrontation when adopting common measures, mostly caused by the different treatment given by the EU and the US to the protection of the rights of their citizens.

The immediate aftermath of 9/11 was the adoption of the USA Patriot Act,³⁹ which was a series of laws created in the US to prevent future attacks in US soil. This Act drastically modified the US counter-terrorism legal framework.⁴⁰ The USA Patriot Act gave law enforcement and intelligence service officials sweeping new powers to conduct searches without warrants, monitor financial transactions, eavesdrop, and secretly detain and deport individuals suspected of committing terrorist acts. These measures adopted implied human rights violations.⁴¹ This is evidenced by the fact that on May 30, 2015, when the USA Patriot Act expired, it was not renewed. Most people were in agreement that this Act contributed effectively to guarantee the security of the US (as there has not been major terrorist attacks since the 9/11). However after much discussion, the American authorities decided to replace the USA Patriot Act with the new USA Freedom Act, in order to try to solve the infringement of the right to privacy legally allowed by the previous measure.⁴² Nonetheless, the collection of information

³⁹ The title is a backronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001".

⁴⁰ COLLINS, Jennifer. *And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community under the USA Patriot Act*. Heinonline, 2002. [Online] www.heinonline.org. Consulted on 5/05/15.

⁴¹ KASHAN, Sunya. *The USA Patriot Act: Impact on Freedoms and Civil Liberties*. College of Dupage. [Online] <http://dc.cod.edu/cgi/viewcontent.cgi?article=1123&context=essai>.

⁴² The USA Freedom Act was adopted as a consequence of Edward Snowden's revelations of June 2013. This measure enhances the protection of the right to privacy by tackling the US National Security Agency (NSA) from continuing its mass phone data collection program.

could still be possible under Section 702 of the FISA Amendments Act and the Executive Order 12333.⁴³

After 9/11, the EU's relationship with the US was transformed from an important trading relationship with embryonic security concerns, into an increasingly important security partnership. As a result of this relationship, the EU and US adopted a series of agreements to cooperate in the fields of Justice and Home Affairs. In particular, those measures enacted were the Agreement between the US and Europol (2002), the US - EU treaty on extradition and mutual legal assistance (MLA) (2003), the Agreement on Assistance in Criminal Matters (2003), the Agreement on intensifying and broadening the Agreement on customs cooperation and mutual assistance in customs matters to include cooperation in container security and related matters (2004), the Agreement between the USA and Eurojust (2006), the SWIFT (2010), and the PNR agreements of 2004, 2006 and 2007.⁴⁴

The measures adopted implied the exchange of information received by their own intelligence agencies (such decision was also made on the level of the EU), extraditions, mutual legal assistance in criminal matters, customs cooperation, and the processing and transfer of passengers and bank operations data. Some scholars have described this cooperation as an asymmetric relationship, where the US is the dominant partner that significantly influenced the EU.⁴⁵ Thus, under the context of intense US pressure, the EU showed its support to the US, and the European Council highlighted the importance of cooperation with the US to prevent future terrorist attacks.⁴⁶

⁴³ JAYCOX, Mark. KAYYALI, Nadia. *The New Senate USA FREEDOM Act*. Electronic Frontier Foundation [Online] <https://www.eff.org/es/deeplinks/2014/07/new-senate-usa-freedom-act-first-step-towards-reforming-mass-surveillance>.

⁴⁴ ARCHICK, Kristin. *U.S.-EU Cooperation Against Terrorism*. Congressional research Service, 2014. [Online] <https://www.fas.org/sgp/crs/row/RS22030.pdf>. Consulted on 9/05/15.

⁴⁵ LIROLA DELGADO, Isabel. *Terrorismo y Cooperación penal: ¿Un contexto más favorable para los Derechos Humanos en las relaciones transatlánticas?*. [Online] http://www.ehu.es/cursosderechointernacionalvitoria/ponencias/pdf/2009/2009_9.pdf . Consulted on 30/03/15, p. 7. See also: BLASI CASAGRAN, Cristina. The future EU PNR system: Will passenger data be protected? *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 23, Issue 3, 2015. p.247.

