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**THE INTERNET AND TERRORISM**

**EXPRESSION CRIME**

WHERE IS THE NEW BOUNDARY?

Diritto penale (IUS/17)

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## Abstract

The main purpose of this thesis is to figure out the new boundary of terrorism expression crime in the internet age. Before answering this question, it provided the empirical evidence of how terrorists are radicalized by the terrorism propaganda online and proposed a new theoretical framework to explain this phenomenon. Accordingly, how the legal framework evolved during the past years to combat this phenomenon was reviewed. By comparing the national laws and typical boundary cases in the Supreme Court of the US, the UK and Italy, it finally proposed some suggestions for Chinese criminal justice system to find a balancing roadmap in terms of combating modern terrorism expression offenses while protecting freedom of expression, taking considerations of the constitutional context in different countries.

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## 1. Introduction

Since the 9/11 event in 2001, the form of terrorism attacks had been evolved along with the growth of ISIS, the increased penetration of internet and the globalization process. The internet had facilitated different types of terrorists' attacks and made individuals to become radicalized into lone-wolves and foreign terrorist fighters. Part II of this thesis figured out some empirical evidence of this phenomena and Part III elaborated how theories of communicative theories and triangle of terrorism-radicalization victim-target could be applied to explain these current phenomena.

Part IV reviewed how the legal and political framework had changed to confront the new form of terrorism crimes with the use of internet. It had made the question of "where is the new boundary of terrorism expression crimes" an important inquiry in jurisprudences of different countries.

Part V in this study explored how far terrorism expression offenses are criminalized in the US, the UK and Italy and analyzed the underlying reasons and related theories derived from the typical cases in the Supreme Courts.

Part VI of this study finally proposed a roadmap for Chinese criminal justice system to better limit the scope of modern terrorism crime, considering the similarities and differences of constitutional laws and terrorism combating policies of the US, the UK, Italy and China.

## 2. The role of Internet and modern terrorism

In contemporary Europe, more and more radicalized individuals choose to go to Syria as foreign fighters or commit lone-wolf attacks in their European homeland. By December 2015, estimates indicate that more than 5,000 fighters from member states of the European Union have made the trip to Syria and Iraq (The Soufan Group (TSG) 2015, 12). Many EU Member States also regard attacks carried out by radical Islamists who are lone actors or small groups to be a serious risk, which actually increased in 2015 in respect of the previous years (European Law Enforcement Agency 2016, 7)

To figure out how the foreign fighters in Syria receive information about the conflict and who inspires them, a recent report by the International Center for the Study of Radicalization and Political Violence (ICSR) at King's College emphasized that social media represents an essential source of information and inspiration for many western fighters (Carter, Maher, and Neumann 2014, 3). The TSG report stresses that social media undoubtedly play a significant role in the recruitment of fighters from Western Europe. (The Soufan Group (TSG) 2015, 13).

In this chapter, I will present three different typical categories of terrorist, in order to analyze the role of the internet in modern terrorism. The first type of modern terrorist is the young foreign fighters. The youngest suicide bomber Talha Asmal in the UK is a typical example of this category of terrorist. It revealed that the new generation of terrorists is younger than the previous one of Al-Qaeda, the possible explanations of this phenomenon are twofold. Firstly, the ISIS' propaganda strategy specifically aims to allure the youth and secondly, it is because the high proportion of penetration rate of the internet among the youth. The second typical category of modern terrorist is the women who travelled to Syria and Iraq, namely the so-called "Jihad bride". This part starts with the introduction of the famous Lady jihad in Italy, Maria Giulia Sergio, and then revealed that how the internet has brought changes to the role of women in terrorism activities. On the one hand, a great deal of jihad brides

involved in modern terrorism mainly because of the ISIS's misleading propaganda, the ISIS's "black propaganda" strategy; On the other hand, by using internet, women's role in modern terrorism is also strengthened especially as terrorism recruiters. The third category is the lone wolf terrorist. A serial lone wolf in France, Mohamed Merah, was introduced as a particular example of terror disseminator. He made video footage of his own violent act of terrorism and disseminated it on the internet. His example is to mainly illustrate that internet has largely empowered the lone wolf in terror spreading. The last part of this chapter demonstrated that there are also other functions that internet has played in facilitating lone-wolf along their attacks, for example, the online radicalization, training, planning and lastly, spreading the terror.

## 2.1. The young foreign fighters

### 2.1.1 The case of the youngest suicide bomber in the UK

In June 2015, a 17-year-old boy, Talha Asmal, Britain's youngest suicide bomber, was killed after detonating a car packed with explosives in an Islamic State attack in Iraq. He had been groomed online by ISIS fanatics (Ledwith, Robinson, and Gillman 2015). Talha's family said that jihadists used the internet to exploit the A-level student's naivety in a process of 'deliberate and calculated grooming' (Ledwith, Robinson, and Gillman 2015; BBC 2015). In March 2015, he had entered Syria with his neighbor and best friend, 17-year-old Hassan Munshi, whose brother, Hammaad, is Britain's youngest convicted terrorist, detained for two years in 2008 after being convicted of making a record of information likely to be used for terrorist purposes (BBC 2015). A jury had heard that Hammaad had spent hours viewing jihadist websites and downloading guides to make napalm, detonators and explosives. He was convicted alongside two other men, one of whom was described as a "key player" in radicalization via the internet.(BBC 2015) Images released by the ISIS terrorists show that Talha Asmal smiling and taking orders as he stands beside a Toyota SUV alongside other fighters, before their convoy attacked an oil refinery, killing 11 people. (Ledwith, Robinson, and Gillman 2015)

It seems that the internet is an important instrument that may bring higher possibilities of radicalization to youth who are exposed to it, and the material available online can probably entice and recruit or radicalize individuals at certain level, although many other social and personal factors might be playing an important role in the radicalization process as well. However, it is undeniable that the ISIS propaganda is targeting the younger generation to recruit them as Foreign Terrorists Fighters.

### 2.1.2 ISIS is alluring a younger generation of foreign fighters through the internet

Since 2014, ISIS had recruited many younger foreign fighters to Syria and Iraq to join their terrorist organization. The *FOREIGN FIGHTERS IN SYRIA* report by the SouFan Group, in June 2014, has shown that among the individuals known to have gone to Syria or who have self-identified as foreign fighters, the typical age range is 18-29, though there are many instances of 15-17 year olds, as well as of people in their 30s (Barrett 2014, 16).

This makes the average age rather lower than in the earlier Afghan 'jihad', where the typical foreign volunteer was 25-35 (Barrett 2014, 15). As of December 2015, the age range of recruits has remained the same, with most being in their 20s, and some are still much younger. Specifically, Austria reported that more than half of their fighters are below the age of 25; Belgium reported that 81% were between 18-35; Germany reported that the majority were younger than 30; Sweden reported that most were aged 18-30; the UK reported that they are increasingly under 26. (European Law Enforcement Agency 2016, 26)

Terrorist organizations understand that the recruitment must meet their short-term and as well long-term needs. Islamic State propaganda also suggests that minors are being trained to become the next generation of fighters. The available evidence suggests that minors are thereby desensitized to violence (Benotman and Malik 2016, 25). They also know that having young people in their ranks can have a unique operational value. The youths and young adults can be used for everything



from travelling to abroad to support the war to becoming suicide bombings in homeland countries.

Admittedly, the mobilization of children into violent extremist organizations (and their use in propaganda) is not a new phenomenon, and has many historical antecedents. This is perhaps most common in the context of child soldiers. However, the Islamic State has heavily championed the mobilization of the young, it even suggests organizational concerns far outweigh short-term propaganda benefits (Bloom, Horgan, and Winter 2016, 29).

In the case of Talha Asmal, we can see part of IS' propaganda strategy as well. They recruit youths both through online materials and social connections, meanwhile making the radicalized youths into perpetrators of violence.

The Islamic State always has a clear political goal of a holistic state. Its ultimate project is to establish a global caliphate. This means that IS has a different approach from other jihadi groups, because it wants to implement a long-term political project that appears attractive to the second generation of young European immigrants with Muslim origins, who often experience a generational crisis of integration in the Western societies.(Christien 2016, 6)

The online magazine of the Islamic State, *Dabiq*, named after a small place in Syria said to be the location of a historical battle according to Islamic mythology, has displayed IS' utilization of different representations of youth to convert a new generation of jihadi fighters.(Christien 2016, 1) Generally, IS' recruitment propaganda is tangled with a sense of heroism, the promise of certainty of the future and it uses the idea of a global brotherhood to target their potential young Muslims in the West.

The sense of heroism could be inspired by IS' propaganda, wanting to create a new society for Muslims with religious obligations, for example to make hijrah(Wikipedia, n.d.) "to the land of Islam" for Muslims around the world. On the other hand, militants appeal to Muslims throughout the world to protect and defend their fellow Muslims from western oppressors.(Lisa 2015, 5) This is apparently a persuasive approach to convince young people to join the extremist group.

IS militants also draw young people in with messages of power and

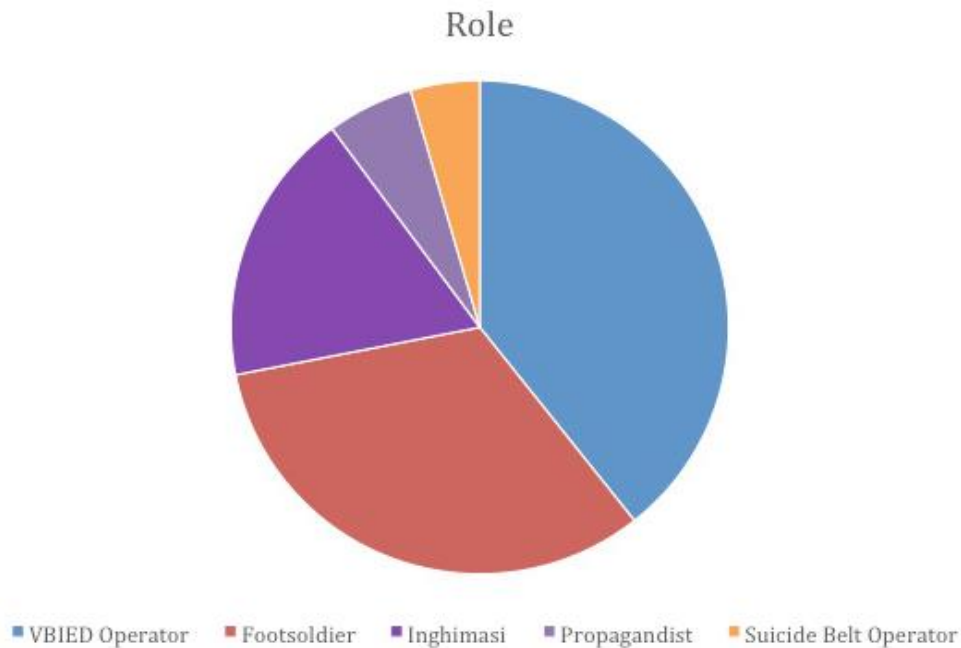
determination, providing a sense of certainty. Teens are especially susceptible because of the lifestyle uncertainty they're going through. As immigrants, they will face challenges of culture conflicts, handle disorders that challenge their religious belief and faith, they may also face glass ceiling effect when they start their career. "They're confused, looking for clarity and coherence, and this kind of ideology that is black and white, clear-cut, very structured is of great appeal to them."(Glum 2015)

In the name of the global Muslim brotherhood, "IS typically preys on young Western citizens with Muslim faith who are disillusioned and have no sense of purpose or belonging."(Haq 2014) Similarly to urban gangs, IS draws in disaffected, aimless youths, offering them a sense of family and purpose.(Barrett 2014, 17)

Not only trying to allure the young generation by providing the sense of identity to the targeted youth, the glorification of martyred youths and violent perpetrators are also manifested in the IS's propaganda to make the youth desensitized to violent so as to encourage them to be martyred or commit violent act, which is the goal of IS to organize and cultivate the young generations as their future members or to be their child soldiers contemporarily.

From January 1 of 2015 to January 31 of 2016, 89 children and youths were eulogized in IS propaganda: 51 percent were alleged to have died in Iraq, while 36 percent died in Syria. The remainder was killed during operations in Yemen, Libya, and Nigeria.(Bloom, Horgan, and Winter 2016, 30) Between January 2015 and January 2016, the possible rate of youth deaths, killed or as suicide operation in the Islamic State's name is more than 50 (Bloom, Horgan, and Winter 2016, 29).

As we can see from the chart below, among these 89 children, the majority died upon detonating a vehicle-borne improvised explosive device (VBIED) against their target, as Talha Asmal had done. Most of the time, the children and youths died in operations targeting state security forces (including military and police targets) (Bloom, Horgan, and Winter 2016, 31). Images serving IS' jihadist martyrdom propaganda are featured with the Islamic State flag in the widely-spread magazine *Dabiq*, where the frequency of the motif of martyrdom with the IS flag is 19 percent.(Bloom, Horgan, and Winter 2016, 31)



**Figure 1: Role of Youth in ISIS' propaganda**

**Source: Depictions of Children and Youth in the Islamic State's Martyrdom Propaganda, 2015-2016, CTCSENTINEL 9, no. 2 (February 2016): 31**

A research has applied qualitative content analysis on eight *Dabiq* magazines released from July 2014 to May 2015. It released that Child-soldiers perpetrating violence is another commonly mentioned theme in this online magazine, where there are four out of thirteen, namely, 30% pictures depict this theme. One of the issues of *Dabiq* featured a full article titled "Cubs of the Khilafah", in which young boys are killing IS' "enemies". (Bloom, Horgan, and Winter 2016, 30)

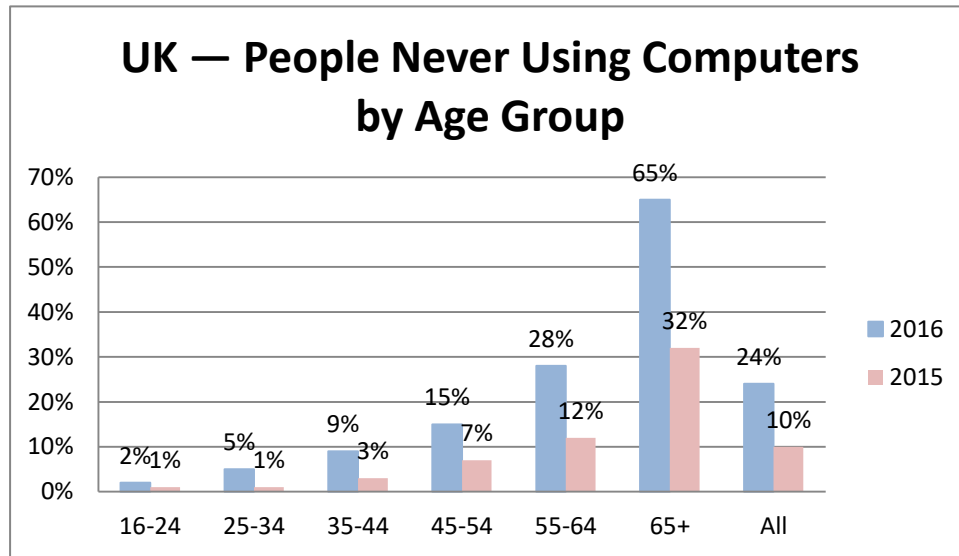
IS' goal of raising a generation of violent and impulsive individuals is also emphasized by using the metaphorical concept of "Lions". In *Dabiq* Issue 8, 2015, there are at least five references to "lions", such as "lion cubs", "young lions", and "ashbal", meaning children and youths. (Bloom, Horgan, and Winter 2016, 30)

### 2.1.3 Penetration of the internet among the young

The phenomena of younger generation is joining in IS, not only because the IS propaganda is targeting the youth, but may also contribute to the fact that the youth is

penetrating in the world of internet.

Data for National Statics in Great Britain has shown that only 2-7 percent of youths and young adults (see the 16-24 and 25-34 age groups in the chart below) never use a computer, while as the age increases, people tend to use computers more and more rarely.

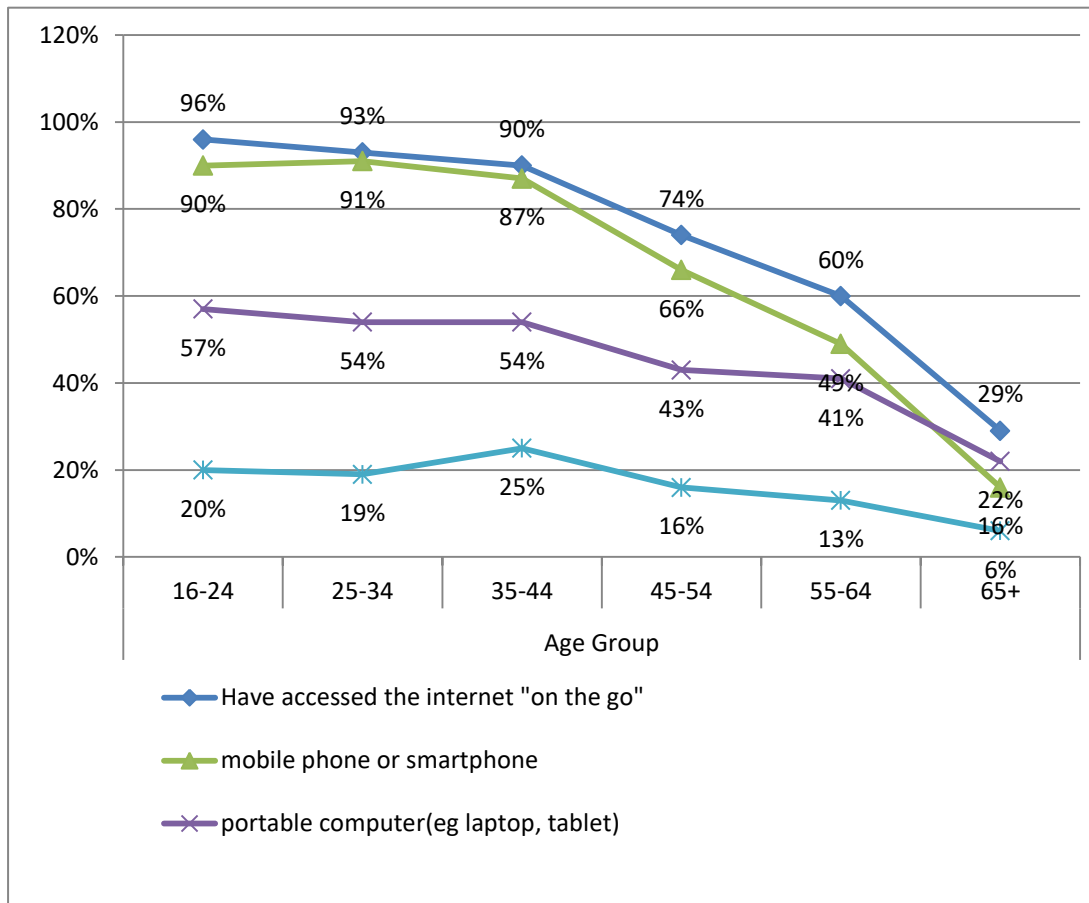


**Figure 2: people never using computers by age group**

**Source: National Statics in Great Britain**

Young adults are using computers not only at home or at work. This phenomenon, accessing the internet away from home or work, was defined as a term “on the go” in the survey in the Great Britain.

As we can see in the chart below (Figure 3), the youth and young adult generation access the internet with different mobilized devices and represent the highest portion of the internet using population as well. Among all the devices used, mobile phone or smart phones are the most popular devices that was used among almost every age range of people who are age 16 and elder. The only exception is the people who are beyond the age of 65. Along with the age grows, the rate of having accessed to the internet “on the go” decreased.



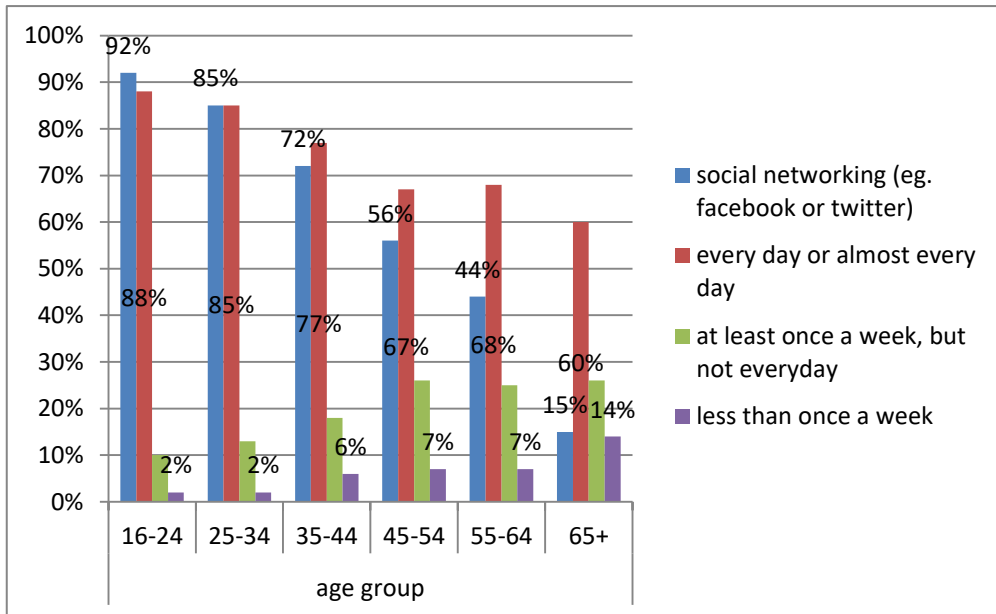
**Figure 3: Accessing the internet "On the go" by Age Group in 2015**(Office for National Statistics 2015, 23)

**1."On the go" refers to accessing the internet away from home or work**

**2. Range of time: within the last three months, 2015**

**Source: Office for National Statistics, GB**

In terms of online activities, as it is shown in the chart below (Figure 4), 92% of individuals from the 16 to 24 age group use social networks (Facebook or Twitter), 88% of them use them every day or almost every day. This percentage is followed by an 85% of people from 25 to 34 who use social networks every day or almost every day. In general, the younger age groups also use the internet more frequently for social networking compared to their elders.