⁴⁶ KAUNERT, Christian. LÉONARD, Sarah. MACKENZIE, Alex. *The social construction of an EU interest in counter-terrorism: US influence and internal struggles in the cases of PNR and SWIFT*. Routledge, European Security, Vol. 21, No. 4. Florence, Salford, Paris, 2012. p. 475.

It is important to note that both the EU and the US share the conviction that the fight against terrorism must be based on a legal framework that ensures the respect for human rights. However, the priorities of the US and EU were not the same after the 9/11. Numerous scholars have referred to the strong protection of human rights within the EU,⁴⁷ in comparison to the US security regime. While the US put more focus on security, the EU maintained that the rights of the EU citizenship could not be restricted under any circumstance. The above-mentioned violations of human rights caused in the US can be explained by the military approach adopted by the Bush Administration. This approach assessed the terrorist activity of Al-Qaeda as a new type of conflict to which the existing rules of the American criminal justice system did not apply. The process of review of US counter-terrorism policy initiated by President Barack Obama led to a more favourable context for an EU-US counter-terrorism cooperation.

As previously discussed, before the Paris shootings the US frequently exerted pressure on the EU to adopt its security agenda, and the EU has certainly adopted some policies that were originated in the US. The establishment of blacklists, massive data collection, unlimited retention periods, lack of oversight and no redress for EU citizens are few examples of the American influence in security matters. Even the various PNR agreements adopted by the EU, as well as the SWIFT agreement,⁴⁸ have been influenced by US interests. In fact, the two of them may be considered as the most representative measures influenced by the US in counter-terrorism.⁴⁹ All of the circumstances mentioned questions the true role of the EU as a counter-terrorism actor in the international stage.⁵⁰ For all of these reasons, it can be concluded that the US

⁴⁷ SMITH, Karen. *European Union Foreign Policy in a Changing World*. Polity Press, Cambridge, 2008. p. 112. See also: LIROLA DELGADO, Isabel. Terrorismo y Cooperación penal: ¿Un contexto más favorable para los Derechos Humanos en las relaciones transatlánticas?. [Online] http://www.ehu.es/cursosderechointernacionalvitoria/ponencias/pdf/2009/2009_9.pdf. Consulted on 30/03/15, p. 1.

⁴⁸ SWIFT is a Belgian company which works as a network, providing information about financial transactions to financial institutions worldwide. In August 2010 was signed an EU-US Terrorist Finance Tracking Program agreement to process and transfer bank messaging data, to track terrorists' financial flows. Recently it has been discussed its suspension after press reports alleged that the NSA tapped into EU citizens' personal financial data handled by SWIFT.

⁴⁹ MCNAMARA, Sally. *The EU–U.S. Counterterrorism Relationship: An Agenda for Cooperation*. The Heritage Foundation, 2011. [Online] <http://www.heritage.org>. Consulted on 6/05/15.

⁵⁰ BURES, Oldrich. *EU Counterterrorism Policy. A Paper Tiger?* Ashgate, Farnham, 2011.

adopted a leading role to face the so called “Global War on Terror”, while the EU acted as a norm taker, at least until the recent terrorist attacks perpetrated in Paris.

b) Limited competences of the EU

Traditionally the EU had limited powers in the field of police and judicial cooperation, as the Member States preferred intergovernmental actions in this field. Despite the fact that the Lisbon Treaty gave the EU new tools and legitimacy to play a more important role in security matters, the current reality is that the EU still remains a marginal actor in counter-terrorism. Notwithstanding the stated priority of establishing an area of freedom, security and justice, national security (this includes internal security policies, legal affairs and intelligence) comes under the authority of the Member States, which are reluctant to give these powers to the EU. According to practitioners,⁵¹ around 90% of the counter-terrorism activities are adopted by the Member States, leaving just 10% of the decisions adopted at the EU level. Despite the progress that the EU has achieved, the Treaty of Lisbon has not shifted this ratio.

Therefore, the current role of the EU is to support the Member States’ efforts in counter-terrorism. The EU has a variety of means to support its Member States. The main EU counter-terrorism action is the coordination and harmonisation between Member States of their own security measures and policies.⁵² This coordinating role of the EU has proved to be very important. The EU works for creating a legal environment and framework for cooperation. This becomes clear when one reads the Counter-Terrorism Strategy, which reorganised all of the previously adopted measures into a single framework. Another example of this coordinating role is the creation of the CTC. In words of the former CTC, Gijs de Bries: “*The European Union's role is to support Member States in their fight against terrorism as the necessary instruments lie in the hands of the individual countries*”.⁵³ The EU also supports Member States’ efforts by

⁵¹ RENARD, Thomas. *EU Counterterrorism Policies and Institutions After the Lisbon Treaty*. Center on Global Counterterrorism Cooperation. Policy Brief, Brussels, 2012, p.2.

⁵² GARGANTINI, Giulia. *European cooperation in counter-terrorism and the case of individual sanctions*. Perspectives on Federalism, Vol. 3, issue 3, 2011. p 5.

⁵³ Council of the EU. *Living in an Area of Freedom, Security and Justice*. [Online] www.consilium.europa.eu/en. p.30. Consulted on 06/05/15.

developing common capabilities and systems (such as SIS), providing fund to Member States (such as the Internal Security Fund or the External Borders Fund),⁵⁴ and by supporting the establishment of concrete and operational cooperation between practitioners and front line actors.⁵⁵

However, an obstacle for establishing a common counter-terrorism policy has been the differing views and interests among Member States in how to confront terrorism -or its corollary, the absence of an EU interest-. This was evident after the Paris shootings, when Member States reacted to the terrorist attacks in different ways. Some Member States have shown reluctance to implement common counter-terrorism tools, as national policy makers do not want to renounce to their competences in security matters. It is not only the Member States that differ in their priorities. This also happens between the EU institutions themselves, mainly on issues such as data privacy or intelligence-sharing. This situation may change after the Paris attacks, as it is similar to the situation produced after Madrid and London attacks, when the interest of national policy makers to regulate gradually declined.⁵⁶ As a result, the EU counter-terrorism strategy has depended until now of the swinging national interest, making very difficult to establish a coherent strategy at the EU level. It is also important to highlight that the process of constructing a European interest has become more complex after the entry into force of the Treaty of Lisbon, as it increased the number of actors involved in the process. This is basically due to the growing importance of the EP in JHA area.⁵⁷

In addition, both the lack of operational capacities of Europol and Eurojust⁵⁸ and the absence of a clear external dimension of the EU counter-terrorism policy have made

⁵⁴ European Commission. *Financing, DG home*. [Online] <http://ec.europa.eu>. Consulted on 09/06/2015.

⁵⁵ Official website of the European Union. *Fighting terrorism at EU level*. Press release database. [Online] <http://europa.eu/>. Consulted on 13/05/15.

⁵⁶ WOUTERS, Jan. DUQUET, Sanderjin. *Managing the Unmanageable: The European Union and Terrorism*. Leuven Centre for Global Governance Studies, N° 122, Leuven, 2014. [Online]: <https://ghum.kuleuven.be/ggs/publications/wp122-wouters-duquetupdateapril2014.pdf>. Consulted on 12/04/15. p.4.

⁵⁷ KAUNERT, Christian. LÉONARD, Sarah. MACKENZIE, Alex. *The social construction of an EU interest in counter-terrorism: US influence and internal struggles in the cases of PNR and SWIFT*. Routledge, European Security, Vol. 21, No. 4. Florence, Salford, Paris, 2012. p. 477.

⁵⁸ The new powers of Europol and Eurojust are examined in the fifth section.

the establishment of a coherent strategy to fight against terrorism at the supranational level difficult.

Therefore, despite the EU has put its efforts to play a more important coordinating role in the field of law enforcement, the impediments above-mentioned has made its actions less important and influential, according to its position as a global power. After the recent events however, this situation may change, increasing the influence of the EU as a counter-terrorism global actor.

V. NEW BALANCE AFTER THE PARIS ATTACKS

a) Security measures proposed by Governments

On January 7, 2015 the EU was the target of new terrorist attacks by Al-Qaeda. The fatal events occurred in Paris and other locations in the Île-de-France region, ended up with twenty people killed, including nine employees at the satirical weekly newspaper Charlie Hebdo, three French National Police officers, and four hostages. A month later, on February 14, 2015, a Danish-born man broke into the venue of a free speech debate and tried to get into a Jewish synagogue, killing 2 people and injuring 5 police officers.