**Figure 4: Frequency and social networking activities by age group in 2015** (Office for National Statistics 2015, 26)

**Range of time: within the last three months, 2015**

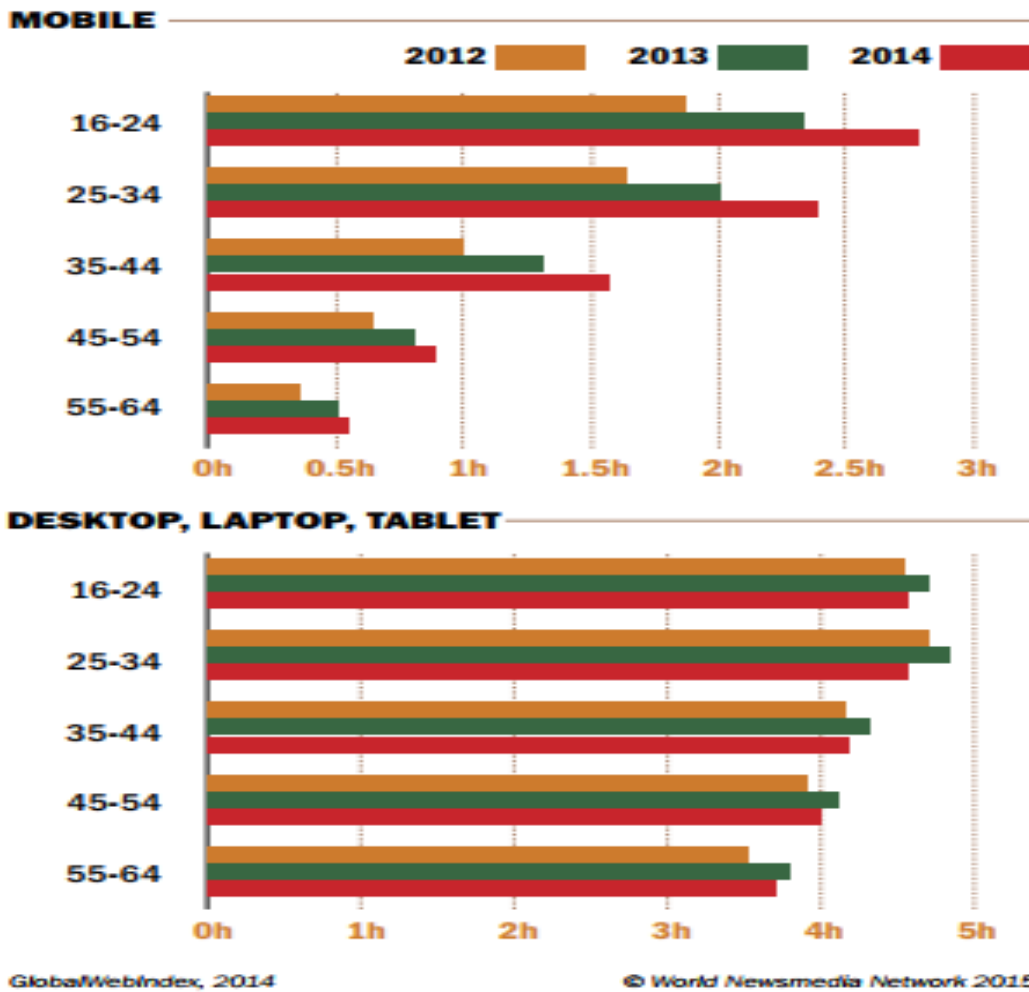
**Source: Office for National Statistics, GB**

This phenomenon is not confined to Great Britain. Surveys in Germany also show that the younger population tends to use the internet much more frequently. (eMarketer 2015b). TNS Infratest surveyed over 1,900 consumers aged 14 and older in June and July 2015. Over 84% of respondents aged 14 to 29 used a mobile device to go online, and using search engines remained the most common activity among internet users, cited by 94%. Yet 68% said they searched blogs, forums and similar sites for information or advice, and 64% said they visited social networks, confirming that social media is now broadly popular in a country where social networking had a notably slow start (eMarketer 2015b). Since 2013, internet usage via smartphones and tablets has grown rapidly, and for young people in Germany mobile device is becoming a primary access channel (eMarketer 2015a).

Rather than a national phenomenon, it is a global phenomenon that youths and young adults are spending hours on the internet by any kinds of devices more than any other age groups of people.(see graphs below,Figure5, by age group from 16-34)(World Newsmedia Network 2015, 14).

## Time spent on Internet, by age

In number of hours spent on each device, by Internet users in each country broken out by age groups



**Figure 5: Hours on the internet by each device by different age group**

**Source: World Newsmedia Network. ‘The EPC Global Media Trends Book-Series’, 2015.14**

Furthermore, why the Islamic youth are easier to drawn into and influenced by the IS’s propaganda? This phenomenon would be at least understood by an aggravated effect of communication gap between different generations and their non-Islamic peers.

In general, there is a communication gap between different generations. Youth tend to find a reasonable answer to their doubts by surfing online instead of asking from their parents. Aside from this communication gap, the technology and the social

media that adolescents used during their daily life can be confusing and unfamiliar to their parents (Lisa 2015, 9). Youths and young adult are embracing the new media and they are more intensively connected to the internet and more active with social networks than their elders.

Specifically, Muslim youth or youth possibly would convert to Muslim is facing a more intense communication gap, not only between their parents but also with their non-Islamic peers. Firstly, most parents are comfortable with a quieter Islam that tends to shy away from controversial matters (Reitman 2015). And secondly, as far as the Muslim youth feel their difficulties of integrated in the real society or making friends with other non-Muslim friends, they would tend to rely on the internet as the only way of having access to the information and communication, which might highly lead them to hold extremism ideology.

The phenomenon of online radicalized youth could also be explained by the differential association theory. The differential association theory has been popular in explaining the phenomenon of juvenile delinquency in the past decades. This theory was proposed by Edwin Sutherland in 1939 and is one of the three important theories of American criminology in the 20<sup>th</sup> century, which has led to a lot of peer group researches. The general principles of Sutherland's theory of differential association are mainly to argue that 1. Criminal behavior is learned; 2. Criminal behavior is learned in interaction with other persons in a process of communication, 3. The criminal behavior occurs within the intimate personal groups, etc. Nowadays, the internet is providing a channel for online association activities, therefore, the criminal behavior not only occurs within intimate personal groups but the learning process is strengthened since the internet is breaking the limitation of distance and facilitates the process of communication so as to tensely provide connecting between groups and individuals.

Accordingly, with the highest rate of internet penetration among the youth in general and the specific communication and integration gap between the Islamic and their non-Islamic peers, terrorist organizations are targeting the young adult groups with Muslim faith so as to make them highly radicalized through internet. The



differential association theory could also partially explain how the youth are radicalized, except for the change internet had brought: rather than through traditional way by intimate group learning, youth learned from what they accessed on the internet or other persons through internet in a process of communication and gradually became radicalized by the learning and communication process.

## 2.2. The women who travelled to Syria and Iraq

### 2.2.1 The case of Lady Jihad in Italy

Maria Giulia Sergio, well-known in the Italian media as “Lady Jihad”, is a 28-year-old young woman who travelled to Syria soon after she got married with Aldo Kobuzi<sup>1</sup>(Biloslavo 2015; Koleka 2016). After arriving there, she persuaded her family members to join her in Syria through wireless modern communication techniques. Sergio is just one of many jihad brides. It has been estimated that many young women are manipulated online with glamorous descriptions of life in Syria with ISIS; the whole grooming process operates using the same techniques of trust-building and reward-offering employed by sexual predators, and is designed to turn them into jihad brides. (Hall 2014)

Although the marriage with Aldo Kobuzi was a breakthrough in her radicalization process, the internet had also significantly facilitated her radicalization process from two points: firstly, Sergio’s way towards Syria (namely, the duty of the “journey”: Hijrah to the newly claimed “caliphate”) and secondly, her terrorism recruiting process via the internet.

Sergio’s sudden conversion to Islam happened through the internet after her high school studies (Marone 2016, 13). This sudden conversion drew her into a life of resistance and tension: she quarreled publicly for her refusal to lift the veil of the *niqad* in a post office, participated in a TV show to argue for the use of the headscarf to support the idea of a “pluralist system” in society, and subscribed to a petition in favor of the *niqab* in 2011.

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<sup>1</sup> Aldo Kobuzi was born in northwestern Albania in 1991; He worked as a mechanic. His younger sister

The second time the internet made a difference in her life was when she made contact with another woman, Bushra Haik. Bushra Haik is a 30-year-old Canadian citizen, born and raised in Bologna into a family of moderate Muslims (LetteraDonna 2016). Since 2012, she has been living in Riyadh, the capital of Saudi Arabia (Lettera43 2015). In 2016, Bushra Haik was searched by Saudi police within a criminal investigation. The Saudi Minister of Interior has stated that she is not in their “radar”. The Italian embassy in Riyadh can’t do anything because she is a Canadian citizen. And neither the Special Agency in Rome nor the one in Riyadh can discover anything about her activities (LetteraDonna 2016).

Bushra Haik is allegedly an ISIS supporter, and had an important role in indoctrinating Maria Giulia Sergio, her sister Marianna, and other women through the internet (Serafini 2016; Marone 2016, 16). She handled five indoctrination groups via Skype, which recruited more than 300 Muslim women (Lettera43 2015). Managing different internet forums and online communities, she also spread Jihadist messages. For example, she justified the killing of “unbelievers”, including women and children (Marone 2016, 16). She is accused of encouraging and preparing women to travel to the self-proclaimed “caliphate” and, additionally, of turning them into new “recruiters” (Marone 2016, 16). Sergio and her sister Marianna are both disciples of Bushara Haik. In March 2015, Sergio herself was prepared to give lessons to “Albanian women”, while Marianna started participating actively in Bushara Haik’s Skype groups (Marone 2016, 16).

Other than this specific case, in a more broad sense, the interaction between women and the internet could be seen from the following two perspectives: on the one hand, IS applied “black propaganda” strategy trying to influence women’s choice to travel to Syria and on the other hand, female recruiters have strengthened their role in terrorism recruitment via the internet.

### 2.2.2. Women influenced by ISIS’ modern “black propaganda” strategy

Historically, propaganda has served the purpose of being a strong tool in warfare,

and its origins can be traced to a time before the advent of literacy. It was linked to Nazi Germany and the former Soviet Union and was used to disseminate their ideologies. “Propaganda” had become a negatively loaded word, associated with lies and half-truths.

Contemporarily, rather than using visual content of violence or authority worship to target women, IS’s propaganda tends to attract women by “black propaganda” strategy. Academics categorize propaganda as ‘white’, ‘grey’ or 'black' (Encyclopedia of the New American Nation n.d.). The white propaganda refers to propaganda put out by modern democracies. Theoretically, this kind of propaganda carries the facts and truthfully states its origin, and is also known as public relations. Conversely, “black” propaganda comprises false information or half-truths. The sources are hidden, and the information may be questionable or falsified.

IS uses the black propaganda (Ali 2015, 8). According to reports in the Islamic State’s media warfare, some of the writers in their media divisions are believed to be former journalists who once worked in cities now under IS’ control and were presented with two options: work for IS or be killed (Ali 2015, 10). IS structures their propaganda to have a wide appeal and it adopts many methods to make sure that global media use their material and “facts”, thus giving the group access to millions of homes, while the same credibility would not otherwise be achieved (Ali 2015, 9).

Specifically, the black propaganda of ISIS targets women are the “Utopia” under their control. Due to the glorified picture presented to them, women travel to ISIS' zones with an idealized image of life in Syria and Iraq (Ali 2015, 15). An estimated 550 European Muslim girls have made the journey abroad from their homes to join IS (Hoyle, Bradford, and Frenett 2015, 8). Many girls are influenced by the social media activity of those who have already joined IS, and post online idyllic pictures of a fun, harmonious life within the Islamic State.

They tell stories of happy families, post pictures of cats on Twitter, and share recipes of cooking. They use social media to express their grievance at the treatment of Muslims across the world, and their perception of IS as a truly Islamic society, built on Sharia law. They spread the belief that it is a duty of all female Muslims to travel

to IS areas. They believe that in this world they will get everything they need: not only a man who loves them, children, and a beautiful house, but also sense of recognition as women warriors fighting alongside men on the battlefield for a just cause. For many of these reasons, some of the girls travel from the West to meet militants they encountered online (Ali 2015, 15).

An ISIS' propaganda brochure written in Italian advertises their well-developed and highly valued social welfare system, including a public health service and an education management system ("Lo Stato Islamico, Una Realtà Che Ti Vorrebbe Comunicare," n.d., 15,29). It also claims that food is prepared with the correct Islamic slaughtering method so as to meet the basic needs of the consumers in their daily life. Bread is distributed to the poor for the charitable cause ("Lo Stato Islamico, Una Realtà Che Ti Vorrebbe Comunicare," n.d., 9,10). Public safety and social justice systems are guaranteed thanks to the responsible and cooperative policemen and the fairness of the judges ("Lo Stato Islamico, Una Realtà Che Ti Vorrebbe Comunicare," n.d., 12,13,19).

Meanwhile, many rules are applied in a non-secular way in the political capital city of IS, Al-Raqqah. In the name of Shari's law, Islamic policemen try to solve disputes by arresting the accused before reporting the situation to the legal Islamic court ("Lo Stato Islamico, Una Realtà Che Ti Vorrebbe Comunicare," n.d., 12). They declare that by the rule of Shari's law, any territory under IS' control, both cities and pastures, is in a status of "real security" ("Lo Stato Islamico, Una Realtà Che Ti Vorrebbe Comunicare," n.d., 23). The tax system is partly established under the notion of the *Zakat*, which calls for an obligatory donation of money. ("Lo Stato Islamico, Una Realtà Che Ti Vorrebbe Comunicare," n.d., 27)

The magazine *Dabiq* also describes a sophisticated and visually pleasing lifestyle that IS's regime can provide for the Children. *Dabiq* contains reports of everyday life in IS controlled areas. It portrays a romanticized image of the caliphate as a restoration of an Islamic golden age. The theme of the happy lives of children in the Islamic State occurs regularly. For example, in one case, a pre-adolescent child, wearing his baseball cap back-to-front, smiles widely at the camera and sits on the top

of the fairground ride. (Bloom, Horgan, and Winter 2016, 31) In another case, after an article about the “hijrah” and “the path” to migrate to the Islamic State, images of children swinging on a swing set is displayed so as to make the viewer believe that the children are enjoying their childhood (Christien 2016, 17).

### 2.2.3 Women’s strengthened role in terrorism recruitment through the internet

Historically, women have been a part of different types of jihad. There are two types of women involved in terrorism, said Al-Boraq in the article “Muslim Family Matters: The Role of Muslim Woman in Jihad”. The first kind is directly involved in the jihad, including fighting on the battlefield and nursing soldiers to health (Seib and Janbek 2010, 85). They are the front-line female soldiers or the “black widow” suicide bombers. For instance, the Chechen suicide squads have been held responsible for almost half of the suicide attacks in Russia between 2000 and 2005. Palestinian women carrying out suicide attacks are another example (Bloom 2011, 128–29). In 2005, the former leader of al Qaeda in Iraq, Abu-Musab al-Zarqawi, also introduced the use of female suicide bombers in Iraq as an Al-Qaeda strategy (Sjoberg and Gentry 2011, 161). But, not everyone agrees on the religious legality of women joining insurgency groups or committing suicide attacks (Seib and Janbek 2010, 85).

The second type is indirectly involved in the jihad, which includes encouraging sons to join the jihad, raising children according to the principles of Islam and teaching them to love martyrdom for God, obeying their husbands and doing what is in their best interest and the best interest of their religion, promoting virtue and preventing vice, replying to those promoting women’s liberation regarding their religious duties, and, finally, advising other women to do the same (Seib and Janbek 2010, 85).

The nurturing role of the women involved in terrorism has never changed. Contemporarily, women married with fighters after arrival in Syria/Iraq soon give birth to children (European Law Enforcement Agency 2016, 7). IS has indicated that children born there and trained there might be the next generations of foreign fighters.

Women are exploited by terrorism to increase the number of foreign fighters and to nurture the next generation. Early in 2015, Aqsa Mahmood, a Scottish 20-year-old girl who left Glasgow for Syria in November 2013, posted a photograph of herself holding the severed head of a Syrian man executed for criminal acts in Syria. She was standing alongside young children at the time (Ali 2015, 15). She is famous in media with the name of “Mother of the Lion”(Engel 2015) and as the “den mother” of those who seek to leave their home countries to join ISIS, according to the Times (Engel 2015).

The case of Sergio falls under the second category, namely, that of the indirect involvement in the jihad. Modern communication techniques have facilitated her in getting her family members to travel to Syria/Iraq to follow her path, and influenced her behavior by virtue of some extent of internet connections with another female spiritual leader.

Before ISIS, women have historically played a minor role in the past terrorism activities (Seib and Janbek 2010, 75). Under the Taliban regime, women were systematically segregated and isolated from society. Women were banned from appearing on radio and television, and could not take part in public gatherings. The Taliban also banned the photography and filming of women; publishing pictures of women in newspapers and books or displaying female pictures within their homes was also prohibited. They demanded that windows of homes be painted over to prevent women from being visible from the streets (Ali 2015, 12). Under the Taliban, women were not a visible part of the society or community. They were never an important part of the Taliban propaganda (Ali 2015, 12). Perhaps the only other time a substantial number of Western women moved to a foreign battlefield were during the Spanish Civil War (1936–1939). Female communists and women from other left-wing groups joined the side of the Republicans in their struggle against the fascist nationalists under General Francisco Franco. They served mainly as nurses, but were also valuable for the Republican propaganda aimed at obtaining more foreign support (Bakker and De Leede 2015, 2). But this time, women’s role in ISIS’ recruitment process has been hugely strengthened owing to the modern media.

In Sergio's story, Bushra Haik is another example of someone who broadened her influence thanks to modern technologies. She made the online recruiting process able to reach more potential members, rather than being limited to husbands or other family members.

Another leading female Spiritual and Militia leader is 20-year-old Aqsa Mahmood. Similarly to Sergio, Mahmood herself was slowly radicalized when she was a teenager by articles and posts she read online from her room in the UK. Afterwards, known as Umm Layth, she was one of the most active ISIS figures online, keeping a blog and engaging in debates on Twitter. She guided young women through the process of joining ISIS in Syria and Iraq, advising them on daily practicalities, such as what clothes to bring for the cold winter. She also took on a counseling role to prepare and support young women in the emotional upheaval of leaving home.

She wrote on her blog on 11th September 2014 (Ali 2015, 15), the 13rd anniversary of 9/11: "To those who are able and can still make your way, hasten, hasten to our lands... This is a war against Islam and it is known that either 'you're with them or with us'. So, pick a side." (Sherwood et al. 2014)

Speech on Mahmood's social media have influence many other young girls. Three teenage girls - Khadiza Sultana, Shamima Begum and Amira Abase - abandoned London for Syria to join IS on 17<sup>th</sup> February in 2015. Just two days before their left, Shamima, the youngest one, sent a Twitter message to Aqsa Mahmood. However, Mahmood's social media accounts didn't react to Shamima's approach (Bennhold 2015).

Mahmood also offers assurances to women who might be worried about: "You can find shampoos, soaps and other female necessities here, so do not stress if you think you will be experiencing some cavewoman life here." (Mullen 2015)

Unfortunately, the reality is often very different for women. They are raped, abused, sold into slavery or forced to marry when they arrive in Syria (Engel 2015). The United Nations estimated in August 2014 that ISIS has forced some 1,500 women, teenage girls and boys into sexual slavery. Amnesty International released a blistering document noting that ISIS abducts whole families in northern Iraq for sexual assault

and worse (Sherwood et al. 2014).

### 2.3. The lone wolves

#### 2.3.1. The case of a serial lone wolf in France

Mohamed Merah was 23 years old, and a French national of Algerian origin. He had spent time in Afghanistan and Pakistan, and watched violent jihadist videos online. Merah's attacks began when he killed a soldier in Toulouse, France, on March 11, 2012. He engaged in a shooting four days later in Montauban and killed two soldiers. His third attack was on a Jewish school in Toulouse, which resulted in four deaths, three of them are children. Neighbors described him as a quiet man, although he claimed ties to Al Qaeda, French officials believe he acted alone (Teich 2013, 19).

Mohamed Merah was a terror disseminator as well. He used a GoPro camera strapped to his chest to record the killing of his seven victims and then posted the gruesome footage online while he was in his flat surrounded by the police. It's a video montage of the various killings set to music and readings from the Koran.

When armed police officers and journalists gathered outside, Merah spoke with negotiators and described how he had travelled to Pakistan a few months earlier to receive some desultory training from a faction linked to Al-Qaeda. He also explained, incoherently, why he had killed seven people over the previous two weeks in a series of shootings. But most of the time, Merah worked on his computer. Just a few hours before he was killed by the police after a sustained firefight, Merah finished editing a 24-minute video clip. It was a compilation of images from the camera that he had attached to his body armor before each of his killings. Merah had filmed his preparations, the murders themselves and his motorbike getaways. His first three victims were off-duty soldiers, two Muslims and a Catholic. The others, a rabbi and three children, died when he attacked a Jewish school. The images showed how Merah had chased and caught one of those children: eight-year-old Miriam Monsonago, who had hesitated for a second when the others ran, reluctant to abandon her school bag. Merah grabbed her by the hair, changed his weapon, and finally shot



the girl in the head. Roughly 24 hours after the police located Merah and surrounded his building, he managed to slip through a gap in the security cordon. However, he did not take the opportunity to escape. Instead, he walked to a postbox, deposited a package containing a USB stick with the video on it, and then returned to his home to await his own death.

The package he dropped into the postbox was addressed to Al-Jazeera, the Qatar-based TV network. Merah was confident that Al-Jazeera would broadcast the material because, in his words, it constantly showed “massacres and bombs and suchlike”(Burke 2016).

After his death, members of several online jihadist forums praised Merah for his attacks on French Jews and soldiers. Posts on these forums have included calls for similar lone-wolf attacks and described Merah’s shootings as Allah’s revenge on France for its foreign policy and attitude toward Muslims. Sometime later, a video tributes to Merah called “The Lone Lion” began circulating on the same forums. The video applauded him for fighting “the French special forces with courage until he was killed as a martyr”, describing England and the United States as legitimate targets because of the civilian casualties in Iraq, Afghanistan and Gaza (Weimann 2012, 85).

### 2.3.2 The internet facilitates lone-wolf attacks

In a broader perspective, a report entitled *Lone Wolf Terrorism in America: Using Knowledge of Radicalization Pathways to Forge Prevention Strategies* containing the analysis of 98 lone-wolf cases in the United States from 1940-2013 shows that there is an emerging trend of online radicalization. Of those 98 lone-wolf cases, 83 qualified as authentic lone-wolf attacks. 38 cases occurred before 9/11, while 45 occurred afterwards (Hamm and Spaaj 2015, 4). The charts below illustrate the results of the analysis of the radicalization loci of lone-wolf terrorists. Figure 6 shows that the primary locus of radicalization among these 38 cases that occurred before 9/11 was extremist group (26%). An extremist group, which the lone-wolf terrorist had previously affiliated with but separated before committing an attack.

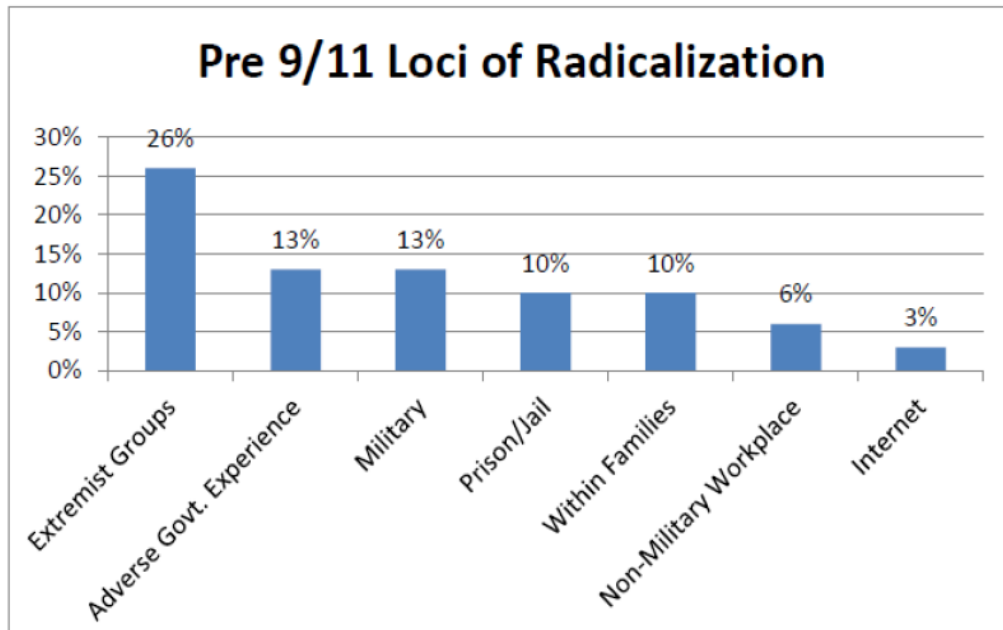


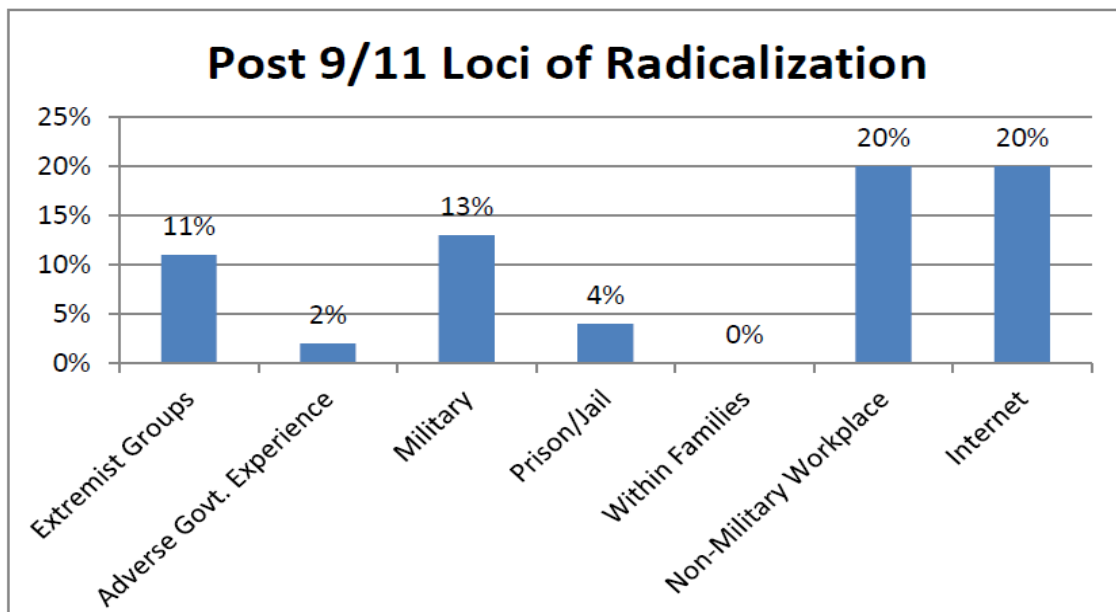
Figure 4. Pre-9/11 Loci of Radicalization. This figure illustrates the pre-9/11 radicalization loci for the 38 lone wolf terrorists analyzed, from *Lone Wolf Terrorism in America: Using Knowledge of Radicalization Pathways to Forge Prevention Strategies*, by M. Hamm & R. Spaaj, 2015.

### Figure 6 Loci of radicalization pre 9/11

Source: M. Hamm & R. Spaaj, 2015, *Lone Wolf Terrorism in America: Using Knowledge of Radicalization Pathways to Forge Prevention Strategies*

Figure 7 shows that after 9/11, the primary loci of radicalization for the 45 cases which occurred was either a non-military workplace or the Internet, both at 20%. This analysis supports Berger and Ross' statement that IS' success in recruiting lone-wolf actors stems from its use of online tools and tactics (Smith 2015).

This conclusion is also supported by Sarah Teich's research results from 2013, *Trends and Developments in Lone-Wolf Terrorism in the Western World*: the internet has a facilitating role in spreading lone-wolf terrorism (Teich 2013, 4).



**Figure 7 Loci of Radicalization post 9/11**

**Source:** M. Hamm & R. Spaaj, 2015, *Lone Wolf Terrorism in America: Using Knowledge of Radicalization Pathways to Forge Prevention Strategies*

Specifically, the internet plays a facilitating role from the very beginning at the point of radicalization, then in committing attacks, and lastly forming lone-wolf pacts among like-minded individuals with the goal of spreading terror.

As I will illustrate in the following section, the internet has played different roles in facilitating lone-wolf terrorists' attacks.

### 2.3.2.1 The internet as a channel of instigation for committing lone-wolf attacks in one's homeland

In addition to its role in recruitment, the internet plays an equally important role for terrorist organizations in instigating western young Muslims to conduct lone-wolf terrorist attacks in their home countries. Inspiring lone-wolf attackers has been "the holy grail of terrorist groups for decades", because they can generate destruction and worldwide publicity without spending money or resources (Smith 2015).

Both the Al-Qaeda network and IS have called upon Muslims in western countries to perpetrate lone-wolf attacks in their countries of residence (European Law

Enforcement Agency 2016, 26).

In 2015, the 14<sup>th</sup> anniversary of 9/11, the leader of Al-Qaeda, Ayman al-Zawahri, used an audio recording posted online to call on young Muslim men in the United States and other Western countries to carry out attacks inside their countries of residence, rather than risking detection trying to travel to conflict areas (European Law Enforcement Agency 2016, 26; Aboulenein and Fahmy 2015).

IS calls for lone-actor attacks in the West as well. On May 21, 2016, a 31-minute audio file by the Islamic State chief spokesman Abu Muhammad al-Adnani (real name: Taha Sobhi Falaha) was uploaded by the IS' Al Furqan Media outlet onto the internet (Kamolnick 2016). Commentators have noted that the speech focused on directing its European and American 'lone wolves' to engage in home-based terror, murder, and mayhem by any means (Youssef 2016; Withnall 2016). Abu Muhammad al-Adnani urged the group's supporters to target the "Crusaders" in their countries, "wherever they are found". He stated that Muslims who can commit a terrorist attack in their country of residence, and fail to do so, will need to justify themselves on the Day of Judgment (European Law Enforcement Agency 2016, 26). In May 2015, IS' leader Abubakr al-Baghdadi made it explicit that IS supporters must choose between travelling to join IS or perpetrating a terrorist attack in their home countries (European Law Enforcement Agency 2016, 26).

#### 2.3.2.2. The internet as a platform to strengthen communication between like-minded extremists

Scholars have argued that the internet has allowed "a conversation between disconnected, scattered people which was not possible before. This is because individuals who are shy about discussing their extremist views in person can now easily find like-minded people on the web through chat rooms and forums."(Weimann 2012, 84).

The accused Fort Hood shooter, Nidal Hasan, exchanged internet messages with Awlaki, who was described by Saudi news station Al Arabiya as the "bin Laden of the

Internet" (Wikipedia 2018b), while the Frankfurt terrorist, Uka, was Facebook friends with several known Islamist extremists in Germany. In fact, almost all the lone-wolf cases in recent years have involved the use of electronic social media. For lone wolves, online communication provides the needed social bonding, a (virtual) community and a source of guidance, support and moral backing.

Literature has also described how the internet works as an “echo chamber” and a “mental reinforcement activity” in many cases. In some cases, the perpetrators went online primarily to gather information, rather than to engage in chat rooms, while in other cases, they participated in online debates, looking to justify their way of thinking (von Behr et al. 2013, 27). Although different in form, convicted terrorists were not looking for information that may have challenged their extremist beliefs (von Behr et al. 2013, 27).

#### 2.3.2.3. A database of crime preparation guidance and reconnaissance

For guidance on how to prepare lone-wolf attacks, al-Qaeda in the Arabian Peninsula (AQAP) and the nominal head of al-Qaeda, Ayman al-Zawahiri, referred potential perpetrators to its online magazine named *Inspire* (European Law Enforcement Agency 2016, 26). *Inspire* is an important tool for recruiting, informing and motivating these lone jihadists. Each edition of the magazine has a special section called, “Open Source Jihad,” which is intended to equip aspiring jihadist attackers with the tools they need to conduct attacks without traveling to jihadist training camps (Weimann 2012, 81).

In several cases, the online article “How to Make a Bomb in Your Mom’s Kitchen” was downloaded as a guidance brochure for crime preparation. It was downloaded by Naser Jason Abdo, a Muslim U.S. soldier who allegedly plotted to attack the Fort Hood military base. This material was also found to be linked with Jose Pimentel, who was arrested for planning attacks with home-made pipe bombs against police vehicles and postal facilities in New York and New Jersey. Jose Pimentel had started making a pipe bomb based on the recipe when he was arrested.

To obtain detailed geographical information before committing an attack, websites such as Google maps, as well as websites specific to airports, are providing maps of buildings and surrounding areas. Some of these maps include information regarding the location of security within an airport, and allow terrorists to identify the best place to leave an explosive device (Majeed 2016, 100).

This phenomenon, which severely threatens the safety of the country, is not new in the U.S.. On June 1, 2009, Abdulhakim Mujahid Muhammad killed one U.S. soldier and seriously wounded another outside of a Little Rock, Arkansas, Armed Forces recruiting station (Barnes and Dao 2009). Abdulhakim Mujahid Muhammad referred to the shooting as a “jihadi attack”. He claimed ties to al-Qaeda in the Arabian Peninsula and dubbed himself as a soldier for them(Dao 2010). Before the shooting, he had used a “Google Maps” application to investigate recruiting centers in at least five states, as well as Jewish institutions, a day-care center, a post office, and a Baptist Church, according to a report issued by the department of Homeland Security(Thomas, Esposito, and Date 2009; Lautenberg 2011, 7).

Currently, Spain’s Centre against Terrorism and Organized Crime (Citco) has also warned of the fresh dangers to travelers in a new report entitled ‘Terrorist Threat against Civil Aviation.’ The report’s authors identified three areas of vulnerability to aviation security: the use of drones, jihadists who have infiltrated airport personnel, and the use of the Google Maps. The advance in technology is enabling ISIS terrorists to flesh out their plans by enabling access to airport layouts and security systems. While the big deal with Google maps is that it allows users to take a virtual tour of the geographical scene (Flood 2016).

Even after terrorist attack, the internet is playing a significant role in spreading terror, enabling terrorist organizations to claim their success on the media.

#### 2.3.2.4. A network for spreading terror

The case of Mohamed Merah is an example of how lone wolves use the internet to spread terror. Using lone wolves is a low-cost and low-resource way to carry out

attacks, where the terrorist group can then retroactively decide if it wants to claim responsibility or not. If they like the attacks they can just lay claim to them afterwards (Smith 2015).

Elton Simpson, one of the suspected gunmen in the Garland shooting, Texas, appeared to have communicated with at least one known IS member on social networking sites. IS claimed to be responsible for his attacks (Smith 2015). By using social media to spread terror, the group looks much more ubiquitous and has unparalleled success (Smith 2015).

On the other hand, one of the key features of the conflict in Syria has been the fact that it has played out in real time online via social media. Research reveals that large numbers of Western fighters get their information about the conflict from unaffiliated, broadly sympathetic individuals called ‘disseminators’ and not from official channels provided by fighting groups (Carter, Maher, and Neumann 2014, 1).

To sum up, the internet has made modern terrorism successful in targeting youths to be involved in violence and martyrdom, reinforcing women’s role as recruiters and facilitating the lone wolves in carrying out their attacks and expanding their impacts. These new evolved forms of terrorists could be attributed to the information and communication disseminated and conveyed by the internet. But specifically, how the role of information and communication functioned in the modern terrorism phenomenon is still need to be clarified in the following chapter.

### 3. A theoretical framework of the function of information and communication in modern terrorism

The magnified power of information and communication is making difference between traditional terrorism and modern terrorism. If we make a comparison between the terrorism campaign in late Qing dynasty from 1851 to 1864 in China and the contemporary modern terrorism phenomenon, we will see that the internet has made the influence of information and communication on the well-functioning of

society more powerful than ever before.

The fundamentalist Taiping movement happened in the late Qing dynasty among 1851 “is one of the major events in four thousand years of Chinese history”(Reilly 2004, 242). The prophetic warrior (Hong Xiu Quan) manipulated Christianity’s leading ideologies to launch his rebellion movement. However, before the rebellion happened in the conflict-ridden hills of Guangxi province in 1851, during the year 1844, the missionary work could only be carried out by Hong Xiuquan and his canonized “brothers of God” Feng Yunshan with traditional means. He put his famous political programs “Yuan Dao Jiu Shi Ge” (Ode on the origin of the way of our salvation), “Bai Zheng Ge” (Ode on the hundred correct things), “Yuan Dao Xing Shi Xun” and “Yuan Dao Jue Shi Xun”(Doctrines on Arousing the World and Doctrines on Awakening the World), on paper in 1846 in order to instigate the citizens in rural areas to rebel against the feudal hierarchy of the Qing Dynasty. In another work, “Tai Ping Tian Ri”, Hong had written “proclamations exhorting the people to worship the Heavenly Father, the Supreme Lord and Great God, and distributed them among the people.”(Spence 1996, 342–43)

However, owing to the traditional way of message dissemination, the influence of Hong’s ideology and his rebellion movement had been confined only to the southern part of China. The speed to spread the fundamentalism message in the past can also not be compared with it is now with the facilitation of the internet.

From another perspective, the difference on the development of traditional terrorism and modern terrorism could also be attributed to the function of internet as a shelter (Telegraph 2014). Without any concealed means to expand his recruitment process and the influence of his propaganda, the local government of the Qing Dynasty crushed the rebellion, aiming at clear targets and arresting Hong’s assistants in the preliminary stages. However, when modern terrorists initially start to prepare their attacks, recruit new members to support them or form lone-wolf pacts, communications on the internet can be used anonymously and secretly. Internet can also offer a shelter to hide their identities for some information and communication could take place anonymously. Nowadays, terrorists are generally able to hide their



identities using encryption tools which were once only available to government agencies.

Above all, the communication and information exchange process of current fundamentalists' attacks could take place widely, secretly and anonymously until the attacks happened in the real world. In this way, the modern communication process through the internet is shaking on the well-function of the society more fiercely than ever before.

In this chapter, I will present a new framework to elaborate the role of information and communication in modern terrorism. Inside this framework, the function of information and communication in two aspects to form modern terrorism phenomenon will be specifically explained: manipulating human beings into becoming radicalized terrorists and turning them into tools of terror dissemination.

### 3.1 Theories of information and communication mechanism in terrorism

#### 3.1.1 The communicative theories of terrorism

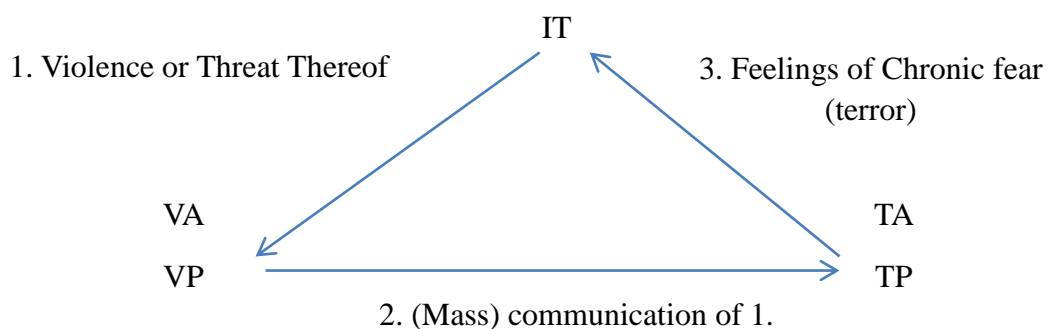
The theory presented by Jacques Ellul in his book "Propaganda: the formation of men's attitudes" in 1962 argues that the total and immersive nature of propaganda is central to its success. When an individual is lost within it, begins to participate in it and, ultimately, derives satisfaction from it, when it pervades both the individual's public and private life, it has 'succeeded' (CHARLIE Winter 2015, 15). According to Ellul, when it comes to the various mechanisms of political messaging, propaganda is used to train, channel and orientate the recipients of propaganda. Along with transmitting ideas, it activates individuals into participation while they remain under the illusion of independent thought. Propaganda could fully surround the targeted individuals, constantly and regularly, and dismantle their ability to discern truth from falsehood. This way, the propagandist is able to furnish a set of objectives and organize the traits of an individual into a given system (Ellul 1973, 14). When the subject is fully absorbed and depends on the information provided by the propagandists, other avenues of information become dormant (Ellul 1973, 104);

already-held beliefs become further entrenched (Ellul 1973, 162); and they act in a cycle of consuming the information, obeying the impulse, and transmitting the content that they are reliant upon. Although social media did not exist when Jacques Ellul wrote his book, the theory he presented explains the function of information in propaganda in the Islamic State nowadays.

In 1982, Alex P.Schmid and Janny de Graaf presented the concept of terrorism itself as a mean of communication, a way of ensuring public attention and even of channeling particular messages to chosen targets (Alex Peter Schmid and De Graaf 1982, ii). The authors leave the readers with little doubt that the concept of “harmful news” has to be taken seriously and that the question of media responsibility at the time of terrorist events is both urgent and hard to deal with (Alex Peter Schmid and De Graaf 1982, ii). The authors also put forward the communicative theory of terrorism in their work, where a third party, communication, distinguishes terroristic violence from ordinary violence (Schmid and De Graaf 1982, 175). In the triangle Terrorist-Victim-Target, the victim, who is usually but not always in some way associated with the target, serves as an instrument to communicate a message to the target it is meant to traumatize, demoralize or otherwise influence (see diagram below) (Alex Peter Schmid and De Graaf 1982, 176). Terrorism, by using violence against one victim, seeks to coerce and persuade others (Alex P. Schmid 2004, 207). Terrorist violence is mainly perpetrated for its effects on others rather than the immediate victims (Alex Peter Schmid and De Graaf 1982, 2).

#### DIAGRAM

#### THE TRIANGLE OF INSURGENT TERRORISM

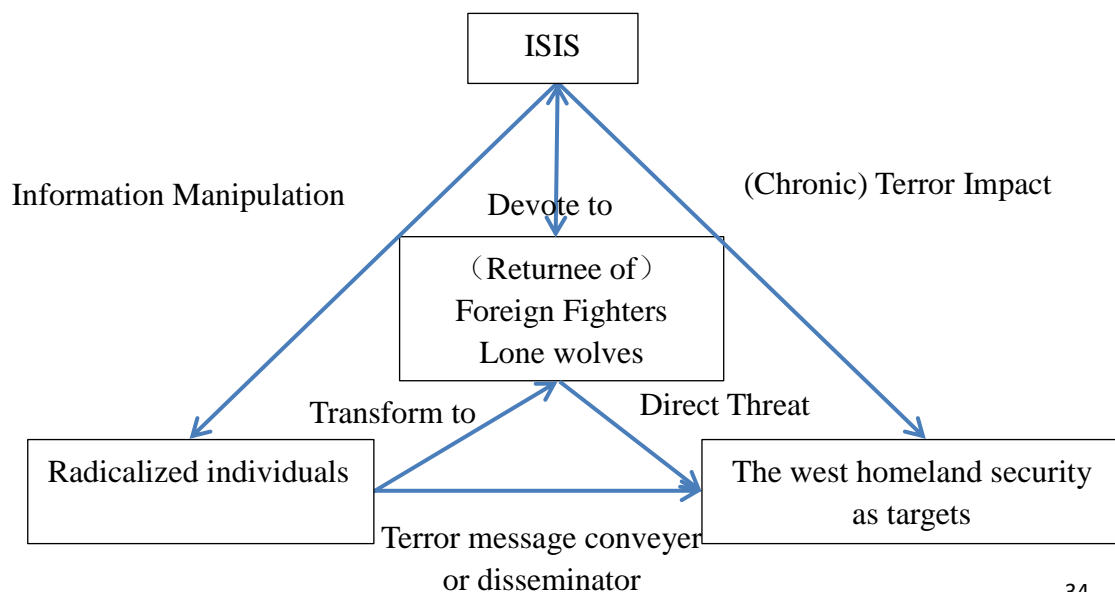


(IT= insurgent terrorist; VA= victim belonging to the camp of the state authorities; VP= victim being part of the public; TA= the authorities as target; TP= the public as target)

However, the empirical evidence provided by the authors to support this theory only focuses on mass media and news channels, such as live/immediate coverage of television, radio or newspapers. In this sense, the book describes the phenomenon of traditional terrorism. It could not predict how this theory evolved because of the development of information and communication technology nowadays: terror is disseminated and diffused through targeted victims with a blurred boundary between virtual and real world, and it targets authorities and public both in direct and chronic terms.

### 3.1.2. The triangle of Terrorism- Radicalized Victim-Target

As a demonstration and combination of the above two theories, taking IS' cyber propaganda strategies as an example, the function of information and communication could be explained well by the following framework: a triangle of Terrorism-Radicalized Victim-Target.



ISIS takes advantage of the cyber space to manipulate individuals with their violent, threatening and misleading online propaganda. The radicalized individuals act as foreign fighters (or returnee foreign fighters<sup>2</sup>) or lone wolves, devoting themselves to ISIS. They deliver terror to the targeted Western society mainly in two ways: by making the radicalized individuals ruin themselves to act as terror message conveyers and disseminators, or by spreading the recruitment message to enlarge the group and increase the social panic. On other hand, the individuals transformed into lone wolves and the returnees of foreign fighters could be the most direct threat to the safety of Western society. By manipulating human beings into carrying out terrorist attacks and destabilizing the relationship between people and nation, ISIS has influenced the Western regimes and public safety with chronic terror impacts.

To figure out how the online terrorism propaganda is influencing individuals in the offline world, two particular processes in the triangle would be analyzed, by taking ISIS as an example:(a) *manipulating individuals by using information* and (b) *turning them into tools of terror dissemination*.

The (a) process could be understood as follows. The information manipulation on individuals is conducted through three different strategies: the emotional manipulation, the behavior manipulation and the cognitive manipulation. The emotional manipulation through the internet is to make people subversive by providing themes such as brutality, mercy and the war. To influence individuals' behaviors, the themes of belonging and utopia are applied in ISIS' fabricating propaganda to influence people's choice and beliefs with a consequence of enlarging members of terrorism groups; while information about military and violence-perpetrate skills are cognitive manipulation instilled to the youth and children so as to better exploit them as child-soldiers.