These attacks have prompted a debate in the EU on strengthening its counter-terrorism strategy. Only one day after the attacks, the European Commission President Jean-Claude Juncker asserted that the EU was going to draw up new proposals to fight terrorism. Both the Member States and the EU announced their plans to establish new counter-terrorism measures. The heads of the Government of the Member States, as well as their Ministers of the Interior, met in several occasions to discuss the necessity of adopting new EU security measures to prevent Europeans from going to fight alongside jihadist militants in Syria and Iraq, and returning to carry out attacks in the EU. Thus on April 28, 2015, the Commission announced the adoption of the European Agenda on Security, setting out key priorities and actions for the period 2015-2020.⁵⁹ This Agenda should be taken into consideration by the EP and the Council for transposing its ideas into a new and more effective Internal Security Strategy. Many of these measures are not new but have stalled for years in the face of resistance from some Member States.

Most measures discussed can be divided into two main priorities: those which try to hamper the travel movements of terrorists, including the so-called foreign fighters and European nationals crossing the EU's external borders, and those which try to

⁵⁹ European Commission. *The European Agenda on Security*. Communication. [Online] <http://ec.europa.eu>. Consulted on 20/05/15.

eliminate terrorist propaganda, particularly on the internet, in order to tackle the root causes of radicalisation, especially among young people.⁶⁰

In the particular field of data protection, many events have occurred. In the aftermath of the Paris and Copenhagen attacks, numerous Member States expressed their intention to adopt national PNRs, a measure which could be included among the first group of measures mentioned, as it collects data from passengers entering and departing the EU area. Some EU leaders called for the rapid adoption of the stalled project of establishing an EU PNR system.⁶¹ There is a debate on whether to establish an EU PNR or adopt various national PNRs, which would not be as effective as a common EU PNR, in terms of offering the highest level of security and data protection.⁶² The adoption of an EU PNR agreement was already proposed by the Commission, subsequent to the failed attack in London, in June 2007.⁶³ The EP is currently studying the compliance of the proposed EU PNR agreement with the EU legal order, and its protection of the fundamental rights enshrined in the Charter. PNRs contain sensitive data which has to be used correctly. It appears to be that the EP has the intention to amend the agreement in terms of compliance with the purpose limitation principle, retention of data, external oversight, and data access. Interestingly, some members of the EP (MEPs) and the Council have proven to be in favour of collecting data, not only from third-country nationals coming in and out the EU area, but from flights within the EU. This would be necessary as a major concern is European jihadists returning from the Middle East. As they are European citizens they have the right to move freely in the EU area. Focusing the attention exclusively on the external borders does not stop the danger, as the Paris and Copenhagen attacks have proven. Nevertheless, the civil liberties committee of the European Parliament (LIBE) has so far blocked this measure, on the grounds that it does not offer sufficient safeguards against

⁶⁰ Euroactiv. *From 9/11 to Charlie Hebdo: The EU's response to terrorism*. [Online] www.euroactiv.com. Consulted on 19/05/15.

⁶¹ European Parliament. *At a glance What Think Tanks are thinking*. [Online] <http://www.europarl.europa.eu>. Consulted on 16/05/15.

⁶² BLASI CASAGRAN, Cristina. *The future EU PNR system: Will passenger data be protected?* European Journal of Crime, Criminal Law and Criminal Justice, Vol. 23, Issue 3, 2015. p.245.

⁶³ On June 29, 2007, two car bombs were found and disabled before they could be detonated by an Islamic extremist.

violations of fundamental rights to privacy and data protection. One of the main demands of the EP is that the EU PNR should not be adopted before the EU adopts a directive covering the rules for the exchange of data between police and judicial authorities, which would serve as a legal basis for the EU PNR, and would imply a better protection of the rights of the EU citizens.⁶⁴ The future of an EU PNR should be decided after the CJEU gives its opinion on the challenged PNR agreement with Canada, and its compliance with the EU treaties. Should be stated that an EU PNR is an important and necessary measure to be adopted due to its vast capacity to increase security within the EU borders, while the action of the CJEU should guarantee its compliance with the respect for the EU fundamental rights.