Briefly, the (b) process of modern terrorism propaganda is driving individuals into tools of terror dissemination. On the one hand, according to their propaganda

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<sup>2</sup> Those who return to their homeland and they were foreign fighters before.

strategy, they encourage individuals to directly participate in terrorism activities and self-report their terrorists' activities to spread terror, without the interference of authorized media. On the other hand, online speech of incitement to terrorism is an impetus of terror spreading machine to persuade people involving into the terrorism activities, while terrorism glorification speeches are eliminating the sense of guilty of terrorists as a psychological strategy to maintain the continuance of terror attacks.

### 3.2 Information manipulation on individuals: taking ISIS as an example

According to the research report named *Documenting the Virtual 'Caliphate'*, there are mainly six themes in ISIS's propaganda, namely: a) Mercy, b) Belonging, c) Brutality, d)Victimhood, e) War, f) Utopia (Charles Winter 2015, 17). Usually, victimhood, political dissatisfaction and religions duty are part of the incitement speeches. In the following part of this chapter, I will analyze how ISIS is using those themes, which are interrelated and interactive between each other, to manipulate individuals in multiple levels.

#### 3.2.1. Emotional manipulation: pursuing the subservience of people at the cost of ruining human dignity and the right to life

When it comes to terrorism, the key point is that it manipulates people at the cost of ruining human dignity and the right to life. Terrorism, in this sense, is primarily a moral failure: a violation of our common humanity and the sanctity of all human life (Cottee 2015).

One of the aims of ISIS' new media facilitated propaganda could be summarized as: *pursuing people's subservience*. Generally, the people in question could be either at an international or at a local level; policymakers or common people; supporters or enemies; adults or children. In two years, ISIS went from releasing Arabic-language propaganda about corruption and human rights abuses by the Iraqi government to English and other languages propaganda focused on changing the hearts of men (Fernandez 2015, 8) so to better serve the regime of ISIS. To this aim, the narrative in

their propaganda is the following: resist to the authority of ISIS, be killed; willingly submit to the control of ISIS, and be rewarded(Charlie Winter 2015, 24). This logic in the context of the narrative is demonstrated by the themes of brutality, mercy and war.

Their retribution abilities are conveyed in ISIS' propaganda by the brutal scenes. In various forms, the content of ISIS' propaganda describes despicable acts, horror and indifference to human life (Krona 2015). Executions are carried out to serve as reminders of their ability to exact revenge on behalf of Sunni Muslims against the Crusader-Shi'ite-Zionist conspiracy allegedly mounted against them (Winter 2015, 23). The gruesome execution of foreign hostages or alleged "spies" on the one hand provokes the authorities of the international community, while on the other hand executions of civilians and hostages aim to warn the local and Western dissenters of what they will be dealt with(Charlie Winter 2015, 23). Examples could be the brutal scenes of either the beheadings of Japanese journalist Kenji Goto (Wikipedia 2018a) and American journalist James Foley(Wikipedia 2018c), or the killing of three members of Bashar al-Assad's Syrian Arab Army (Charlie Winter 2015, 23), or Jordanian pilot Muadh al-Kasasbeh(Wikipedia 2018d) being burned alive. The attacks ISIS claim responsibility for were designed to show that 'crusader citizens will never enjoy any peace or security in any part of the Muslims' lands as long as they continue to be at war with the Islamic State'(Reed 2016). ISIS' messaging strategy avoids "showings of weakness", for example, the hardships that the population might be suffered with in the ISIS controlled cities, such as lack of food, water and gas(Gartenste-Ross and Barr 2015, 5), for it is not beneficial to the psychological war. The caliphate shows the coalition and the rejectionists crimes, and also shows how ISIS is capable of retaliating against them as a major theme in the projection of strength, and fundamental power(Gartenste-Ross and Barr 2015, 5).

ISIS desires absolute authority. They intimidate people that are not fully subservient, or even just don't behave obediently enough. A farmer was filmed outside Aleppo: ISIS fighters ask him to recite a verse from the Quran and he cannot seem to remember, he falls to his knees and is cut in different pieces alive. The bystanders cheer and one puts the camera in close-up on his eyes closing, as he is

trying to take his final breath and it is taken from him instead(Krona 2015).

In tandem with the brutal scenes, footage also shows that if people show signs of repentance before God and the Islamic State organization itself, they are received into the embrace of the jihadists(Charlie Winter 2015, 24). The mercy message of the Islamic State is delivered not only to the fighters, but also to civilians and former government employees. The Islamic State will forgive their past affiliation, provided it is wholly rejected and obedience to the ‘caliphate’ is guaranteed(Charlie Winter 2015, 24).

ISIS’ military strength is demonstrated from time to time. War is a brand in ISIS’ propaganda, with multiple functions. On the one hand, it is used to instill fear in hostile forces, while on the other hand, the purpose of preoccupation of military power and looting of the booty in the war field is also used for parading ISIS’ supremacy, raising fighters’ morals, presenting the supporters and sympathizers with a skewed understanding of its successes(Charlie Winter 2015, 26).

Many researches, however, have criticized ISIS’ monopolizing reports from the battlefield as a propaganda strategy, resulting in problems of credibility and reliability. Not only obscuring its losses, ISIS has also systematically exaggerated its strength. One example of this is that a group of militants in the eastern Libyan city of Derna openly pledged *bayat* to ISIS, and declared that they had established an emirate in the city: ISIS then flooded social media with videos and pictures of ISIS militants in Derna, including a video showing a parade of militants waving ISIS flags as they drove down a thoroughfare in the city. However, control of Derna was and remains divided between a number of militant groups, including some al-Qaeda-linked groups that oppose ISIS’ expansion into Libya (Gartenste-Ross and Barr 2015, 5). Another example is that ISIS had issued a deceptive claim of responsibility for the devastating March 18<sup>th</sup> attack on the Bardo museum in Tunis, which was actually carried out by al-Qaeda-aligned Katibat Uqba ibn Nafi. Knowing from past experience that al-Qaeda generally doesn’t take credit for attacks while the operatives who carried them out are still at large, ISIS issued a claim of responsibility before al-Qaeda was prepared to do so (Gartenste-Ross and Barr 2015, 6).

### 3.2.2. Behavioral manipulation: enlarging a group by fabricating and eschewing information

If the first step is to pursue the subservience by proving the power of authority of ISIS, the second step would be making the organization function with momentum from generation to generation. To enlarge the group, themes of belonging and utopia are frequently applied in ISIS' propaganda. However, the disinformation in the recruitment propaganda of ISIS sustains their long-term development, while eschatology serves as a catalyzer in the recruitment process.

The themes of utopianism and eschatology are two tactics applied in ISIS' recruitment propaganda to facilitate and catalyze the process of insurgents' supplement. The utopianism lures people into joining the Islamic State's establishment and implementation of the 'caliphate'(Ingram 2016), its fabricated feature misleading the targeted audience into traveling to the territories under ISIS' control. Meanwhile, the eschatological narrative pushes them to participate in the raising Islamic State with urgency (Charlie Winter 2015, 30; al-Furqān Media and al-Baghdādī 2015, 3). In every high-profile address from the leadership, the looming nature of the end of the world is emphasized, and every time a new issue of *Dabiq* surfaces, its pages are replete with references to Armageddon.(Charlie Winter 2015, 30)

One aspect of the depiction of society and happiness of life in ISIS' propaganda could target different audiences. The efficient "justice" system ("Lo Stato Islamico, Una Realtà Che Ti Vorrebbe Comunicare," n.d., 23)<sup>3</sup> and non-secular punishments(Winter 2015, 29)<sup>4</sup> in the rule of Shari's law could provide a sense of security and stability to the locals, also serving as a warning for the criminals, as gratification for the ideological supporters and as evidence of IS' legitimation(Charlie Winter 2015, 29) and of the safeguards they can provide for the potential recruiters.

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<sup>3</sup> In the name of Shari's law, Islamic policemen try to solve dispute by arrest the accused before report the situation to the legal Islamic court.

<sup>4</sup> For example ,the ideas of ḥudūd punishments would be found in "Establishment of ḥadd for theft in the city of Dar al-Fatḥ", *Aleppo Province Media Office*, 17 February 2015; "Establishment of ḥadd for drinking wine in before the door of the shari'a court", *Barqa Province Media Office*, 22 October 2014.



Lured by perceived benefits, supporters of all ages and both gender expect ISIS to allocate housing to them, and some accounts suggest that “widows receive welfare benefits based on how many children they have.”(Birke 2015) However, by only reviewing ISIS’ propaganda, the audience could never perceive the real situation of safety and security in Syria/Iraq.

Sometimes, ISIS messaging wove together rational- and identity-choice appeals to lure supporters to its ‘caliphate’ or, as a secondary option, to pledge allegiance to ISIS before committing acts of terrorism ‘at home’(Ingram 2016). If individuals choose to commit an attack, their families will be well protected and cared. In a video ISIS published in August 2014, a Finnish fighter of Somali descent tried to persuade the Muslims living in the west, America and Europe, to migrate with their families: “Here, you go for fighting and afterwards you come back to your families. And if you get killed, then ... you’ll enter heaven, God willing, and Allah will take care of those you’ve left behind. So here, the caliphate will take care of you.” However, the widows of foreign fighters, such as Lewthwaite, who are married to 7/7 suicide bomber Germaine Lindsay, 30, who was said to be fighting for the Islamic State in Syria and was gunned down (Stewart 2014), are confronted with the fate of dying in the battlefield for ISIS.

### 3.2.3. Cognitive manipulation: indoctrinating and training youths regardless of their physical and mental well-being

The force or momentum of the Islamic State could also be supplied by the exploitation of child-soldiers. Children have also featured heavily in ISIS propaganda videos, with footage of ‘cubs of the caliphate’ training camps appearing many times online. By manipulating youths and children, ISIS has at least 3 advantages. Children are considerably cheaper in comparison to adults: they consume less food and do not need as much pay (Benotman and Malik 2016, 27). They can follow orders as tools: they are fast to commit, demonstrate loyalty fairly quickly, and are easy to indoctrinate, and highly susceptible to indoctrination from people they know, love and

respect(Benotman and Malik 2016, 27). ISIS could gain long term profits by indoctrinating children in their territory, because the future of any state lies with the next generation(Benotman and Malik 2016, 27).

As we know, ISIS is using information as a weapon to change people's minds. The younger generations, and children, averagely less independent in mind, are more likely to be eroded and gnawed into compliance or blind obedience to orders or doctrines, which are conveyed either by way of IT penetration or by way of their growing up environment. Besides using the intimidation and reward strategies, ISIS also provides indoctrination and training lessons to obtain the exploitation of children and youths.

As ISIS propaganda proudly demonstrated, the typical images of children are as martyrs and as executers of shootings or beheadings of the spies and captures (Kavanaugh 2015; Bloom, Horgan, and Winter 2016, 29). ISIS' strategy jeopardizes the well-being of the youths, in that they are not only the victims of violence but also the perpetrators of the violence, which increases the likelihood of their own victimization (Horgan et al. 2016, 2). And the perception of information and ideology in their early life decides who the children will be. Children listen to their parents, participate in school education, communicate with their peers, and while they grow up, they are trained into "Lions".

In many cases, adolescents decide to join ISIS seemingly of their own accord. However, for much younger children, what they say and do is little more than a reflection and parroting of what their parents are instructing them to do, as demonstrated in a Vice News interview with ISIS fighter Abdullah al-Baljiki (aka "Abdullah the Belgian") and his young son: "Abdullah asks his son, 'Why do we kill infidels? What have the infidels done?' 'They kill Muslims.' The boy says, looking to his father, as if to say, 'Did I say the right answer?'"(Svirsky 2014).ISIS also provides mothers with the books instructing them on how to bring up jihadi children; suggestions include telling bedtime stories about martyrdom, exposing children to graphic content through jihadi websites, and encouraging them to play sports and games which improve their fitness and hand-eye coordination (Withnall 2015, 1). The

suggestion and persuasion from older siblings and the entire family also results in the involvement of children from abroad. For example, thirteen-year-old Younes Abaaoud, from Belgium, traveled to Syria with his 27-year-old brother, Abdelhamid (the ringleader of the Bataclan Paris attacks) in 2014 (Robinson 2014).

In terms of schools and education system, unlike in most previous conflicts, the Islamic State relies on a rigid ISIS curriculum and training camps to indoctrinate and recruit children. ISIS focuses on educating children with strict rules: for example, in IS-controlled areas, school attendance is compulsory for all children (Montgomery 2014); home education is forbidden so that the children can be better controlled and monitored (Benotman and Malik 2016, 29); the content of the curriculum is fixed and restricted (Benotman and Malik 2016, 31), and teachers who refuse to teach their curricula are killed (OHCHR and UNAMI 2015, 24). After the compulsory learning of Qur'an memorization and Arabic language, boys are taught hand-to-hand combat and weapons training (Benotman and Malik 2016, 97). This education system is similar to what Nazi Germany used to manipulate German youths, which is a system of indoctrination, rather than empowerment (Benotman and Malik 2016, 33). UNESCO has long recognized that in times of conflict, destructive educational practices can fuel suspicion, hostility and ethnic intolerance, and that the content, structure, and delivery of education can catalyze violence (Tawil and Harley 2004, 5).

ISIS use children to entice and recruit their peers, too. In many respects, young people are effective recruiters because children might be less suspicious of their peers and more inclined to trust people at their own age (Horgan et al. 2016, 11). As previously recruited children are seen engaging with IS, children watching from the outside come to believe that the practices they witness are the norm, and a positive course of action for them. Child recruiters give speeches, which spur both adults and other children into action through the lure of status, purpose, and admiration (Bloom 2015).

The indoctrination that begins in schools intensifies in training camps, where ISIS transforms individuals into tools in order to best serve the state. A video titled 'Farouq Institute for Cubs' depicted three types of training: teaching of the Qur'an,

specifically in relation to jihad, weapons training, and how to deal with prisoners.(OHCHR and UNAMI 2015, 23) Putting aside the adverse effects of the rigorous way of training and the tough living conditions imposed on the children, ISIS' constant emphasis on the theological justification of child soldiers and their recruitment with propaganda have posed a long-term influence on children and their way of thinking and judgment. The Islamic State justifies the military training of children using a verse from the Qur'an stating 'The Almighty has said: 'Go forth, whether light or heavy, and strive with your wealth and souls in the cause of God. That is better for you, if you truly know' [Qur'an 9:41]'. Citing Muhammad al-Bukhari's saying as well: "The Messenger of God said: 'When you are called to fight, go forth". These theological justifications are often followed by an announcement which targets new potential recruits, such as "in obedience of the command of God Almighty, and thus the command of the Noble Messenger, the Islamic State calls on the youth of Islam in Wilayat al-Furat to fight, and calls on them to join the convoy of their mujahidin brothers in obedience to God and in support of His religion."(Benotman and Malik 2016, 40)

### 3.3 Turing people into tools of terror dissemination

#### 3.3.1. The priority of disseminating the terror message by self-reporting

In the past, terrorists were notorious for issuing threats that they often followed up with actual attacks. But they did not provide graphic descriptions of their brutality and the suffering of their victims. Contemporary terrorists can and do utilize the internet to go public even in the midst of staging horrific terrorist strikes (Nacos 2016, 78). Beyond al-Qaeda's elite vanguard narrative, the narrative of ISIS' propaganda democratizes the ability to engage with the struggle, makes it a 'do-it-yourself' jihad (Charlie Winter 2015, 28). Similarly, ISIS' communication strategy also embeds the idea of "self-reporting" to attract the attention of publicity.

ISIS learned a lesson from the 9/11 attacks during the Bush administration: a

Knight Ridder poll reported that 44% of respondents believed that some of the 9/11 hijackers were Iraqi citizens. Mass-terrorism serves not only terrorists, but can often be manipulated for political gains by presidents, governments, and their officials. Susan Moeller's extensive study of U.S. media's coverage of WMD (Weapon of Mass Destruction) ended with a clear conclusion: "most journalists accepted the Bush "administration's formulation of the "War on Terror" as a campaign against WMD.(Nacos 2006, 1)" Terrorists need the massive publicity and the opportunity to showcase their ability to strike against even the strongest state. And the media are rewarded as well in that they energize their competition for audience size and circulation, and thus for all important advertising revenues (Nacos 2006, 1). Terrorists, instead, have not only relied on the gatekeepers of the traditional media (newspapers, newsmagazines, radio and television) but tried to circumvent them. For example, in the 1969 *Minimanual of the Urban Guerrilla* by Brazilian revolutionary Carlos Marighela, he wrote that the mass media were important instruments of propaganda but that this opportunity should not prevent his comrades from utilizing their own processing and copying machines (Nacos 2006, 1).

In this sense, IS not only use their own propaganda machines, they guide radicalized human beings to report their own attacks in the fastest circulated social media and use the cheapest way to spread the terror and satisfy their publicity need.

To sustain individuals conducting terrorism attacks, namely, the lone wolf attacks, and doing self-reports terrorist attacks, terrorism organizations constantly use incitement and glorification narrative strategies to realize their goals of terror communication to the public or state authorities.

### 3.3.2. The incitement speech: impetus of the terror spreading "machine"

The leader of ISIS, Abu Bakr al-Baghdadi, was a preacher and PhD focusing on the sharia law (Sherlock 2014). Those two professions have made him superior to Osama bin Laden and his second-in-command, Ayman al-Zawahri, in manipulating the general public and occupying the moral high ground to incite others. None of

those two leaders of Al-Qaeda, Osama bin Laden and Ayman- al Zawahri had studied specifically the Sharia law, but both of them are keen on Sharia law and the theory of Jihad during their studies (Wikipedia 2018b).

Abu Bakr al-Baghdadi has not only emphasized the function of propaganda and incitement in their regime of structure by establishing specific department of propaganda (or media council) in the ISIS regimes (Bellini and Makhoul 2014), he has also himself preached to incite others to start their revenge attacks. The narrative structure of his incitement speeches is intertwined with victimhood and the jihad as resistance, along with seeking assistance from Allah Almighty.

He pointed out that Muslims were defeated after the fall of their khilāfah (caliphate). Their caliphate was annihilated, so the disbelievers could weaken and humiliate the Muslims, dominate them in every region, plunder their wealth and resources, and rob them of their rights. They accomplished this by attacking and occupying their lands, placing their treacherous agents in power to rule the Muslims with an iron fist, and spreading dazzling and deceptive slogans such as: civilization, peace, co-existence, freedom, democracy, secularism, baathism, nationalism, and patriotism, among other false slogans (Abu Bakr Al-Husayni Al-Qurashi Al-Baghdadi 2014, 4).

In another speech named “give good news to the believers”, Baghdadi described the death of Abu Musab Al-Zarqawi as “Allah Almighty graced him with martyrdom”, after he had infused the methodology of superiority for the pleasure of Allah Almighty to Abu Omar Al-Baghdadi and his war minister (Abu Bakr Al-Husseini Al-Quraishi Al-Baghdadi 2013, 4). In the name of Allah Almighty, Baghdadi, who has assumed the mediaeval title of caliph, used the message to seek to assert authority over Muslims everywhere (Bayoumy 2014). He emphasized that the persecution of the Muslims and the fading of previous organizations, such as the Mujahideen Shura Council, the Islamic State of Iraq and the leadership of bin Laden and Zarqawi, call for a revolution of the Muslims. Learning from the humiliation, he said: "A believer should not be stung twice from the same hole"...“people in beloved Al-Sham do not be like the butterfly that goes to the fire following its colleagues since you have

experienced dictatorship and injustice for long years so beware from replacing these years of injustice by the injustice of democracy and the people of Iraq have preceded to it and it have been implemented in Egypt, Tunisia and Libya so look at their condition and what have become of them and beware that you be stung from the hole which the Muslims in those countries have been stung”.

Therefore, the democracy Western countries want to build is one of the targets and symbols described to express the political grievances with the West “.... Do not make democracy the cost for the carnage that are under the ruins of the homes that were demolished over the women, children and elderly, do not make democracy the cost for displacement from homes and living in tents, do not make democracy the cost for the honors of our girls and women that were violated since I swear by Allah it is the worst cost and the worst gain....”

Describing the destroyed situations of Muslims in the Western value system, he called on them to rise up and avenge the alleged wrongs committed against their religion (Bayoumy 2014), “.....we extend our wide hands and open our arms and hearts to the factions doing jihad for the sake of Allah Almighty and the proud tribes in the beloved land of Al-Sham to make the word of Allah the most high and that the people and land be ruled by the laws of Allah Almighty without anyone other than Allah having any share in the rule, the Almighty says: And fight with them until there is no more persecution and religion should be only for Allah.”(Abu Bakr Al-Husseini Al-Quraishi Al-Baghdadi 2013, 6)

The victimhood narrative is not just served up as justification for ISIS’ existence; it is also intended as an indicator of the ‘sacrifices’ it suffers on behalf of Sunni Muslims the world over (Charles Winter 2015, 24). In doing so, the group justifies its harshest acts by exploiting the anguish of its civilian population and, using the ‘Crusader’-’Safavid’-’Nusayri’ war as a cause to rally around the flag, it legitimizes its continued existence (Charles Winter 2015, 23).

Traditionally, there have already been attempts to exempt certain types of political violence from the definition of terrorism, such as re-label terrorists as “challengers of power” and “rebels for change”, resulting in the cliché “one man’ s

terrorist is another man's freedom fighter.”(Daskin 2016, 3) In incitement speeches by Baghdadi, one of the bridges that connected the political grievances, the victimhood, and the migrating to ISIS held territories or fighting jihad is religious duty(Gartenste-Ross and Barr 2015, 4). Specifically, ISIS' primary justification is a distorted version of the concept of jihad. Its doctrine is based on extreme interpretations (Daskin 2016, 8) of selected parts of Quranic verses and hadiths, ignoring Islamic protocols and limits to violence (Daskin 2016, 8). Additionally, this duty was imposed on each Muslim that is able-bodied, not physically disabled. In one of the videos released in 2015, titled “Message from Those Who Are Excused to Those Who Are Not Excused,” ISIS used two deaf foreign fighters to call on Western Muslims to join the caliphate, and to deliver the message that only disabled individuals are generally exempt from participating jihad under Islamic law: it is a shame that a healthy Muslim is not aiding the ISIS military (Gartenste-Ross and Barr 2015, 4).

On the other hand, after an attack, individuals are regarded as heroes in the widely spread online glorification videos produced by ISIS, to make it seem as if it is admired and accepted by “the public opinion” both in the online and the offline society.