Another of the numerous measures proposed in the aftermath of the Paris attacks which could have consequences in counter-terrorism is the establishment of the so-called “smart borders” (project AMBERLIGHT 2015, also known as “border package”),⁶⁵ launched on April 1, 2015.⁶⁶ The aim of this measure is to intensify border checks in the EU external borders, in order to collect data from “overstayers” (people who stay in the EU area beyond their visa period, e.g.: visitors, students or business people) in the EU area. This data collected would be used to check automatically if third-country nationals who enter the EU depart before their visas expire. “Overstayers” represent a threat to internal security and the EU needed to harmonize its law and sanctions. The fact that overstay detections are more numerous every day, and that third-country nationals try to leave the EU area via other Member State, proves the shortcomings in the existing legal procedures and the practical processing in this field. For a proper enforcement of this measure the EU should enhance its functioning and competences, as currently Frontex cannot know whether third-country nationals depart from the Member State where they overstayed or from another one in order to mask the violation. The Council of the EU expressed that no personal data was going to be

⁶⁴ MORTERA, Camino. *After Paris: What's next for the EU's counter-terrorism policy?* Centre for European Reform. [Online] <http://www.cer.org.uk>. Consulted on 16/05/15.

⁶⁵ Council of the EU. *Note: Presidency activity AMBERLIGHT 2015*. [Online] <http://www.statewatch.org/>. Consulted on 15/05/15.

⁶⁶ KIETZ, Daniela. *Joint police operation Amberlight: critics miss the real questions*. [Online] <http://reshaping-europe.boellblog.org>. Consulted on 09/06/15.

gathered within the establishment of the “smart borders”,⁶⁷ in order to preserve the right to privacy of the EU citizenship.

Another measure discussed related with borders as well is the reintroduction of systematic passport checks on borders within the Schengen area, as well as more stringent controls on the Schengen’s external borders. However, the European Commission has expressed its opposition to this measure, arguing that Member States are able to tackle the freedom of movement of potential terrorists by using already existing mechanisms, such as the SIS II. In fact, the SIS II is one of the most effective tools to prevent terrorism, although Member States are not using it properly as national intelligence services are reluctant to share its information.⁶⁸

Furthermore, the EU has announced its intention to enhance the powers of some EU bodies as Europol, IntCen, and Eurojust. The European Agenda on Security sets out the Union’s strategy to facilitate better information sharing, and to increase operational cooperation between police and judicial authorities of the Member States and with EU Agencies. The EU has many information exchange systems, although the possibilities of these instruments are not fully exploited. In fact, Europol is the Agency of the EU that exchanges the most information, not only within the EU but outside as well, sending more than 20.000 messages a year to third countries.⁶⁹ Moreover, the European Agenda on Security has proposed to step up Europol’s role by establishing a European Counter Terrorist Centre, for the exchange of information among national law enforcement authorities.⁷⁰ Europol made public the idea that foreign fighters might pose a threat to the EU for the first time in its report: The Terrorism Situation and Trend Report 2014.⁷¹ In this report the Europol stated that returning fighters “*have the potential to utilise this*

⁶⁷ Statewatch. *Smart borders? Operation AMBERLIGHT*. [Online] <http://www.statewatch.org/>. Consulted on 15/05/15.

⁶⁸ MORTERA, Camino. *After Paris: What’s next for the EU’s counter-terrorism policy?* Centre for European Reform. [Online] <http://www.cer.org.uk>. Consulted on 16/05/15.

⁶⁹ BLASI CASAGRAN, Cristina. *El papel de Europol como actor normativo de la UE en el intercambio de datos con terceros Estados (La dimensión exterior de las agencias del espacio de libertad, seguridad y justicia)*. Marcial Pons, Bellaterra, 2014, p.102.

⁷⁰ Official website of the European Union. *European Agenda on Security: Questions & Answers*. [Online] <http://europa.eu>. Consulted on 20/05/15.