### 3.3.3. The echoes of glorification: maintaining the continuance of terror attacks

Not surprisingly, it is important that the international terrorists striking abroad hope and need to increase their respectability in the eyes of those people in certain societies on whose behalf they claim to act (Nacos 2006, 8). To gain “public opinion” support in the international Muslim community, the ISIS' media strategy tries to create an environment supporting and respecting of what they had done and what they will do in the future in the name of a justice career. The effect of an attack is also important to sustain the attacks, for they are justified and admired in the community. The glorification speech is playing this kind of role to make terrorists' attacks keep occurring and growing.



Convincing them that they are doing the right and admirable thing could be helpful in keeping individuals constantly supporting terrorist activities in various ways. As reflected in transnational public opinion surveys, Bin Laden, his closest aides, and the Al Qaeda organization had achieved the respect and sympathy of many people in Arab and Muslim countries in the aftermath of 9/11 in the Western diaspora. According to a survey by the Pew Research Center published in 2005 (*Islamic Extremism: Common Concern for Muslim and Western Publics Support for Terror Wanes Among Muslim Public, Support for Terror Wanes Among Muslim Publics*), although confidence in Osama bin Laden in countries like Indonesia, Morocco, Turkey and Lebanon had drastically dropped from 2003 to 2005, in 2005 the majority of Jordanians (60%) and Pakistanis (51%) still had a lot or some confidence in Osama bin Laden “to do the right thing in world affairs,” and this confidence was higher than in 2003, when 55% of Jordanians and 45% of the Pakistani public had such trust in the Al Qaeda leader, which are also relatively high percentages (see the graph below) (Kohut et al. 2005, 6). Although hiding since the fall in 2001, nearly four years after 9/11, bin Laden continued to have the respect of many millions of admirers (Nacos 2006, 8).

<b>Confidence in Osama bin Laden*</b>				
	A lot/ Some %	Not too much %	None %	DK %
<b>Jordan</b>	<b>60</b>	<b>20</b>	<b>18</b>	<b>2=100</b>
<i>May 2003</i>	55	26	18	1=100
<b>Pakistan</b>	<b>51</b>	<b>11</b>	<b>12</b>	<b>26=100</b>
<i>May 2003</i>	45	7	20	28=100
<b>Indonesia</b>	<b>35</b>	<b>27</b>	<b>10</b>	<b>27=99</b>
<i>May 2003</i>	58	26	10	7=100
<b>Morocco</b>	<b>26</b>	<b>8</b>	<b>40</b>	<b>26=100</b>
<i>May 2003</i>	49	7	29	15=100
<b>Turkey</b>	<b>7</b>	<b>6</b>	<b>73</b>	<b>14=100</b>
<i>May 2003</i>	15	7	67	11=100
<b>Lebanon</b>	<b>2</b>	<b>9</b>	<b>78</b>	<b>10=99</b>
<i>May 2003</i>	14	18	64	4=100

\*Confidence in Osama bin Laden to do the right thing regarding world affairs.

Source: Pew Research Center, *Islamic Extremism: Common Concern for*

**Muslim and Western Publics Support for Terror Wanes Among Muslim Public, Support for Terror Wanes Among Muslim Publics, 2005.** (Pew Research Center 2005)

In normal circumstances, the use of violence results in self-condemnation and self-sanction. However, terrorist organizations try to make their violence acts personally and socially acceptable (Daskin 2016, 1). Individuals would also gain honor as a reward in this approach.

The glorification videos demonstrate that what they have done is widely supported and admired in the eyes of their commanders and their names remain among the public masses of the believers. They emphasize that those who carry out an attack to the heart of the enemies will be regarded as respectable and as being heroes. Taking human lives can be perceived as something right and honorable (Daskin 2016, 3). “Some terrorists are in a race to be famous by dying as a hero,” said France Socialist MP S ébastien Petrasanta (Mcpartland 2016). ISIS grants honor and pride to numerous Mujahidin killed in action or attacks, from Afghanistan and Iraq to the suicide terrorists who died in the Paris and Brussels attacks. Imagery of martyrs with added slogans such as “We haven’t forgotten” are published regularly on ISIS magazines and social media. The terrorists of the Paris and Brussels attacks were glorified in many videos and ISIS magazines (Osborne 2016). Individuals searching for a new future come into a community bound with religious ties and fighting for a higher cause, reaching the highest religious level possible if they fall during battle(Daskin 2016, 10). This way, the sense of identity and belonging can be another factor that encourages lost individuals to commit terrorist attacks or serve for ISIS.

Additionally, there are also other utilitarian factors in spreading the glorification material, such as satisfying certain feelings of revenge and anger (Daskin 2016, 11); cheering for the success of brutal violence as it minimizes later casualties(Engel 2015); acting as a deterrent and thus making it easier to control local populations and encouraging them to join ISIS for protection(Engel 2015; Speckhard and Yayla 2015).

However, praising and recognition for terrorist organizations have also caused so

much pain and suffering (Minder 2017) within the local and international society. Essentially, it could serve as material to better exploit humans as terror disseminators and guarantee the continuance of the terrorist attacks, so as to further communicate their message to the public authorities.

Up till now, the sociological, empirical communication theories related evidence have proved that online terrorism materials shall be restricted, but it does not provide an answer as to how far the restrictions and sanctions may go. Another fact that shall be taken into consideration is that modern technology easily permits incitement to emanate in one state and reach an audience in another. Accordingly, it is necessary to regard this problem from both an international and regional perspective.

In the following chapter, I will address this question by reviewing the international and regional legal frameworks at both UN and European institutions (the EU, Council of Europe and OSCE), to figure out if there is an international common knowledge on the restriction and its limits. The basic knowledge of the structure of the EU and UN system and their documents legal binding natures will be introduced in the beginning part as a indicative note.

#### 4. The political and legal frameworks for combating modern terrorism from 2001 to 2017 at UN and European level

Compared with traditional safety issues, non-traditional security issues such as international terrorism tend to be transnational, decentralized and linked with mobility. The internationality of terrorism could be regarded as a dark side of globalization (Jenkins et al. 2011). The difference between ‘traditional’ and ‘modern’ terrorism is still rudimentary, but modern terrorism can be appreciated in terms of the range of its manifestation and the visibility of the phenomenon (Ronen 2010, 649). Not only globalization, but also development of the information and communication technology has transformed terrorism into a kind of monster with expanded antennas. It is not limited by time or place and its form and appearance are the armed non-state networks with global reach, which pose a universal threat (UN General Assembly

2004, para. 146).

By taking advantage of globalization and of the power of the internet, the organizational structure of modern terrorism is not necessarily tightly focused, but rather loosely packed. The structure of international terrorism varies from centralized organizations to decentralized international campaigns. This evolution of international terrorism has meant an evolution of its interests as well: while the pursuit of extremist ideologies is still the political aim, financial benefits are becoming increasingly important for terrorists.

Owing to the enormous economic costs and to the social instability caused by terrorist organizations, it is both because of the realistic demand and the need for justice that in the age of anti-terrorism, namely from 2001 onwards, the UN and European institutions have been playing an important role in coordinating and combating the evolving phenomenon of international terrorism.

The review of several major legal measures and responses at UN and EU levels for countering the modern terrorism phenomenon will be conducted from a chronological perspective, paying particular attention to those new provisions that aim at countering modern terrorism phenomena. The analysis will only focus on some important responses starting from 2001, considering that only after the 11<sup>th</sup> September tragedy in 2001 a consensus has been reached on the urgency of action in the international community (Doctors without borders n.d.). The review ends with the recognition in the legal frameworks at UN and EU level of explicit responsibility for the Member States to criminalize terrorist propaganda, including incitement, public provocation and recruitment, as a solution to counter “lone wolves” and foreign terrorist fighters, on September 2014 for the UN, and afterwards at EU level.

The analysis is divided into two parts. The first part covers how the international and regional legal frameworks responded after 9/11, until the withdrawal of the United States Armies from Iraq in 2011 and the death of the leader of the Taliban, Bin Laden. The second part covers the legal responses at UN and EU levels during the civil war in Iraq, the three years during which the IS emerged, evolved and controlled the regions of Syria and Iraq, and afterwards.

Before the chronicle work starts, I will provide a briefly introduction on the legal force of the legal provisions adopted or issued by the UN system and European institutions, such as the EU, the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE), etc. Some relevant execution organs established to facilitate the implementation of political and legal frameworks might be mentioned as well.

#### 4.1 The introduction of legal and political frameworks within the UN system and the European institutions

There are different typologies of soft and hard law in the frameworks of the UN system and European institutions.

Generally, all resolutions adopted by organs of international or intergovernmental organizations (whether of a legal or non-legal nature) pertain to the body of “soft law.” Terms such as “resolution” and “declaration” are used almost interchangeably by international organizations (Doctors without borders n.d.). On the contrary, hard law is based on rules and regulations developed and adopted with the participation and explicit consent of the States or other actors who will be bound by these rules. International treaties and conventions fall under this category of law (Doctors without borders n.d.).

In the UN system, Article 25 of the Charter of the UN has regulated that “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. A strict interpretation of Article 25 of the UN Charter provides that only Security Council resolutions adopted under Chapter VII<sup>5</sup> (which regulates actions undertaken with respect to threats to the peace, breaches of the peace, and acts of aggression) are binding. (Doctors without borders n.d.) However, in 1971, the International Court of Justice had given a much

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<sup>5</sup> Chapter VII of the Charter of the United Nations, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, provides the framework within which the Security Council may take enforcement action. It allows the Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to make recommendations or to resort to non-military and military action to “maintain or restore international peace and security” (Repertoire of the Practice of the Security Council n.d.)

broader interpretation of the scope of Article 25 in the judgment of Namibia (Khan et al. 1971, para. 113). The judgment denies that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter (Khan et al. 1971, sec. 113). The court “has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State not to affect legally any right of any State.”(Khan et al. 1971, para. 114) Therefore, before making a conclusion of the binding effect of a resolution of the Security Council, the language of the resolution shall be carefully analyzed and it shall be determined in each case, considering all circumstances, such as the terms of the resolution to be interpreted, the discussions leading to it and the Charter provision invoked, that might assist in determining the legal consequence of the resolution of the Security Council.(Khan et al. 1971, para. 114) The same Court had also put some limits on the legal effects of resolutions when these conflicts with the principles and purposes in Chapter I of the UN Charter(Khan et al. 1971, paras. 110,122-125). However, doubts persist on the binding nature of Security Council resolutions adopted under chapters other than Chapter VII (Doctors without borders n.d.), because of the absence of any organ competent to review the validity of SC resolutions (Öberg 2005, 885).

As for resolutions adopted by the UN General Assembly, there has been extensive debate over whether they are binding. Unlike the resolutions of the Security Council, resolutions of the General Assembly have no binding effect in the operational realm of international peace and security. Though they are not a formal source of law, General Assembly resolutions do retain strength and authority since they reflect the opinion, or “general will,” of States on a specific subject(Doctors without borders n.d.). For example, the legal impact of a resolution voted by all or a majority of States is widely regarded as a legally binding norm: this reflects “general practice accepted as law,” or *opinio juris* (Doctors without borders n.d.). In sum, a General Assembly resolution, adopted by a large majority, using precise language, and reflecting the opinion of the international community, may be considered as being of a legally binding nature, although it may not be enforceable (Doctors without borders

n.d.). Owing to the legal status of soft law of Resolutions adopted by the UN Security Council, the following analysis in this chapter will mainly focus on the evolving impacts or legal binding effects by the use of different wording in the resolutions.

The OSCE is another large security organization, with 57 participating States, which works to ensure peace and safety. But its decisions are taken by consensus only on a politically, not on legally binding basis (“OSCE | Organization for Security and Co-Operation in Europe” n.d.).

Some hard laws on combating terrorism will be reviewed in the following part of this chapter as well, such as the Council of Europe Convention on the Prevention of Terrorism of 2005 and the Additional Protocol to it of 2015. The Council of Europe is not an EU institution. It is an intergovernmental organization, which aims (amongst other things) to protect human rights, to promote Europe’s cultural diversity and to combat social problems (European Commission 2014a, 7). One of its early achievements was to draw up the European Convention on Human Rights. To enable citizens to exercise their rights, the Convention has set up the European Court of Human Rights (European Commission 2014a, 7). The Council of Europe now has 47 member countries, including the 28 European Union countries, and its headquarters are located in the Palais de l’Europe in Strasbourg (France).

At EU level, there are some binding provisions aiming at fighting against modern terrorism and foreign terrorism fighters. Before the entry into force of the Lisbon Treaty, in 2009, the only permissible legislative instrument in criminal law matters was the Framework Decision. Unlike Directives, Framework Decisions were not capable of producing direct effect: they were only subject to the optional jurisdiction of the European Court of Justice, and enforcement proceedings could not be launched by the European Commission for any failure to transpose a Framework Decision into domestic law. Two Framework Decisions, namely 2002/475/JHA and 2008/919/JHA, will be analyzed later. The Framework Decision was quite frequently used in the area of judicial cooperation, based on Art.34 of the old Treaty on the European Union. This legal basis was abolished by the Treaty of Lisbon (Satzger 2015, 1). The EU can now enact Directives in the area of criminal means of the

ordinary legislative procedure (ex “codecision”). This means that the directly elected European Parliament has to approve EU legislation together with the Council (which represents the governments of the 28 EU countries) (European Union 2016a).

A “directive” is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to each Member State to devise their own laws on how to reach these goals (European Union 2016b). Unlike a regulation, which is immediately applicable in EU countries, a directive is not directly applicable. It must first be transposed into national law before governments, businesses and individuals can have recourse to it (EUR-Lex 2015).

#### 4.2. The UN and EU legal framework from 2001 to 2010

##### 4.2.1. UN Resolution 1373(2001), 1624 (2005), EU Framework Decision 2002 and the Council of Europe Convention on the Prevention of Terrorism (2005)

Less than three weeks after 9/11, the Security Council adopted its landmark Resolution 1373 (2001), which had been predominantly drafted by the USA, but enjoyed full support from the remaining Security Council members. The Security Council resolution 1373 (2001) has become a first step in stemming and eradicating terrorism (UN Meeting Coverage and Press Release 2001).

Resolution 1373 (2001) had declared that knowingly inciting terrorist acts are contrary to the purposes and principles of the UN (UN Security Council 2001, para. 5) and reaffirmed the principle that every State has the duty to refrain from instigating or assisting terrorist acts:

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

However, the main focus of the UN Security Council in the Resolution 1373 (2001)



was plainly on other issues, such as to prevent and suppress the financing of terrorist acts (UN Security Council 2001, para. 1(a)); to refrain from providing any form of support, including by suppressing recruitment of members of terrorist groups (UN Security Council 2001, para. 2(a)); to prevent the movement of terrorists or terrorist groups by effective border controls (UN Security Council 2001, para. 2(g)); and to find ways of intensifying and accelerating the exchange of operational information, such as the use of communications technologies by terrorist groups (UN Security Council 2001, para. 3(a)).

At the EU level, the European Council met in an extraordinary session on 21<sup>st</sup> September 2001 in order to analyze the international situation following the terrorist attacks in the United States, and to impart the necessary impetus to the actions of the European Union (European Council 2001, 1). In this meeting, the European Council decided that the fight against terrorism would be a priority objective of the European Union (European Council 2001, 1). The EU reaffirmed its policy of solidarity and cooperation with the US, and shaped its own policy to combat terrorism, such as enhancing police and judicial cooperation, developing international legal instruments, putting an end to the funding of terrorism, strengthening air security, coordinating the European Union's global action, etc. (European Council 2001, 1–3). The meeting also looked at the many possible challenges posed by terrorism, such as air safety, regional conflict, refugee flow and slowdown of the economy. With this meeting, the European Union again adopted a common definition of terrorism, along with the conclusion at Tampere (European Council 2001, 1). Later on, the common definition of the concept of “terrorism” was introduced in the Framework Decision 2002/475/JHA.

To effectively tackle terrorism, Framework Decision 2002/475/JHA was adopted by the Council of the European Union on 13<sup>th</sup> June 2002. It harmonized for the first time the definition of terrorist offences in all EU Member States, by introducing a specific and common definition of the concept of “terrorism”<sup>6</sup>, setting forth

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<sup>6</sup> Council Framework Decision of 13 June 2002 on combating terrorism  
Article 1

Terrorist offences and fundamental rights and principles

1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in

jurisdictional rules to ensure that terrorist offences may be effectively prosecuted, and outlining specific measures with regards to victims of terrorist offences. The Framework Decision 2002/475/JHA also required that incitement to terrorism shall be punished by the Member States of the EU:

#### Article 4

##### Inciting, aiding or abetting, and attempting

1. Each Member State shall take the necessary measures to ensure that inciting or aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable [...].

2. Each Member State shall take the necessary measures to ensure that attempting to commit an offence referred to in Article 1(1) and Article 3, with the exception of possession as provided for in Article 1(1)(f) and the offence referred to in Article 1(1)(i), is made punishable.

Shortly after the 3/11 terrorist attack in Madrid in 2004, on 25<sup>th</sup> March the European Council announced the Declaration on Combating Terrorism, believing that full implementation of measures to combat terrorism was a matter of urgency. The events in Madrid had been the last straw that pushed the conclusions of the 21<sup>th</sup> September 2001 meeting to come into effect: the Union had to increase its

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points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

- seriously intimidating a population, or  
- unduly compelling a Government or international organisation to perform or abstain from performing any act,  
or

- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,  
shall be deemed to be terrorist offences:

(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 or chemical weapons, as well as research into, and development of, biological and chemical 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) threatening to commit any of the acts listed in (a) to (h).

2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

See "Offences relating to a terrorist group" in Article 2 and "Offences linked to terrorist activities" in Article 3.

involvement in the efforts of the international community to prevent and stabilize regional conflicts (European Council 2004, 2). The European Council called for the development of an EU long-term strategy to address all the factors which contribute to terrorism (European Council 2004, 2). And it recalled that “European Council welcomes the political commitment of the Member States, and of the acceding States, to act jointly against terrorist acts, in the spirit of the Solidarity Clause contained in Article 42 of the draft Constitution for Europe.”

Having adopted the Declaration on Combating Terrorism at its meeting on 25<sup>th</sup> March 2004, the European Council published the EU Plan of Action on Combating Terrorism on 11<sup>th</sup> May 2004, with fixed deadlines for the plan of action, where one of the objectives was to address the factors which contribute to, support, and recruit to terrorism and to protect the security of international transport and ensure effective systems of border control. The Declaration, against that background, mandated the preparation of a revised Plan of Action to Combat Terrorism.

According to the assessment report of 8<sup>th</sup> June 2004 of the Council Framework Decision 2002/475/JHA on combating terrorism, it appears that member states would comply implicitly with article 4 of the Framework Decision by applying general rules on complicity and inchoate offences (Commission of the European Communities 2004, 6). Till 24<sup>th</sup> June 2004, only eight countries out of forty-five EU states could be deemed as states with legislation that specifically criminalized “incitement to terrorism” and three of them (Denmark, France and Spain) also mention “apologie du terrorisme” as a special crime (Committee of experts on terrorism (CODEXTER) 2004, 28; Ribbelink and Council of Europe 2004, 43). A number of states raised the problem of free expression and press, if "apologie du terrorisme" were to become a crime (Bunyan 2005, 25). From the perspective of the EU, only a small portion of its Member States specifically criminalized incitement to terrorism in 2004.

It was not until 2005 that the act of incitement of terrorism was stressed more frequently and emphasized to a certain extent, because of the adoption of the legal documents of UN Resolution 1624 (2005) and of the Council of Europe Convention on the Prevention of Terrorism (2005). The Council of Europe Convention on the

Prevention of Terrorism (2005) was adopted shortly before Resolution 1624 (2005), with similar objectives, and influenced the drafting of Resolution 1624 (2005) (Ronen 2010, 660–661).

The Council of Europe Convention on the Prevention of Terrorism, signed in Warsaw on 16<sup>th</sup> May 2005, required parties to criminalize under their domestic law certain acts that may lead to the commission of terrorist offences, such as public provocation and recruitment, etc., all of which may be committed through the Internet (UNODC 2012, 21).

#### Article 5 – Public provocation to commit a terrorist offence

1 For the purposes of this Convention, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

2 Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

#### Article 6 – Recruitment for terrorism

1 For the purposes of this Convention, "recruitment for terrorism" means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group.

2 Each Party shall adopt such measures as may be necessary to establish recruitment for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

The Council of Europe Convention on the Prevention of Terrorism of 2005 clearly required the criminalization of the provocation to commit ‘terrorist offences’, and expressly defined those by reference to the convention appendix. On the other hand, at a UN level, Resolution 1624 (2005), adopted on 14<sup>th</sup> September 2005, refers to ‘terrorist acts’ rather than to ‘terrorist offences’, suggesting a broader category of target conducts (Ronen 2010, 662).

Building on Resolution 1373 (2001) and others concerned with threats to international peace and security caused by acts of terrorism, Resolution 1624 (2005) put its emphasis on prevention and on social contexts that may be conducive to the spreading of terrorism. It also addressed the threat posed by the incitement and recruitment to terrorism, something that is still relevant today with the increasing use of the internet and of social media. It called on States to prevent and prohibit incitement to commit terrorist acts, strengthen international cooperation and border control, and enhance dialogue and understanding among civilizations. In resolution 1624(2005), the role of media in countering terrorism had been further stressed compared with the resolution 1373(2001)(UN Security Council 2005, pt. preamble). The importance for the States to cooperatively act to prevent terrorists from exploiting technology, communications and resources to incite support for criminal acts has also been recognized in resolution in 2005 (UN Security Council 2005, pt. preamble).

According to the head of the UN Committee's Executive Directorate (CTED), Mike Smith, it is "critical to address the conditions that terrorist recruiters exploit to persuade young people to support their cause." UN Resolution 1624 (2005) called the international community's attention to the messages that often precede acts of terrorism (United Nations Security Council Counter-Terrorism Committee 2015). It not only *condemned* the incitement of terrorist acts (UN Security Council 2005, pt. preamble), *repudiated* attempts of justification or glorification (apologie) of terrorist acts that may incite further terrorist acts (UN Security Council 2005, pt. preamble), and as previously mentioned in resolution 1373 (2001), reaffirmed that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly inciting terrorist acts are also contrary to the purposes and principles of the United Nations(UN Security Council 2005, pt. preamble); but, furthermore, it required states to *prohibit* incitement to commit a terrorist act *by law*:(UN Security Council 2005, 3)

1. *Calls* upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:
  - (a) Prohibit by law incitement to commit a terrorist act or acts;
  - (b) Prevent such conduct;

(c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct;

3. *Calls upon* all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, in an effort [...] to take all measures to counter incitement of terrorist acts motivated by extremism and intolerance [...]

In its resolution 1624 (2005), the Security Council, *inter alia*, called upon States to act ‘by all means’ and to take ‘measures as may be necessary and appropriate’ to prohibit incitement to terrorist acts. Meanwhile, States were called upon to ensure that measures targeting acts inciting terrorism fully conform to their international obligations under human rights law, refugee law and humanitarian law (UNODC 2012, 135). However, the adopted UN resolution had a non-binding status (van Ginkel 2011, 18), or at least the mandatory nature of this resolution was ambiguous (Ronen 2010, 650).

In 2005, both EU and UN legal documents directly addressed ‘modern’ terrorism (Ronen 2010, 648). The breakthrough in the legal responses both at EU and UN levels might be attributed to the phenomenon of terrorists starting to communicate via the internet and accordingly posing threats to the homeland security both regionally and globally. For example, around 2005, there were two major events that could be regarded as landmark tragedies, namely the 3/11 terrorist attacks in Madrid in 2004 (Miquel 2009)<sup>7</sup> and the London 7/7 bombing attack in 2005 (BBC Newsround 2015). Four months prior to the Madrid train bombings, in December 2003, there were incitement messages posted on an Al-Qaeda website (Matusitz 2013, 343). The message was intended “to force the Spanish government to withdraw from Iraq, the resistance should deal painful blows to its forces...It is necessary to make the utmost use of the upcoming general election in March next year. We think that the Spanish government could not tolerate more than two, maximum three blows, after which it will have to withdraw as a result of popular pressure...”(Lia 2007, 84; Lia and Hegghammer 2004, 369) The official assessment of the 7/7 London bombing attacks

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<sup>7</sup> The Spanish legal system concluded that this operation, attributed first to ETA and then to Al Qaeda, was Islamist inspired, though not linked with international networks.

had also concluded that the “the London attacks were a modest, simple affair by four seemingly normal men using the Internet”(Kirby 2007, 415; Townsend 2006).

Considering the deteriorating situation of terrorism in Europe, on 30<sup>th</sup> November 2005, the Council of the European Union put forward a new policy, the *European Union Counter-Terrorism Strategy*, which was structured in four strategic strands, namely, “Prevent, Protect, Pursue and Respond”. It emphasized the strategic commitment to tackle the factors and root causes which can lead to radicalization and recruitment in Europe and internationally (Council of the European Union 2005, 3). In December 2015, the EU Strategy for Combating Radicalization and Recruitment (EU doc.14781/1/05) was adopted, which effectively implemented the “prevent” strands (Coolsaet 2008, 148).

#### 4.2.2. UN Global Counter Terrorism Strategy 2006, EU Framework Decision 2008 and UN Resolutions 1963 (2010)

Meanwhile, the role of the internet and the importance of instigation, recruitment, training and communication to the terrorists have been emphasized in UN strategies or reports such as the *Uniting against Terrorism: Recommendations for Global Counterterrorism Strategy* on 27<sup>th</sup> April 2006, and the *United Nations Global Counter-Terrorism Strategy* in September 2006.

It seems that from 2006 the international community started to reach a common understanding that the internet enables and accelerates violent extremism and sought a multi-lateral cooperation on combating terrorism. The report of the Secretary-General of the United Nations ‘*Uniting against Terrorism: Recommendations for Global Counterterrorism Strategy*’, of 27<sup>th</sup> April 2006, interprets Resolution 1624 (2005) as providing a basis for the criminalization of the incitement to terrorist acts and recruitment, including through the Internet. In this report, the Secretary-General explicitly stated: “the ability to generate and move finances, to acquire weapons, to recruit and train cadres, and to communicate, particularly through use of the Internet, are all essential to terrorists.”(UN General

Assembly 2006a, para. 38) It was asserted that the Internet was a rapidly growing vehicle for terrorist recruitment and dissemination of information and propaganda, which must be countered through coordinated action by Member States, while respecting human rights and other obligations under international law (UN General Assembly 2006, para. 58, 60). Later, on 8<sup>th</sup> September 2006, the Global Counter-Terrorism Strategy, which was adopted by the United Nations General Assembly, presents a milestone in the domain of multilateral counter-terrorism initiatives,(UNODC 2012, 16) signaling that Member States were moving towards a sense of common purpose and strategic framework in defeating the global threat of terrorism (UN General Assembly 2006b, 1 and 3). The Strategy called on the Member States,

Resolved to work with the United Nations with due regard to confidentiality, respecting human rights and in compliance with other obligations under international law, to explore ways and means to “(a) Coordinate efforts at the international and regional levels to counter terrorism in all its forms and manifestations on the Internet; (b) Use the Internet as a tool for countering the spread of terrorism, while recognizing that States may require assistance in this regard”

Since the adoption of the UN Strategy against terrorism in 2006, much of the implementation work has been initiated by the UN system, under the leadership of the CTITF.<sup>8</sup> And Resolution 1624 (2005) has been consistently mentioned to enhance the implementation in consequent documents at UN level, during the following ten years after its adoption.

The UN Global Counter-Terrorism Strategy is composed of four pillars (United Nations Office of Counter-Terrorism and Counter-Terrorism Implementation Task Force n.d.)<sup>9</sup>. In the first pillar, named *Measures to address the conditions conducive*

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<sup>8</sup> The United Nations Counter-Terrorism Implementation Task Force (CTITF) was established by the Secretary-General in 2005 to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system. CTITF is chaired by a senior United Nations official appointed by the Secretary-General and consists of 30 United Nations system entities and INTERPOL <https://www.opcw.org/special-sections/ctitf-report/the-role-of-the-counter-terrorism-implementation-task-force-ctitf/>

<sup>9</sup> Addressing conditions conducive to the spread of terrorism, combating and preventing terrorism, building



to the spread of terrorism<sup>10</sup>, the UN resolved to undertake the following measures aimed at addressing the conditions conducive to the spread of terrorism:

continue to work to adopt such measures as may be necessary and appropriate and in accordance with our obligations under international law to prohibit by law incitement to commit a terrorist act or acts and prevent such conduct. Prohibit by law incitement to commit a terrorist act or acts and prevent such conduct.

Moreover, in the second pillar, *Measures to prevent and combat terrorism*, terrorism, in all its forms and manifestations on the Internet, is called to be countered in coordinate efforts at an international and regional level, with respect for human rights, due regard to confidentiality, and in compliance with other obligations under international law.<sup>11</sup>

The General Assembly reviews the United Nations Global Counter-Terrorism Strategy every two years, in order to provide updated guidance for the Member States in terms of the legal practice of combatting terrorism, while at the same time reiterating that the implementation of the strategy itself rests with the Member States (UN General Assembly 2014a, 19).

In the following years, the OSCE and the CoE have also developed holistic counterterrorism programs that in many ways mirror the breadth of the European Strategy itself, while placing a premium on coordination with the United Nations (Rosand et al. 2008, 14). The OSCE sought to provide a forum for addressing some of the emerging threats, including the misuse of the internet to recruit and train new members, collect and transfer funds, organize attacks and incite violence (OSCE, n.d., 3). In 2007, the implementation of the United Nations Global Counter-Terrorism Strategy had been a major objective for high-level representatives of the OSCE, the United Nations and the Council of Europe in Vienna (OSCE 2007). The *ministerial*

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national capacities to counter terrorism and upholding the principles of human rights and the rule of law while countering terrorism, as the plans of the action for the Member State to combat terrorism.

United Nations Office of Counter-Terrorism and Counter-Terrorism Implementation Task Force <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>

<sup>10</sup> United Nations Office of Counter-Terrorism and Counter-Terrorism Implementation Task Force <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>

<sup>11</sup> United Nations Office of Counter-Terrorism and Counter-Terrorism Implementation Task Force <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>.

*statement on supporting the United Nations global counter-terrorism strategy* adopted by the 56 OSCE participating states was published on 30<sup>th</sup> November 2007. The statement showed grave concerns on countering the use of internet for terrorist purposes and countering violent extremism and radicalization of terrorism;

14. Remaining seriously concerned about the use of the Internet for terrorist purposes, the OSCE participating States will continue the exchange of information about this threat, and take other measures in accordance with Ministerial Council Decision No. 7/06 on countering the use of the Internet for terrorist purposes.

15. The OSCE will support efforts by the UN Counter-Terrorism Committee/Counter-Terrorism Committee Executive Directorate to advance implementation of UN Security Council resolution 1624 (2005);

17. The OSCE will continue its activities in countering violent extremism and radicalization that lead to terrorism.

The statement also recognizes “the leading role of the United Nations in the international efforts against terrorism” and recalls “the comprehensive global approach of the Strategy towards countering terrorism by addressing not only its manifestations, but also the conditions conducive to its spread.”(OSCE Ministerial Council 2007, para. 3)

Before three new offences were introduced by Council Framework Decision 2008/919/JHA, the implementation of Framework Decision 2002/475/JHA 2002 on combating terrorism in the national level was assessed and reported in the same year, 2007. According to the official report, in 2007 “only some Member States have specific provisions implementing Article 4,” while most Member States have implicitly implemented Article 4, provided the preceding articles have been fully implemented by applying general rules on complicity and inchoate offences(Commission of the European Communities 2007, 8).

The specific criminalization of the conducts that facilitate the modern terrorism became mandatory following the adoption of the Framework Decision 2008/919/JHA of 28<sup>th</sup> November 2008. In response to the growing terrorist threats, including the use of new technologies such as the Internet, the 2005 convention was incorporated into

EU law through the amendment of the Framework Decision on Combating Terrorism (2008/919/JHA)(Council of the European Union 2008), with 2010 as the deadline for criminalizing the ‘public provocation to commit a terrorist offence’ under the domestic laws of the member states (Ronen 2010, 661). Council Framework Decision 2008/919/JHA of 28<sup>th</sup> November 2008 amended Framework Decision 2002/475/JHA on combating terrorism. The 2008 Framework Decision specifically revised the provisions of public provocation to commit a terrorist offence, recruitment for terrorism, etc.

1. Article 3 shall be replaced by the following:

Article 3

Offences linked to terrorist activities

1. For the purposes of this Framework Decision:

(a) “public provocation to commit a terrorist offence” shall mean the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed;

(b) “recruitment for terrorism” shall mean soliciting another person to commit one of the offences listed in Article 1(1)(a) to (h), or in Article 2(2); Each Member State shall take the necessary measures to ensure that inciting an offence referred to in Article 1(1), Article 2 or Article 3(2)(d) to (f) is made punishable.

2. Each Member State shall take the necessary measures to ensure that offences linked to terrorist activities include the following intentional acts:

(a) Public provocation to commit a terrorist offence;

(b) Recruitment for terrorism; [...]

Framework Decision 2008/919/JHA provides, therefore, a basis for prosecuting the dissemination of terrorist propaganda through the Internet, to the extent that such dissemination is committed intentionally and meets the requirements of the named offences (UNODC 2012, 23). The amendments to framework decision 2002/475/JHA relating to the offences of public provocation and recruitment were based on same provisions of the Council of Europe Convention on the Prevention of Terrorism (European Commission 2008).

As with the Council of Europe Convention on the Prevention of Terrorism 2005,

the provisions of framework decision 2008/919/JHA are not internet-specific, while they both cover activities conducted by means of the Internet (UNODC 2012, 23). However, the role of internet was emphasized in the preamble of the Council Framework Decision 2008/919/JHA, which pointed out that the “the current inter-link international networks” of the terrorists’ *modus operandi* increasingly “relies on the use of new technologies, in particular the Internet.” And the same preamble recognized that

the Internet is used to inspire and mobilize local terrorist networks and individuals in Europe and also serves as a source of information on terrorist means and methods, thus functioning as a ‘virtual training camp’. Activities of public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism have multiplied at very low cost and risk.

In this 2008 Framework Decision, the role as a security authority of the Union as a whole has been reminded and underlined again, as in The Hague Programme on strengthening freedom, security and justice in the European Union, which was adopted by the European Council on 5<sup>th</sup> November 2004 (The Council of the European Union 2008, vol. 330, pt. preamble (5)).

According to the 2008 Framework Decision, the fundamental rights shall not be restricted and reduced, while the implementation of the criminalization should respect the principle of proportionality:

(13) The Union observes the principles recognized by Article 6(2) of the EU Treaty and reflected in the Charter of Fundamental Rights of the European Union, notably Chapters II and VI thereof. Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as freedom of expression, assembly, or of association, the right to respect for private and family life, including the right to respect of the confidentiality of correspondence.

(14) Public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism are intentional crimes. Therefore, nothing in this Framework Decision may 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, including terrorism, falls outside the scope of this Framework Decision and, in particular, of the definition of public provocation to commit terrorist offences.

(15) The implementation of the criminalization under this Framework Decision 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 or discrimination [...]

There is a slight difference between the 2005 Council of Europe Convention and 2008 EU framework Decision. The 2008 EU Framework Decision required the criminalization of a provocation to commit a ‘terrorist offence’, and this term had a broader meaning than in the *Council of Europe’s Convention on the Prevention of Terrorism* in 2005 (Ronen 2010). Many of the acts listed in the 2008 Framework Decision correspond to specific international treaty offences; however, they are defined in the Framework Decision more generally (Ronen 2010, 663).

To facilitate the UN Global Counter Terrorism Strategy 2006, a report was published on February 2009 by the Working Groups of the United Nations Counter-Terrorism Implementation Task Force (CTITF), which aims to provide a common, coherent and focused counter-terrorism framework for entities of the United Nations system (Counter-Terrorism Implementation Task Force (CTITF) 2009, 2). In this report, the “*use of the internet for terrorist purposes*” started to become a specific phenomenon to be studied. The report suggests that all uses of the Internet for terrorist purposes should be classified according to four basic types of Internet use: (1) Use of the Internet to perform terrorist attacks by remotely altering information on computer systems or disrupting the flow of data between computer systems; (2) Use of the Internet as an information source for terrorist activities; (3) Use of the Internet as a means for disseminating information relevant to the advancement of terrorist purposes and (4) Use of the Internet as a means for supporting communities and networks dedicated either to pursuing or supporting acts of terrorism (Counter-Terrorism Implementation Task Force (CTITF) 2009, 2). The report pointed out that “the latter two are the areas in which terrorism and the internet appear most obviously to convert into a distinct, new phenomenon, which may require specific types of

counter-strategies.” Specific concerns of recruitment, propaganda, radicalization and other phenomenon were expressed in this report, where six States expressed concern about the use of the internet for terrorist recruitment, “interactive forms of recruitment” and “self-ignition” have suggested a ‘bottom up’ understanding of recruitment (Counter-Terrorism Implementation Task Force (CTITF) 2009, 6), radicalization are closely related to recruitment and the issue of radicalization on the internet was addressed directly by only one State. Several others dealt with it indirectly (Counter-Terrorism Implementation Task Force (CTITF) 2009, 7). According to this report, the use of the Internet to transmit terrorist propaganda was a commonly expressed concern. In some state jurisdictions content that advocates violence is illegal; in others it is not. The radical ideology that caused most concern appeared to be that of Al-Qaida and its related organizations(Counter-Terrorism Implementation Task Force (CTITF) 2009, 6–7).

To further assist Member States in identifying challenges and opportunities in countering the use of the internet for terrorist purposes, the CTITF Working Group on Countering the Use of the Internet for Terrorist Purposes undertook a three-stage project from October 2009 to April 2011, researching and analyzing legal, technical, and counter-narrative aspects.

Having recognized that the use of the internet for terrorist purposes cannot be addressed nor resolved solely through legal solutions(United Nations Counter-Terrorism Implementation Task Force and Working Group Compendium 2011, vi), the same Working Group held a second workshop of international experts in Redmond, Washington (USA) which was hosted by the Microsoft Corporation. In May 2011, the Working Group published a report titled: *Countering the Use of the Internet for Terrorist Purposes — Legal and Technical Aspects*, made the technical challenges and solutions available for countering the use of the Internet for terrorist purposes. In the May 2011 report, from a technological perspective, some counter measures and opportunities, such as establishing national countering filter system, launching of distributed denial of service (DDOS) attacks against terrorist websites are provided for the member states to address the internet as a tool of propaganda and

radicalization, although there are still some changes left (United Nations Counter-Terrorism Implementation Task Force and Working Group Compendium 2011, 27–31). Owing to the problems and challenges of blocking the terrorism content, projects on the monitoring online activities of terrorists and exploit them for intelligence and law enforcement purposes were held and presented at the CTITF Expert Workshop, for example, the 2007 Europol ‘Check the Web’ project (Council document 8457/3/07), the 2007 “Joint Internet Centre” in Germany (Gemeinsames Internetzentrum—GIZ) and the 2009 Interpol Monitoring Assessment and Partners (MAP).

In terms of UN documents, it was not until 20<sup>th</sup> December 2010, with the adoption of Resolutions 1963 (2010), that the non-binding status of the original resolution 1624 (2005) seemed to be morphing into a more coercive status (van Ginkel 2011, 18). In Resolution 1963 (2010), the Security Council expressed “concern at the increased use, in a globalized society, by terrorists of new information and communications technologies, in particular the Internet, for the purposes of the recruitment and incitement as well as for the financing, planning and preparation of their activities” (UNODC 2012, 17). Most importantly, in Resolution 1963 (2010), States were invited to report on their progress on criminalizing incitement to terrorism with exact deadlines and receive advice on how they can most efficiently do so. In Resolution 1963 (2010), the Council directed the Counter-Terrorism Committee Executive Directorate (CTED) to provide an updated Global Implementation Survey of Resolution 1373 (2001) by 30<sup>th</sup> June 2011, and a Global Implementation Survey of Resolution 1624 (2005) by 31<sup>st</sup> December 2011 (United Nations Meetings Coverage and Press Releases 2010). Through the posting of these reports on the website of the Counter-Terrorism Committee, the peer pressure in relation to implementing this resolution started to increase (van Ginkel 2011, 18).

4.3 The UN, EU and OSCE legal and political frameworks to respond to foreign fighters and their recruitment from 2011 to 2017

Up to June 2011, some two-thirds of UN Member States had either ratified or acceded to at least 10 of the 16 universal counter-terrorism instruments<sup>12</sup> (UNODC 2012, 18). These conventions range from aircraft hijacking to terrorist financing (Security Council Counter-Terrorism Committee n.d.).<sup>13</sup> In the course of the years between 2011 and 2014, a new global terrorism situation had emerged, and the previous warfare situation was changed: Ben Laden was killed in May of 2011, and the Iraq war, started in 2003, eventually came to the end in December 2011. After the withdrawal of U.S. troops in 2011, the Iraq insurgency upraised. From 2011, armed groups inside Iraq were increasingly galvanized by the Syrian Civil War, with which it merged in 2014. In the year of 2014, Islamic State was declared to be established (Withnall 2014). Meanwhile, internet had played significant role to facilitate the terrorist radicalization. The Islamic State had developed effective virtual propaganda machinery (Zelin 2015, 95), and relied also heavily on the recruitment of foreign fighters, not only the local supports (Zelin 2015, 85). Lone-wolf terrorism attacks became more unpredictable and globally wide-spread after 2011. The very Norway Oslo terrorist event – which had in fact nothing to do with Islamic fundamentalism – can be regarded as a remarkable example to prove that even countries publicly oppose to Iraq war started to suffer lone-wolf terrorism attacks.

In this context, the phenomenon of “the use of internet for terrorism purposes” started to attract interest from different levels of organs. However, the EU documents during those years do not recognize the same classification within UN system. In the UN system, the document “*The use of the Internet for terrorist purposes*”(UNODC 2012, 2)<sup>14</sup>, which was published on September 2012, classified the term of “the use of the internet for terrorist purposes” into six categories: namely, *propaganda* (including

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<sup>12</sup> This 16 number was changed now to 19 in 2018.

<sup>13</sup> The 16 international legal instruments increased to 19 currently. They are Aircraft Convention, Unlawful Seizure Convention, Civil Aviation Convention, Diplomatic Agents, Hostage Taking Convention, Nuclear Material Convention, Amendments to the Nuclear Material Convention, Airport Protocol, Maritime Convention, Protocol to the Maritime Convention, Fixed Platform Protocol, Protocol to the Protocol on Fixed Platform, Convention on the Marking of Plastic Explosives for the Purpose of Detection, Terrorist Bombing Convention, Terrorist Financing Convention, Nuclear Terrorism Convention.

<sup>14</sup> It is a practical guidance to Member States to facilitate the more effective investigation and prosecution of terrorist cases involving the use of the internet. This guidance is a follow up document of 2009 report conducted within the framework of the Working Group.



recruitment, radicalization and incitement to terrorism); *financing; training; planning* (including through secret communication and open-source information); *execution; and cyber-attacks*. But, it was also mentioned that those six categories are sometimes overlapping.

The EU documents do not recognize the same classification within UN system. For example, in a report named “*Reducing the Terrorist Use of the Internet*” published in January 2013(The Clean IT project team 2013, 6)<sup>15</sup>, the “Terrorist Use of the Internet” was defined as *public provocation* (radicalization, incitement, propaganda or glorification), *recruitment, training* (learning), and *planning and organization of* terrorist activities (The Clean IT project team 2013, 9). This is likely because of the impact of the Council of Europe Convention on the Prevention of Terrorism of 2005, where public provocation and recruitment to terrorism are expressively criminalized as new offences. Meanwhile, the classification from UN system does not pay close attention that if the propaganda is conducted publicly or not.

Although several ambitious strategies and programs, such as the establishment of RAN (Migration and Home Affairs - European Commission 2016)<sup>16</sup> were launched at a supranational level to respond the Foreign Terrorism Fighter phenomenon, the following part will only focus on the analysis of the content and background of some new political and legal frameworks related to the prevention and suppression of the radicalization and recruitment of Foreign Terrorism Fighters, such as criminalizing public provocation of, incitement to and recruitment for terrorism, including through the internet. Specifically, the international and regional communities have revised several strategies, frameworks and adopted new resolutions to address those issues, such as UN Resolutions No. 2170 and No. 2178, the 2015 Directive Proposal(European Commission 2015), 2015 Council of Europe Additional protocol (Council of Europe 2015) and EU Directive 2017/541(The European Parliament and the Council of the European Union 2017).

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<sup>15</sup> It is a report of a project was started in June 2011 with the financial support of the European Commission and some government partners.

<sup>16</sup> For example, a set of 22 measures adopted by the Council in June 2013, and the establish of RAN, RAN is a network of frontline or grassroots practitioners from around Europe who work daily with people who have already been radicalized, or who are vulnerable to radicalization. Practitioners include police and prison authorities, but also those who are not traditionally involved in counter-terrorism activities, such as teachers, youth workers, civil society representatives, local authorities’ representatives and healthcare professionals.

4.3.1. The UN Global Counter Terrorism Strategy implementation reports, UN Resolutions 2170(2014) and 2178(2014)

4.3.1.1 The UN Global Counter Terrorism Strategy implementation reports

According to the Global Terrorism Index 2015 issued by the Institute for Economic and Peace (Institute for Economics & Peace 2015), since 2011, global terrorism has caused an increasing number of countries to experience terrorist attacks and deaths each year (Institute for Economics & Peace 2015, 9). In 2014 terrorism impacted more countries than ever before. Attacks were recorded in 93 countries, up from 88 in 2013. Furthermore, there was a 120 per cent increase in the number of countries that recorded over 500 deaths: in 2014 eleven countries, up from five countries in 2013(Institute for Economics & Peace 2015, 9). As it is said in the end of the year Policy brief of 2014, *Addressing the Foreign Terrorist Fighters Phenomenon from a European Union Perspective*, “What is new these days is the scale of the threat”(Global Center on Cooperative Security, Human Security Collective, and International Centre for Counter-Terrorism 2014, 1). Unlike the situation in 2001, when many felt that Security Council Resolution 1373 (2001) was controversial for imposing universally binding legal obligations, the multilateral counterterrorism framework today is the product of a broad range of member states (Global Center on Cooperative Security, Human Security Collective, and International Centre for Counter-Terrorism 2014, 3).