⁷¹ Europol. *TE-SAT 2014. European Union Terrorism Situation and Trend Report 2014*. [Online] www.europol.europa.eu. Consulted on 18/07/15.

training, combat experience, knowledge and contacts for terrorist activities in the EU". Europol will also play a crucial role on fighting the relatively-new phenomenon of cybercrime.

In addition to all these measures, in the current political debate other measures have been suggested, such as increasing internet surveillance (the European Agenda on Security has proposed to launch an EU-level forum with IT companies to develop tools against terrorist propaganda online),⁷² the establishment of an European CIA equivalent, intercepting communications without court orders (including the access to Whatsapp and other instant-messaging applications), and strengthening the fight against terrorism financing.⁷³

b) Balance between security and the rights of the EU citizenship

"We must not minimise our freedom of thought or revise downward our European values in the face of violence and Kalashnikovs" exerted Martin Schulz, the President of the EP, in the aftermath of Charlie Hebdo attacks.⁷⁴

In line with the words of Mr. Schurlz, it is convenient to take into consideration that the EU has presently the highest standards of protection of human rights in the world, which is one of the treasures of the contemporary Europe. The protection of the EU fundamental rights according to the TUE and the Charter is part of the EU policy to fight terrorism in the AFSJ.⁷⁵ For this reason, the adoption of the above-mentioned new security legal framework is intended to be adopted preserving the rights of the European citizenship. In order to achieve this, the EP and the CJEU play a crucial role. It is essential to take into consideration the Charter when adopting the new measures for an adequate preservation of the EU fundamental rights, as well as to avoid the processes of

⁷² JONES, Chris. *Analysis. Full compliance: the EU's new security agenda*. 2015. [Online] <http://statewatch.org>. Consulted on 20/05/15.

⁷³ MORTERA, Camino. *After Paris: What's next for the EU's counter-terrorism policy? Centre for European Reform*. [Online] <http://www.cer.org.uk>. Consulted on 16/05/15.

⁷⁴ European Parliament. *Minute de silence pour les victimes des attaques contre Charlie Hebdo*. [Online] <http://www.europarl.europa.eu>. Consulted on 19/05/15.

⁷⁵ Established in article 6 TUE and the Preamble of the Charter.

challenging all these new possible measures to the CJEU, and conflicts derived from the processes. It is essential to find a balance between the principles of necessity and proportionality.

Nevertheless, it seems the EU might be experiencing a new approach in the field of security after the attacks in Paris and Copenhagen. As it has been described, the recent attacks committed in EU soil could lead to the adoption of a series of security measures similar to the USA Patriot Act in the US. The tendency to a global harmonisation on security is noticeable. The initial concerns of some EU authorities after Edward Snowden's revelations regarding the US espionage activities seems to be now disappearing in an attempt by the EU to expand surveillance measures.

In the recent years, the CJEU has delivered numerous judgments assessing the flaws in the protection of the EU fundamental rights as regards to counter-terrorism restrictive measures. In the particular field of data protection, a consequential decision was announced on April 8, 2014.⁷⁶ Although the case was brought to the CJEU for not being adopted under the proper legal basis, the Court annulled the controversial DRD for being contrary to articles 7 and 8 of the Charter. Despite the CJEU admitted the necessity of a measure such as the DRD, it concluded that the measure was disproportional for not being possible to establish a link between the data retained and the threat to public security. The CJEU stated that there was a need to establish limits to what it was strictly necessary, and the DRD was not compatible with the Charter. Thus, the CJEU considered that the DRD entailed a serious interference in fundamental rights, to respect for private life and to the protection of personal data. Furthermore, it is important to take into consideration the fact that since December 2014, the CJEU is able to examine new measures, even if they were adopted previously. This was not possible before, as it was established a transitional period of five years after the entry into force of the Treaty of Lisbon, by which the CJEU could not examine new measures.⁷⁷ Therefore, this situation may have consequences for other measures, such as the Swedish Initiative, Prüm or the various PNRs.

⁷⁶ Curia. *The Court of Justice declares the Data Retention Directive to be invalid*. Press release No 54/14. [Online] <http://curia.europa.eu>. Consulted on 20/05/15.

⁷⁷ Article 10 of the Protocol 36 TEU.