Besides the countries under warfare and the countries supporting and leading the war, the rest of the world is also suffering from these terrorist attacks. For example, Norway did not support the US-led war in Iraq that began on 19 March 2003 (Encyclopedia.com 2007). However, “the Norway Oslo bombing attack happened in 2011 demonstrated that no area of the world is completely immune from terrorism and the future trajectory of the threat remains unpredictable.”(UN General Assembly 2014, para.10) The media reports of the Oslo bombing attack have analyzed the role of internet in the process of radicalization (Williams 2011). The terrorist in the Oslo

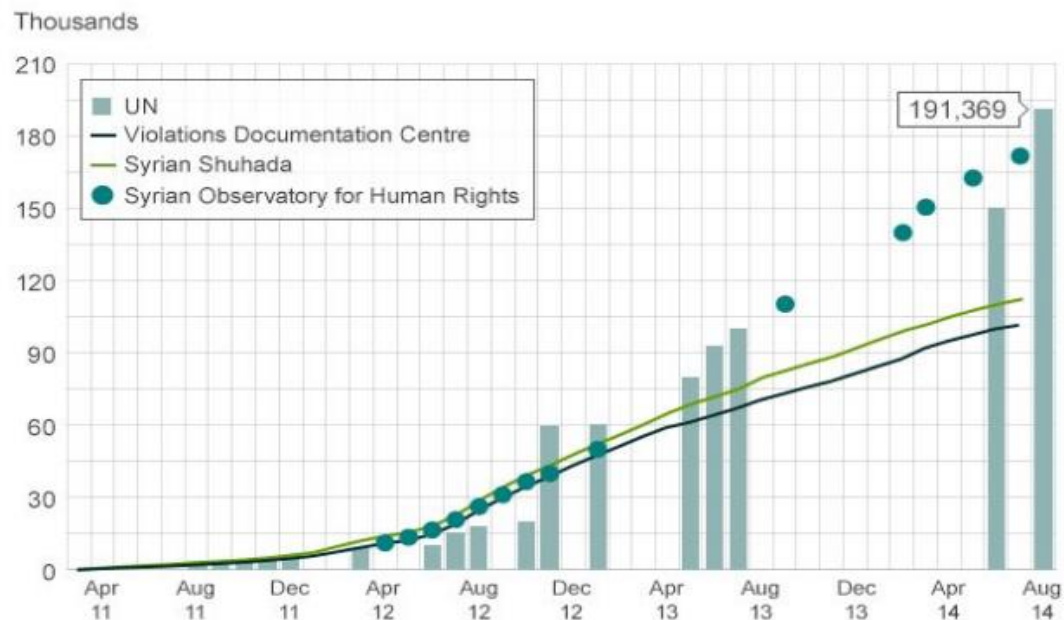
bombing attack, *Breivik*, had participated for years in debates on internet forums and spoken against Islam and immigration (Schwartz and Saltmarsh 2011). And he trained for the attacks by using the computer game *Call of Duty: Modern Warfare* (Pidd 2012). Anders Behring Breivik thought Norway and Europe were threatened by an Islamist conspiracy: he felt like he was doing a historically necessary deed in order to save his country – and Europe – from an existential threat (Lenz and Perona-Fjeldstad 2011, 1).

On the other side, the Syria civil war began in 2011, and had already been developing for three years in 2014. Less than two weeks after the adoption of Resolution 2161 (2014) on 29<sup>th</sup> June, ISIS declared that it had established a "caliphate" in the territory it controlled, stretching from Aleppo in north-western Syria to the eastern Iraqi province of Diyala. The group would be known as "Caliph Ibrahim" and it would be renamed as the Islamic State (IS), said its leader, Abu Bakr al-Baghdadi. In August 2014 the war situation was getting worse with leader Abu Bakr al-Baghdadi. Starting from 2<sup>nd</sup> August 2014, IS fighters pushed further into northern Iraq, overwhelming lightly-armed Kurdish Peshmerga forces that had moved into areas abandoned by the Iraqi army. The town of Sinjar was overrun and the strategically important Mosul Dam, which supplies water and electricity to much of Iraq, was seized. IS got control within 40 km (25 miles) of Irbil, the capital of Iraqi Kurdistan (BBC News 2014). On 8<sup>th</sup> August 2014, the US launched air strikes against IS militants near Irbil and around Mount Sinjar, its first direct involvement in a military operation in Iraq since American troops withdrew in late 2011 (BBC News 2014). On 13<sup>th</sup> August 2014, Islamic State militants launched an offensive in north-western Syria, capturing several villages and moving to within 50 km (30 miles) of the opposition-controlled suburbs of the city of Aleppo, and within striking distance of key rebel positions leading to the Turkish border (BBC News 2014).

Within only two months, from June to August 2014, the Syrian death toll had experienced an apparent increase with the declared establishment of the IS. The UN says more than 191,000 people have been killed in the Syrian conflict in the three years up to August 2014. Meanwhile, since 2011, between 25,000 and 30,000 foreign

terrorism fighters from 100 different countries have arrived in Iraq and Syria. The flow of foreign fighters is still high, with estimates suggesting that over 7,000 new recruits arrived in the first half of 2015 (Institute for Economics & Peace 2015).

### Syrian death toll



Note: Figures are cumulative

Source: BBC news: Syria conflict: Islamic State seizes Tabqa airbase, <http://www.bbc.com/news/world-middle-east-28918792>

Two months before the declaration of the renamed Islamic State in June 2014 and the fourth review of the Global Counter-Terrorism Strategy (A/RES/68/276), on 14<sup>th</sup> April 2014 the General Secretary launched the A/68/841 report, *Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy*, which started to clearly concern the issues of FTFs (UN General Assembly 2014a, para. 16), the use of internet (UN General Assembly 2014a, para. 17) and Violent Extremism (UN General Assembly 2014a, para. 20). In the A/68/841 report, Pillar I of the preventive aspects of counter-terrorism of *The UN Global Counter-Terrorism Strategy*, which calls for the conditions conducive to the spread of terrorism to be addressed, was emphasized as a priority (UN General Assembly 2014a, para. 107).

Multiple measures were also recommended in the A/68/841 report to prevent

radicalization and prohibit incitement to terrorism. For example, urging all Member States to take action to prevent and combat terrorism in all its forms and manifestations through the full and effective implementation of Resolution 1373 (2001) (UN General Assembly 2014a, para. 32); collecting good practices in areas relating to the prohibition and prevention of incitement and to the promotion of dialogue among civilizations by the Executive Directorate continuously engaging with States on their efforts to implement Security Council Resolution 1624 (2005)(UN General Assembly 2014a, para. 44); enhancing Member States' capacity to implement resolutions 1373 (2001) and 1624 (2005) with the delivered technical assistance facilitated by the Executive Directorate (UN General Assembly 2014a, para. 83); fostering community-led partnerships and prevention programs to build resilience against violent extremism, which benefit from the experience of civil society organizations and other actors on the ground(UN General Assembly 2014a, para. 107); extending law enforcement cooperation in newly emerging areas of vulnerability, namely the Internet, which is of particular concern as terrorists have abused it to radicalize, recruit, plan and promote their nefarious agendas (UN General Assembly 2014a, para. 110),etc.

The fourth review of the Strategy took place in June 2014. Taking into consideration the wording difference, two essential points of works were stressed, namely, “the importance of keeping the Strategy relevant and contemporary in the light of emerging new threats and evolving trends of international terrorism(UN General Assembly 2014b, para. 3); and the significance of a sustained and comprehensive approach, including through stronger efforts, where necessary, to address conditions conducive to the spread of terrorism, bearing in mind that terrorism will not be defeated by military force, law enforcement measures and intelligence operations alone.”(UN General Assembly 2014b, para. 8) This principle was again emphasized in the preamble to Resolution 2178.<sup>17</sup> Furthermore, Resolution 2178 further “underlined the need to address the conditions conducive to the spread of

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<sup>17</sup> Recognizing terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone.

terrorism, as outlined in Pillar I of the UN GCTS(A/RES/60/288).”(United Nations Security Council 2014b, 2)

#### 4.3.1.2 UN Resolutions 2170 (2014) and 2178 (2014) and the legal obligations for Member States

The emerging danger brought by the phenomenon of foreign terrorism fighters and its strategic use of internet had urged the UNSC to adopt two important resolutions in August and September of 2014.

The UNSC focused its attention on those involved in the recruitment of FTFs, and on those fighters themselves, formally demanding that all FTFs withdraw immediately (De Guttery, Capone, and Paulussen 2016, 267). Resolution 2170, adopted by the UN on 15<sup>th</sup> August 2014, also gravely concerned the impact of the violent extremist ideology and actions on stability (United Nations Security Council 2014a, 1).

The Security Council again prompted Member States to take all possible measures to prohibit the incitement of terrorist acts, and expressed the necessity of the readiness of the sanction for those individuals who are recruiting for ISIL or ANF, and for all other individuals, groups, undertakings and entities associated with Al-Qaida through information and communications technologies including the internet and social media or through any other means(United Nations Security Council 2014a, paras. 6, 18).

The Security Council,...expresses its readiness to consider listing individuals, groups, undertakings and entities providing support to ISIL or to ANF, including those who are .....recruiting for ISIL or ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida through information and communications technologies including the internet and social media or through any other means...

States were also imposed responsibilities with both preventive and repressive duties on combating the FTFs phenomenon, according to international law. For example, the state shall suppress the flow of FTFs and *prevent the movement* of

terrorists or terrorist groups as well. From a perspective of suggestion, Member States are encouraged to engage with those *within their territories* at risk of recruitment and violent radicalization to discourage travel to Syria and Iraq.

8. Calls upon all Member States to take national measures to suppress the flow of foreign terrorist fighters to, and bring to justice, in accordance with applicable international law, foreign terrorist fighters of, ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida, reiterates further the obligation of Member States to prevent the movement of terrorists or terrorist groups, in accordance with applicable international law, by, inter alia, effective border controls, and, in this context, to exchange information expeditiously, improve cooperation among competent authorities to prevent the movement of terrorists and terrorist groups to and from their territories, the supply of weapons for terrorists and financing that would support terrorists;

9. Encourages all Member States to engage with those within their territories at risk of recruitment and violent radicalization to discourage travel to Syria and Iraq for the purposes of supporting or fighting for ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida;

Scholars' analysis of this resolution had also pointed out that this resolution had represented a significant change in the priorities of the UN body in dealing with terrorism, compared with the UNSC Resolutions adopted immediately after 11 September 2001, namely, the need to fully respect human rights and the rule of law even in the combat against extremely dangerous and radicalized terrorist groups (De Guttry, Capone, and Paulussen 2016, 269).

Three days after the adoption of Resolution No. 2170, on 18<sup>th</sup> August 2014, supported by US air strikes, Iraqi troops and Peshmerga fighters took back the Mosul dam. Meanwhile, US President Barack Obama confirmed that the US was beginning a long-term strategy to help defeat the Islamic State (BBC News 2014). As a revenge for the US military intervention in Iraq, on 20<sup>th</sup> August 2014, two days later, the Islamic State published a video online, showing the killing of James Foley, an American journalist who was abducted in northern Syria in 2012. It is believed that the group is holding as many as 20 foreign hostages (BBC News 2014).

On 24<sup>th</sup> August 2014, fighters from the Islamic State (IS) took control of a key Syrian government airbase(BBC news 2014). The Tabqa airbase was the last remaining stronghold of Bashar al-Assad's government in the Raqqa province. The Syrian Observatory for Human Rights, a UK-based activist group with opposition ties, said clashes around the airbase were ongoing, but added that the base was under IS control. Hundreds of soldiers and IS fighters had died in the previous few days' fighting around the base. And the Syrian state television confirmed that government troops had lost control of the base (BBC news 2014).

One month later, Resolution No. 2178(2014) was adopted by the Security Council on 24<sup>th</sup> September 2014, only 40 days after the previous Resolution 2170(2014). There are some difference between Resolution 2178(2014) and Resolution 2170(2014). The former Resolution No. 2170 underlined the primary responsibility of UN member states to suppress and prevent the flow of foreign terrorist fighters,(Global Center For the Responsibility To Protect n.d.) while Resolution 2178 required states to prevent and suppress the recruiting of FTFs (United Nations Security Council 2014b, para. 5; U.S. Mission to the United Nations Office of Press and Public Diplomacy 2014). Resolution 2170 addressed only FTFs' joining or attempting to join ISIL, the ANF, and other al-Qaida affiliates and splinter groups, while Resolution 2178's obligations on states pertain to travel, travel financing, and travel facilitation in support of terrorist acts, terrorist training and recruitment of the travel of individuals without regard to ties to al-Qaida (United Nations Security Council 2014b, para. 6(a),(b),(c); Davis and Security 2014).

Measures to prevent and suppress the recruitment of FTFs are considered in Resolution No. 2178 from two perspectives: the prosecution and penalization of acts of recruitment for terrorism purpose as suppressive approach(United Nations Security Council 2014b, para. 6(c)), and the preventive approaches such as the development and implementation of rehabilitation and reintegration strategies(United Nations Security Council 2014b, 4), and the development of strategies to counter the violent extremist narrative that can incite terrorist acts(United Nations Security Council 2014b, para. 16), and to address the conditions conducive to the spread of violent



extremism, which can be conducive to terrorism(United Nations Security Council 2014b, para. 16).

In Resolution 2178, for the first time ever, the Council underscored that Countering Violent Extremism (CVE) is an essential element of an effective response to the FTF phenomenon (United Nations Security Council 2014b, para. 15). Resolution 2178 also focused existing UN counterterrorism bodies on the FTF threat, providing a framework for long-term monitoring and assistance to countries in their efforts to address this threat(United Nations Security Council 2014b, para. 21; U.S. Mission to the United Nations Office of Press and Public Diplomacy 2014). Resolution 2178 (2014) regards Countering Violent Extremism measures, such as preventing radicalization, recruitment, and mobilization of individuals into terrorist groups and becoming foreign fighters, as elementary approaches to terrorism prevention, and considers the foreign terrorism fighters as a part of emerging issues related to previous Resolutions 1373 (2001) and 1624 (2005)(United Nations Security Council 2014b, para. 25).

The good practice and the capacity gap of resolution implementation were requested to be identified (United Nations Security Council 2014b, para. 24). To facilitate the implementation of this resolution, the committees and executive offices were requested to report their efforts and positively take on their role to facilitate the terrorism combating task (United Nations Security Council 2014b, para. 26). In this sense, the measures to counter violent extremism were regarded as something essential, and there were pressures on the member states to implement the development of these measures. Considering that the countermeasures against violent extremism shall engage with the relevant local communities, there will not be one universal solution and approach (De Guttry, Capone, and Paulussen 2016, 277). Resolution 2178(2014) did not define the specific nature or objective of a CVE intervention, primarily because there is neither a clear typology for a violent extremist nor a clear and linear progression from expressed sympathy to actual support for violent extremism(William McCants and Watts 2012; Will McCants 2012; Schmid 2013, 11). Therefore it is left to government policies and frameworks makers to

design and decide.

Noticeably, special concern is expressed by the UNSC in this resolution to urge Member States to cooperate, according to the international law, in terms of addressing the threat posed by foreign terrorist fighters and preventing terrorists from exploiting technology, communication and resources to incite support for terrorist acts.

11. *Calls upon* Member States to improve international, regional, and subregional cooperation, if appropriate through bilateral agreements, to prevent the travel of foreign terrorist fighters from or through their territories, including through increased sharing of information for the purpose of identifying foreign terrorist fighters, the sharing and adoption of best practices, and improved understanding of the patterns of travel by foreign terrorist fighters, and for Member States to act cooperatively when taking national measures to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law;

In a statement issued on behalf of the Council by the President of the UNSC on 29 May 2015, it is underlined that the Council recognizes that ‘addressing the threat posed by foreign terrorist fighters requires comprehensively addressing underlying factors, including by preventing radicalization to terrorism, stemming recruitment, ..., countering violent extremism, which can be conducive to terrorism, countering incitement to terrorist acts motivated by extremism or intolerance, promoting political and religious tolerance, economic development and social cohesion and inclusiveness, ending and resolving armed conflicts, and facilitating reintegration and rehabilitation’ (United Nations Security Council 2015, 2).

This statement had again emphasized the importance of addressing the underlying factors on handling the problem of FTFs. However, as analyzed above, the CVE measures and approaches addressing the FTFs underlying factors depended on different traditions and cultures and left the specific approach to be implemented by different levels of decision makers (at a national, regional, and even local level).

#### 4.3.2. The EU legal Framework updates and OSCE recommendations

As a social problem, the EU had already started to address the foreign fighter threat as early as January 2013 (De Guttery, Capone, and Paulussen 2016, 299). Early in 2014, the policy document Hague/Marrakech Memorandum on *Good Practices for a More Effective Response to the FTF Phenomenon* was adopted by the Global Counterterrorism Forum (GCTF) (De Guttery, Capone, and Paulussen 2016, 302). From a legal perspective, updating the EU Framework Decision would allow UN Resolutions 2170(2014) and 2178(2014) to be collectively implemented (De Guttery, Capone, and Paulussen 2016, 314). The harmonized criminalization of foreign fighter related offenses across the EU would provide a common legal framework, which would also be an important reference point for EU agencies and facilitate cross-border cooperation (De Guttery, Capone, and Paulussen 2016, 314).

In September 2014, in the *Report on the implementation of the 2008 Framework Decision*, (European Commission 2014b, 5) the European Commission noted that most EU countries (apart from Ireland and Greece) had adopted measures to criminalize the newly introduced offences of public provocation, recruitment and training to terrorism. On 10<sup>th</sup> October 2014, the EU Counter-Terrorism Coordinator in the *Report on the implementation of the EU Counter-Terrorism Strategy* pointed out that there are a number of potential concerns in particular in relation to the criminalization under national provisions of "indirect provocation" and recruitment of "lone actors" (Council of the European Union 2014, 42).

The issue of radicalization and foreign terrorist fighters was also examined by the Committee of Experts on Terrorism (CODEXTER) at the occasion of its 27th plenary meeting on November 2014.

In December 2014, the OSCE Ministerial Council adopted the *Declaration on the OSCE role in countering the phenomenon of foreign terrorist fighters in the context of UN Security Council Resolutions 2170 (2014) and 2178 (2014)*, based on Resolution 2178 (De Guttery, Capone, and Paulussen 2016, 363). The Paragraph 4 in this declaration had called states to "enhance international co-operation to counter the use

of the Internet for the purposes of inciting violent extremism and radicalization that lead to terrorism and for recruiting foreign terrorist fighters, Paragraph 5 of this declaration called states to promote private and public partnerships to counter the incitement, recruitment, and travel of foreign terrorist fighters, as well as to prepare for and mitigate the threat posed by their return.”(Organization for Security and Co-operation in Europe Ministerial Council 2014, 2) On 22 January 2015, the Committee of Ministers, at the proposal of the CODEXTER, adopted the terms of reference for the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE). The COD-CTE, under the authority of the CODEXTER, was tasked with preparing an Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), examining a very broad scope of conducts committed intentionally for the purpose of terrorism, such as being recruited, receiving training, etc. The final Additional Protocol to the Convention was adopted by the Committee of Ministers at its 125th Session in Brussels (Belgium) on 19 May 2015. The Opening for signature of it was held at Riga, on 22<sup>nd</sup> of October 2015 and entered into force on 1<sup>st</sup> of July in 2017 with 6 rectifications of the Parties to the Convention, including 4 member states of Council of Europe.

It is worth to notice that Security Council Resolution 2178 (2014) and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism both require Member States, including States of the European Union, to criminalize the receiving of terrorist training and the provision of such training. The criminalization of the receipt of terrorist training is not, however, required by European Union Council Framework Decision 2008/919/JHA(UN High Commissioner for Refugees (UNHCR), 2015, 23).

Seven months after the adoption of OSCE Declaration at the end of 2014, the 2015 OSCE-wide counter-terrorism conference, planned for 30 June–1 July 2015 in Vienna, had focused on countering the incitement of foreign terrorist fighters and preventing their recruitment and departure. With this campaign, the OSCE collected and discussed good practices in countering the Incitement and Recruitment of Foreign Terrorist Fighters (FTF), and rallied all its participating states and partners to address

the need for everyone to mobilize and cooperate at all levels to counter violent extremism. Some more specific recommendations were provided by the OSCE platform in 2017.

On 2<sup>nd</sup> December 2015, the proposal for a directive of the European Parliament and of the council on combating terrorism, replacing Council Framework Decision 2002/475/JHA on combating terrorism, had provided some explanations of the specific situations in establishing minimum rules for “public provocation to commit a terrorist offence” and “recruitment for terrorism”(European Commission 2015, 16) to facilitate the criminal prosecutions. The punishment of the dissemination of those messages through the internet is specifically required in this proposal.

Article 5: Public provocation to commit a terrorist offence - This offence was introduced by the Framework Decision 2008/919/JHA (introducing a new offence in Article 3(1)(a)) to implement Article 5 of the Council of Europe Convention on the prevention of terrorism.

Under this provision are considered as punishable acts, for example, the glorification of suicide bombers, encouragement to join violent jihad, direct invitations to kill non-believers, justification of terrorism or the dissemination of messages or images of brutal assassinations as a way to gain publicity for the terrorists cause or prove their power, where such behavior actually creates the risk that terrorist acts will be committed and provided that the messages are disseminated with the purpose of furthering terrorist activities (not necessarily those of a specific terrorist organization). Such messages and images may also include those denigrating victims of terrorism, including their families. The provisions were also meant to ensure that dissemination of messages through the Internet encouraging the commission of terrorist offences or providing for terrorist expertise was made punishable.

Article 6: Recruitment for terrorism – This offence was introduced by Framework Decision 2008/919/JHA (introducing a new offence in Article 3(1)(b))to implement Article 6 of the Council of Europe Convention on the prevention of terrorism. As clarified in the explanatory notes to this Convention, punishment under this provision "requires that the recruiter intends that the person or persons he or she recruits commit or contribute to the commission of a terrorist offence or join an association or group for that purpose, whereas it is immaterial "whether the addressees of the solicitation actually participate in the commission of a terrorist offence or join an association or group for that purpose. This provision is meant to provide adequate criminal justice tools to stem extensive recruitment activities by

individuals or recruitment networks.