Consequently, if all databases mentioned in this research are not used appropriately, this could imply an infringement of the right of privacy.⁷⁸

Another right which may be infringed in the fight against terrorism could be the freedom of expression.⁷⁹ As mentioned, the EU and the Member States are doing a vast effort to counter terrorism propaganda, especially on the internet. For instance, ISIS has proved fluent in Youtube, Twitter, Instagram, Tumblr, internet memes, among other social media.⁸⁰ There is a need to establish very clearly the line that separates a political or ideological opinion from a call for terrorism.

Traditionally one of the human rights infringed in the fight against terrorism has been the right of not being tortured.⁸¹ Torture has been a considerable concern in the global “war on terror”, especially in the US where there has been various cases revealed during the last decade⁸² (during the Bush administration it was even debated the possibility of legalizing torture in case of emergency).⁸³ Despite in Europe the infringement of this right is not a major concern such as in the US, a number of countries have also been implicated in tortures, in particular in the form of complicity in renditions that have often resulted in torture.⁸⁴

⁷⁸ Established in the articles 7 and 8 of the Charter.

⁷⁹ Established in article 11 of the Charter.

⁸⁰ The Guardian. *The Isis propaganda war: a hi-tech media Jihad*. [Online] www.theguardian.com. Consulted on 19/07/15.

⁸¹ Established in article 4 of the Charter.

⁸² Euroactiv. *Liberals outraged following fresh CIA torture flights revelations*. [Online] www.euroactive.com. Consulted on 19/05/15.

⁸³ DUZZE, Tessa. VERSTEEGH, Lia. *The Position of the European Terrorism Suspect under the Treaty of Lisbon: Improvement of Protection*. Opleiding Europese Studies, Universiteit van Amsterdam, ISSN 1871-1693, 2013. p. 7.

⁸⁴ Redress. *Torture in Europe: The Law and Practice*. Regional Conference Report. European Center For Constitutional and Human Rights. London, 2012. [Online] <http://www.redress.org/downloads/publications/121012%20Europe%20Report%20FINAL.pdf>. Consulted on 7/09/15.p.5. See also: Human Rights Agency. *EU Watchdog: Torture in Europe Prisons Feeds Terror*. [Online] <http://en.humanrightsagency.com/?p=1026>. Consulted on 8/09/15. See also: Vice News. *Europa condena a España por no investigar torturas a un preso vasco*. [Online] <https://news.vice.com/es/article/europa-condena-espana-por-no-investigar-torturas-a-presos-vascos>. Consulted on 14/08/15.

If there are finally adopted measures such as the re-imposition of internal border controls within the Schengen area, this would affect inevitably to the right of free movement of people within the EU.⁸⁵ At the same time, the proposed “oversecurisation” of the EU borders would imply the establishment of stricter checks on people entering the Schengen area, which could also have consequences on the right of free movement of persons (in case these people are Europeans citizens, as third-country nationals do not have this right).

Furthermore, it has been debated the possibility of reducing the supply of firearms among the EU, which could be understood as an infringement of the right of free movement of goods in the internal market.⁸⁶ However, as far as the problem is the trafficking of illegal firearms, this cannot be understood at any level as an infringement of the freedom of goods. If it were proposed to reduce the supply of legal firearms (which despite could be an interesting debate, it has not been discussed so far) then this answer regarding the free movement of goods could be debatable.

Another right which may be infringed when adopting the new measures discussed could be the right of non-discrimination.⁸⁷ Ethnicity and race-based profiling is a major concern in the EU, as in the past minorities and immigrant communities have reported discriminatory treatment.⁸⁸ Ethnic profiling occurs most often in police decisions about whom to stop, question, search, and even arrest. The sensitivity produced after Paris and Copenhagen attacks may increase this problem.

⁸⁵ Established in the fourth title of the third part of the TFEU.

⁸⁶ Established in the second title of the third part of the TFEU.

⁸⁷ Given by the article 21 of the Charter.

⁸⁸ European Parliament. *Ethnicity and Race-based profiling in counter-terrorism, law enforcement and border control*. [Online] <http://www.europarl.europa.eu>. Consulted on 19/05/15.

VI. CONCLUSIONS

Throughout this study it was possible to see how the EU has been increasing its actorness in security matters from the early 1970s to now, despite the competences in this field belongs to the Member States. The 9/11 implied a turning point in counter-terrorism worldwide. Under an intense pressure from the US, the EU adopted a vast number of measures in counter-terrorism. Although most of these measures were influenced to some extent by the American interests, the EU never renounced to its high standards of protection of the rights of its citizens. Subsequent to the entry into force of the Treaty of Lisbon and the new binding effects of the Charter, the EU acquired a new legal framework to develop its security strategy, and also to guarantee a higher protection of the EU fundamental rights.

Notwithstanding the evolution of the security measures which the Lisbon Treaty implied, the EU does not yet have its own security policy. The Member States have shown in many occasions different views in how to deal with terrorism. Furthermore, as security matters have been traditionally linked with sovereignty, the Member States have not agreed at ceding its competences in security to the EU.

The Charlie Hebdo attacks appear to have been a decisive moment for counter-terrorism in Europe. EU leaders reacted strongly to the attacks, and announced a series of important measures, which seems to lead to a common EU security policy. These attacks had a vast impact on EU citizens, who does not feel secure anymore, especially in major cities. The citizens of the EU now seem to share the conviction that sacrificing their high fundamental rights standards in order to increase security standards is worth it. This situation is very similar to the one that occurred in the US after the 9/11.

Admitting the major importance of maintaining security, it seems dangerous the shift in the EU priorities. The high level of protection of the EU fundamental rights is a European achievement which defines the EU as a society. The EU must tell the world that it does not recognize terrorism as a tool for changing society. As Islamic terrorists have as one of their goal changing the European society, reducing the EU fundamental rights standards would inevitably imply a victory for terrorism. This would be a victory of terror over democracy.

Some rights of the EU citizenship are at stake, such as the right to privacy, the right to not being discriminated, and the right of free movement within the EU. To preserve these rights, the role of the CJEU and the EP is essential. The menace of jihadists with EU passports represents a complex threat to give a legal response, but the EU must enhance the security in EU soil without renouncing to the rights of the EU citizens and their European identity.

In any case, it is important to take into consideration that most counter-terrorism measures relate to the medium and long run. In the short run are fewer options. Traditionally the EU counter-terrorism actions have been adopted as urgent responses to the attacks occurred (as example, the European Arrest Warrant and the setting up of Eurojust were taken after the 9/11 attacks; also, the EU first counter-terrorism strategy and the DRD were adopted after the Madrid and London attacks, in 2005). It would be wise to plan a sensitive and well-structured counter-terrorism strategy, taking into consideration all ramifications of the present moment. It would be sensitive that the EU rather than focusing on radical initiatives as the establishment of a European CIA, or the re-imposition of border controls, it would bring the position of the Member States closer, and agree to make a better use of the counter-terrorism instruments already existing at their disposal. In addition, a stricter regulation for the use of weapons is necessary, as a vital factor in the success of the Paris shootings was the terrorists' access to weapons. It is important as well the social aspect of the Islamic terrorism. Many EU countries have large and growing Muslim minorities, and while the vast majority of Muslims are not involved in radical activities, the numerous attacks committed in the last decade highlight questions about whether EU governments have done enough, both to integrate Muslims into the European society and to counter Islamist extremism. In order to stop anti Muslim feelings among the EU citizenship, as well as the spread of Islamic terrorism in the EU, public authorities have to promote dialogue and tolerance, and prevent defamation of the Islamic religion. The effective integration of European Muslims into the European society is vital.

Finally, it is necessary to considerate that all the measures mentioned in this study have as a goal the increase of security inside the EU borders, but it does not solve the problem internationally. As a matter of fact, the vast majority of the terrorist attacks that are committed nowadays in the world take place outside the EU borders, and also outside the Western world. Extremist Islamism is a global threat which has to disappear

worldwide. It seems appropriated that the EU and its allies carry on military operations in the land of the operating bases of ISIS, Al-Qaeda, Jabhad al-Nusra, and Boko Haram to reduce the menace of these organizations in the short term. In the long term the military option will not bring the solution. Good governance in Middle East countries, with focus on the Human Rights and the fight against corruption, it is going to be essential in order to end with this nonsense for good.

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