The 2015 proposal referred common understanding of terrorist-related crimes like public provocation, recruitment to terrorism, which have ensured that especially cross-border cases are dealt with more efficiently. It would be seen as the transportation of Framework Decision 2008/919 JHA into national legislations. (European Commission 2015, 11)

Finally, EU Directive 2017/541 of the European Parliament and of the Council was signed on 15<sup>th</sup> March 2017 (The European Parliament and the Council of the European Union 2017). As the (10) of the preamble of EU Directive 2017/541 suggests:

The offence of public provocation to commit a terrorist offence act comprises, inter alia, the glorification and justification of terrorism or the dissemination of messages or images online and offline, including those related to the victims of terrorism as a way to gather support for terrorist causes or to seriously intimidate the population. Such conduct should be punishable when it causes a danger that terrorist acts may be committed. In each concrete case, when considering whether such a danger is caused, the specific circumstances of the case should be taken into account, such as the author and the addressee of the message, as well as the context in which the act is committed. The significance and the credible nature of the danger should be also considered when applying the provision on public provocation in accordance with national law.

The criminalization of the “recruitment of a child for the purpose of terrorism” shall be applied with an aggravated punishment, as suggested in the (13) in this legal framework:

When recruitment and training for terrorism are directed towards a child, Member States should ensure that judges can take this circumstance into account when sentencing offenders, although there is no obligation on judges to increase the sentence. It remains within the discretion of the judge to assess that circumstance together with the other facts of the particular case.

There are two differences between the 2015 Proposal and the 2017 Directive: firstly, the 2017 Directive had explicitly stated that public provocation could be done in any form, either “directly or indirectly”, “such as by the glorification of terrorist acts.... causing a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally.” Secondly, the scope of Article 6 of the 2017 Directive is much wider than the 2015 Proposal. Not only the offenses listed as terrorist offenses are updated: illegal system interference is regulated as a new terrorist offense in the 2017 Directive, but also behaviors that soliciting another person “contribute to the commission of the terrorist offense” are criminalized as recruitment for terrorism, while in the 2015 Proposal recruitment for terrorism was confined to soliciting another person to commit the terrorist offenses.

Compared with the 2015 Proposal, new measures were introduced in article 21 of the Directive (EU) 2017/541, which allowed member states to take the necessary measures to ensure the prompt removal of online content constituting a public provocation to commit a terrorist offence and take measures to block access to such content towards the internet users within their territory. Along those measures, transparent procedures, for example requiring that users are informed of the reason for the measures taken against them, and adequate safeguards, such as possibility of judicial redress, shall be provided.

#### Article 21 Measures against public provocation content online

1. Member States shall take the necessary measures to ensure the prompt removal of online content constituting a public provocation to commit a terrorist offence, as referred to in Article 5, that is hosted in their territory. They shall also endeavor to obtain the removal of such content hosted outside their territory.
2. Member States may, when removal of the content referred to in paragraph 1 at its source is not feasible, take measures to block access to such content towards the internet users within their territory.
3. Measures of removal and blocking must be set following transparent procedures and provide adequate safeguards, in particular to ensure that those measures are limited to what is necessary and proportionate and that users are informed of the reason for those measures. Safeguards relating to removal or blocking shall also include the possibility of judicial redress.

Some content is pointed out directly in the Directive (EU) 2017/541, to be excluded from the definition of public provocation to commit terrorist offences.

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(The European Parliament and the Council of the European Union 2017, pt. preamble(40))

Two months later, the OSCE Conference held in May 2017 identified initiatives, lessons learned and challenges in the topics of preventing and countering Violent Extremism and Radicalization that Lead to Terrorism(VERLT) (OSCE 2017);according to the Chairmanship's Perception Paper of this conference published in July 2017, the topic of "Protecting Freedom of Expression when Countering Radicalization and Violent Extremism on the Internet" was one of the side-events convened by Denmark, Norway, United Kingdom and Austria (OSCE 2017, 4). Session 2 of the Chairmanship's Perception Paper on this conference had recommended the OSCE participating States and OSCE Partners to cooperate "to ensure a targeted and rule-of-law based approach to filtering and blocking online content in order to uphold freedom of expression and the media, recognizing that social media only serve as a catalyst not a cause of Violent Extremism and Radicalization that Lead to Terrorism and that violent extremism thrives on lack of information and disinformation."(Koja 2017, sec. 2)

Briefly speaking, although the UN and the EU have not been able to take on a decisive role regarding the Syrian conflict and foreign terrorist fighters, the EU and UN political and legal frameworks have reached some common understandings, such as applying both suppressive and preventive approaches to fight against lone actor terrorists and foreign fighters: the criminalization of terrorism propaganda crime, such as incitement, public provocation and recruitment for terrorism with the use of



internet was requested to be developed as suppressive approach, while applying appropriate measures to counter radicalization and recruitment to terrorism shall be developed as preventive approach according to different local experiences, solely repression is not a long-term solution and human rights must be respected even in the process of combating the most severe terrorism attacks.

New offenses were criminalized and the scope of punishable behaviors was broadened. The common understanding emphasized in the UN and EU legal frameworks had generally made for a balanced response to terrorism and violent extremism, attempting to combine repressive measures with preventive approaches. Although the “legislative” role of the UN resolutions triggered many questions concerning their far-reaching powers, the UN documents have played an important supportive role in coordinating the responses of the member states and guiding the legislation process of countries with common safety and justice needs. Although within the EU systems, security in general, and counter-terrorism in particular, have traditionally remained in the Member States' remit (Bąkowski, Puccio, and Parliament 2015, 1) , most EU member states have adopted measures to criminalize the offences of public provocation and recruitment to terrorism.

Therefore, from a legal perspective, as the states are the key actors in counter-terrorism, how states respond to those crimes and to what extent human rights will be respected are what I'm about to review in the following chapters. The review of the national practices will be focused on scrutinizing how and to what extent the incitement for terrorism purpose online are criminalized, and the proportionality of the punishment and the rehabilitation measures in the criminal justice system concerning those crimes and on these criminals will also be considered as an important indicator to be viewed as a well-balanced approach.

Response from non-European and non-Western countries will be reviewed as well, considering the different cultures and political regimes basis. The selection of countries' responses will include China as a representative of non-western countries with unitary system of long history, the US., a Western but non-European country, and the UK, two countries with very different standing points on freedom of speech, as

well as Italy, a Member State of the European Union, with specific geopolitical features, namely long Mediterranean coasts and the fact that it has long been influenced by religion and went through a special secularization process.

## 5. Terrorism expression crimes with the use of the internet in the jurisprudence of the US, the UK and Italy

To explore the boundaries of terrorism expression crimes in the selected countries, all forms of terrorism crimes facilitated by information or speech are included in this chapter. Freedom of speech is not absolute in the selected three countries. With the development of modern terrorism, both the common and civil law system are changing their ways of curbing the growth and transformation of terrorist organizations and networks (Margulies 2012, 480).

The selected three countries (US, UK and Italy) have developed different doctrines and approaches to interpret the statutes regarding terrorism expression offences with the use of internet, in their relation to the right to freedom of speech. To provide a general picture of each country, this chapter only chooses some typical cases to explore how the related terms were interpreted by the judges in the Supreme Courts in the US, the UK and Italy and how the interpreted scopes were changed owing to the current context.

As examples of typical boundary cases, incitement to terrorism in the US jurisprudence, possession of terrorism materials in the UK jurisprudence, and terrorism apology in Italian jurisprudence, the related statutes and their constitutional review in the Supreme Court of the US and the Constitutional Court in Italy will be briefly examined as well, in order to see the changing scope of terrorism expression crimes in the internet age and the accommodating practice to protect freedom of speech in those countries.

### 5.1. The incitement to terrorism offenses in the US jurisprudence

### 5.1.1. The Material Support for Terrorism Statute and its constitutional review by the Supreme Court

18 U.S.C. §§ 2339A and 2339B are two federal statutes criminalizing material support for terrorism or foreign terrorist organizations:

#### 18 U.S. Code § 2339A - Providing material support to terrorists

##### (a) Offense. —

Whoever provides *material support or resources* or conceals or disguises the nature, location, source, or ownership of *material support or resources*, knowing or intending that they are to be used in *preparation* for, or in *carrying out*, a violation of section [...] or in *preparation* for, or in *carrying out*, the concealment of an escape from the commission of any such violation, or *attempts or conspires* to do such an act, shall be [...] under this title....

##### (b) Definitions. —As used in this section—

(1) the term “*material support or resources*” means any property, tangible or intangible, or service, including [...] training, expert advice or assistance [...], personnel (1 or more individuals who may be or include oneself) [...], except medicine or religious materials;

(2) the term “*training*” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term “*expert advice or assistance*” means advice or assistance derived from scientific, technical or other specialized knowledge.

#### 18 U.S. Code § 2339B - Providing material support or resources to designated foreign terrorist organizations

##### (a) Prohibited Activities. —

##### (1) Unlawful conduct. —

Whoever *knowingly provides material support or resources* to a foreign terrorist organization, or *attempts or conspires* to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization [...], that the organization has engaged or engages in terrorist activity [...], or that the organization has engaged or engages in terrorism [...].

(4) the term “*material support or resources*” has the same meaning given that term in section 2339A (including the definitions of “*training*” and “*expert advice or assistance*” in that section);

(6) the term “*terrorist organization*” means an organization designated as

a terrorist organization under section 219 of the Immigration and Nationality Act.

(h) Provision of Personnel. —

No person may be prosecuted under this section in connection with the term “personnel” unless that person has *knowingly provided, attempted to provide, or conspired to provide* a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.

(i) Rule of Construction. —

Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

The creation of 18 U.S.C. §2339A, in 1994, along with the enactment of the Violent Crime Control and Law Enforcement Act in the same year,(Stacey 2016, 212; Doyle 2016, 1)<sup>18</sup> aimed to prevent financial support to terrorist organizations (Stacey 2016, 212; Knox 2014, 303). Two years later, in 1996, 18 U.S.C. §2339B, the second part of the Material Support Statute, was created as part of Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),(Stacey 2016, 212) which reflected a recognition of the fungibility of financial resources and other types of material support (Doyle 2016, 1). These new provisions use a common definition for the term “material support or resources”: any service or property tangible or intangible(Doyle 2016, pt. summary). This definition shows that support or resources do not necessarily need to be substantial, but cover a broad range of “activities”(Stacey 2016, 213; Knox 2014, 305). To limit the activities, the Congress provided specific definitions on “training”,<sup>19</sup> “expert advice or assistance”<sup>20</sup> and “personnel”.<sup>21</sup> The power to

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<sup>18</sup> The Violent Crime Control and Law Enforcement Act of 1994 was passed one year after the bombing of World Trade Center in 1993.

<sup>19</sup> 18 U.S. Code § 2339A - Providing material support to terrorists (b)(2) the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.

<sup>20</sup> 18 U.S. Code § 2339A - Providing material support to terrorists (b)(3) the term “expert advice or assistance” means advice or assistance derived from scientific, technical or other specialized knowledge.

<sup>21</sup> 18 U.S. Code § 2339B (h) Provision of Personnel

designate an entity a “terrorist organization” was left in the hands of the Secretary of State (Roberts 2010a, Syllabus:1; Fiss 2011, 295,297; Stacey 2016, 214), regulated under section 219 of the Immigration and Nationality Act (“INA”)<sup>22</sup>, and “Terrorist Activities” and “Terrorism” were defined in the 8 U.S. Code § 1182(a)(3)(B)(iii)(2012) and 22 U.S. Code § 2656f(d)(2)(2012) respectively (Stacey 2016, 214–15).

In 1997, the Secretary of State designated 30 groups as foreign terrorist organizations. Two of those groups are the Kurdistan Workers’ Party (PKK) and the Liberation Tiger of Tamil Eelam (LTTE) (Charity & Security Network 2010). The LTTE sought judicial review of its designation as a foreign terrorist organization, but the D.C. Circuit upheld that designation, while the PKK did not challenge its designation (Pollock 2012, 758).

Those statutes were challenged mainly by the organization Humanitarian Law Project,<sup>23</sup> which, with two other US citizens and six domestic organizations, wished to provide support, in the form of monetary contributions, other tangible aid, legal training, and political advocacy, for the humanitarian and political activities of these two separatist militant organizations, but could not do so for fear of prosecution under §2339B (Pollock 2012, 758). In 1998, HLP filed a pre-enforcement suit in a federal court challenging the constitutionality, on Fifth and First Amendment grounds, of the material support law (Charity & Security Network 2010).

The litigation against the material support law had a 12-year history from 1998 to 2010. The federal District Court for the Central District of California found that HLP failed to establish a probability of success on their First Amendment speech and association claims(Charity & Security Network 2010). But the court held that the plaintiffs had established a probability of success on their claim that the statutory terms “personnel” and “training” in the definition of “material support” were impermissibly vague(Pollock 2012, 758).The Ninth Circuit Court of Appeals affirmed

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<sup>22</sup> 18 U.S. Code § 2339B - Providing material support or resources to designated foreign terrorist organizations (g)(6) the term “terrorist organization” means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.

<sup>23</sup> Humanitarian Law Project (a human right organization with consultative status to the UN) sought to train those two Foreign Terrorist Organizations (PKK and LTTE) on how to use the United Nations conflict resolution process and other nonviolent means to resolve their disputes.

the lower court's decision.

Meanwhile in 2001, Congress amended the definition of “material support or resources” to include “expert advice or assistance”(Charity & Security Network 2010). In 2003, HLP filed a second action challenging the constitutionality of this term. The District Court ruled that “expert advice or assistance” was impermissibly vague, but rejected the First Amendment claims that the new terms were overbroad and criminalized associated speech (Charity & Security Network 2010). The two lawsuits were on appeal in 2004, when Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA) which made amendments to the material support laws (Charity & Security Network 2010). Subsequently, the two cases proceeded through the federal appeals process and up to the US Supreme Court to be argued on February 23, 2010 and decided on June 21, 2010.

#### 5.1.1. Three breakthroughs in the constitutional review by the US Supreme Court in the HLP case

The Material Support Statute finally passed a “hybrid scrutiny” of constitutional review in the US Supreme Court, which first of all offered at least three interpretations of the requirements of the statute that moved beyond previous understandings.

1) The “support” for terrorism organizations could be extended to peaceful activities: (Roberts 2010a; Knox 2014, 306)

Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, *even if the supporters meant to promote only the groups' nonviolent ends* (Roberts 2010a, Syllabus:5).

2) No “specific intention” to further the organization's terrorist activities was

required; instead, the knowledge of the organization's connection to terrorism was enough to be regarded as mens rea:

We reject plaintiffs' interpretation of §2339B because it is inconsistent with the text of the statute. Section 2339B (a)(1) prohibits "knowingly" providing material support. It then specifically describes the type of knowledge that is required: "To violate this paragraph, a person must have knowledge that *the organization is a designated terrorist organization . . .*, that the *organization has engaged or engages in terrorist activity . . .*, or that the *organization has engaged or engages in terrorism. . .*." Congress plainly spoke to the necessary mental state for a violation of §2339B, and it chose knowledge about *the organization's connection to terrorism, not specific intent to further the organization's terrorist activities.*(Roberts 2010b, Opinion of the Court:11)

3) Only the *coordinated advocacy*, rather than the independent advocacy or expression, was interpreted as a punishable standard for terrorism speech crimes (Fiss 2011, 306) and it was later further developed by the intermediate theory:

Independently advocating for a cause is different from the prohibited act of providing a service "to a foreign terrorist organization." §2339B(a)(1). Thus, any independent advocacy in which plaintiffs wish to engage is not prohibited by §2339B. On the other hand, a person of ordinary intelligence would understand the term "service" to cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization (Roberts 2010, vol. Syllabus, para. (c)).

5.1.2. The hybrid scrutiny of the material support law: the narrow category of speech and multiple aspects of state interest

The material support law, interpreted as above, eventually passed a kind of "hybrid scrutiny" in respect of the freedom of speech (Margulies 2012, 455,485,520), which is neither a wholly strict nor an intermediate one, but a combination of strict and intermediate scrutiny. The strict scrutiny is usually applied to content-based restrictions, while the intermediate scrutiny focuses on the regulations on the time, place, and manner of speech (Ruane 2016, 2–3). The strict scrutiny requires that a

speech restriction “directly advance a compelling government interest” and be the “least restrictive” means for achieving that interest (Ruane 2016, 3). The intermediate scrutiny requires instead that the government show that the restriction “advances a substantial government interest” and is “narrowly tailored” to achieve that interest (Ruane 2016, 3–4). The statute passed the hybrid scrutiny for the government identified a “compelling interest” which meets strict scrutiny standard and achieved this interest in a “narrowly tailored means” required by intermediate scrutiny.

The material support law not only prohibits the illegal content of the speech, but also covers the conducts of communicating or disseminating a message. The majority acknowledged that the restriction was content-based, and accordingly applied “a more demanding standard” of scrutiny to the provision than what would have been reached before (Ruane 2016, 8; Roberts 2010b, Opinion of the Court:27–28).

The Government does identify a *compelling countervailing interest*, namely, the interest in protecting the security of the United States and its nationals from the threats that foreign terrorist organizations pose by denying those organizations financial and other fungible resources. (Breyer 2010, 7)

Congress has prohibited “material support,” which most *often does not take the form of speech*. And when it does, the statute is *carefully drawn to cover only a narrow category* of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations. On the other hand, the Government errs in arguing that the only thing actually at issue here is conduct, not speech, and that the correct standard of review is *intermediate scrutiny*, as set out in *United States v. O’Brien*, 391 U. S. 367, 377. *That standard is not used to review a content-based regulation of speech*, and §2339B regulates plaintiffs’ speech to the PKK and the LTTE *on the basis of its content*. Even if the material support statute generally functions as a regulation of conduct, as applied to plaintiffs *the conduct triggering coverage under the statute consists of communicating a message*. Thus, the Court “*must[apply] a more demanding standard*” than the one described in *O’Brien*. (Roberts 2010a, Syllabus:d(1))

The court ruled that speech should be regarded as a form of “service”, if under



the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organization, rather than “independent advocacy” that happened to support those groups or membership of designated Foreign Terrorism Organizations.

The court also agreed that “the government’s interest in combating terrorism is an urgent objective of the highest order”(Roberts 2010a, Syllabus:4), as the prohibition status had “directly advanced the government’s compelling interest in combating terrorism”. The court justified the government’s interest in combating terrorism in two ways.

Firstly, the fact that the taint of terrorist organizations is so great that working in coordination with them or at their command *legitimizes* and *further*s their terrorist means. The support could be provided by any means, even to the extent of peaceable and lawful conducts: in this sense, the support could be defined as “resource” or “information”, where terrorist threats occur in an area where information can be difficult to obtain, and the impact of certain conducts can be difficult to assess.

Material support meant to “promot[e] peaceable, lawful conduct,”..., can further terrorism by foreign groups in multiple ways. “Material support” is *a valuable resource by definition*. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps *lend legitimacy* to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks (Roberts 2010b, Opinion of the Court:25).

Secondly, the government argued for their interest in maintaining the relationships between the US and their allies and in developing their cooperative international efforts to prevent terrorism. Providing material support in any form would undermine the government’s interest in preventing terrorism, strain the US’ foreign affairs, and put national security at stake.

[...] respect for the Government’s factual conclusions is appropriate in light of the courts’ lack of expertise with respect to national security and foreign affairs, and the reality that efforts to confront terrorist threats occur in an area where information can be difficult to obtain, the impact of

certain conduct can be difficult to assess [...] (Roberts 2010a, vol. Syllabus, para. (d)3,5)

Providing material support in any form would also undermine cooperative international efforts to prevent terrorism and strain the United States' relationships with its allies, including those that are defending themselves against violent insurgencies waged by foreign terrorist groups.(Roberts 2010a, vol. Syllabus, para. (d)2,5)

At this point, the boundary of freedom of speech had been changed at least from two perspectives by comparing *Brandenburg* test in 1969 and the true threat doctrine in the case of *Virginia v. Black* in 2003.

In *Brandenburg*, the Supreme Court established the standard to determine whether speech could be restricted. The speech that is not protected by the First Amendment “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”, namely, the speech must (1) intend to incite (2) imminent lawless action and will (3) likely produce the action (Best 2007, 4–5).

The establishment of true threat doctrine would be dated back to the Supreme Court case of *Watts v. United States* in 1969. In 2003, this doctrine was expanded to the symbolic speeches. In case of *Watts*, an eighteen-year-old male was convicted in a Washington, D.C. District Court for violating a statute prohibiting persons from knowingly and willfully making threats to harm or kill the President of the United States(Weiss 2004). *Watts* appealed and the Supreme Court reversed the conviction of *Watts*, but the Supreme Court finds the statute constitutional and there is a “true threat” exception to protected speech and the statement must be viewed in its context and distinguished from protected hyperbole. In 2003, the majority of the Court of *Virginia v. Black* delivered the opinion that cross burning, a symbolic speech, carried out with *the intent to intimidate* is constitutionally unprotected “true threats”. The true threat doctrine in the *Black* test requires “only the intent to threaten”, but not necessarily contain an imminence component, and this doctrine was applied to larger sets of online terrorist postings considering the diffuse nature of the World Wide Web and limited the application of the *Brandenburg* incitement standard to terrorist content on

the internet. (Tsesis 2017, 669).

Contemporarily, the material support law is neither in line with the “imminence” requirement in the Brandenburg test, nor with the requirement of “the intent to threaten” in the Black test. It broadened the scope from targeting speech aimed at promoting violent purposes to non-violent purposes, from specific intentions to non-specific intentions: only the knowledge of the organization’s connection to terrorism becomes enough for a violation (Roberts 2010a, vol. Syllabus, para. (b),2). When it comes to restricting speech or information, the “service” should be “coordinated” to the foreign terrorist organizations.

As the Material Support for Terrorism Statute passed a “hybrid scrutiny” of constitutional review in the US Supreme Court, how the material support law was interpreted in US jurisprudence in specific case indicated the boundary between freedom of speech and the national safety.

5.1.2. The interpretation of *US v. Mehanna* in the Supreme Court: “indirect connection”, intermediate theory and the “real coordination” standard

In April 2012, Mehanna was sentenced in federal court in Boston on four terrorism-related charges and three others related to lying to FBI and other U.S. federal officials. Mehanna appealed his case to the First Circuit Court of Appeals, but he lost. Mehanna then appealed his case to the Supreme Court on 17<sup>th</sup> March 2014. On 12<sup>th</sup> August 2014, the US Supreme Court filed Reply of petitioner Tarek Mehanna.(Supreme Court of the United States n.d.) On 6<sup>th</sup> October 2014, the Supreme Court denied to review the case of *US v. Mehanna* (Supreme Court of the United States 2014). Scholars suggested that “Courts shall look to the First Circuit’s decision in Mehanna to conclude that solicitation of an individual may constitute a ‘concerted activity’ just as providing a ‘service’ of online translations for the foreign terrorism organization. Meanwhile, soliciting an innocent individual through social media to provide support to ISIS should be enough to warrant criminal prosecution.”(Stacey 2016, 222)

The decision by the Supreme Court of US in *Mehanna* provided at least three important points for the current legal practice in the US justice system: the “real coordination” standard, the clarification of “indirect connection”, and the intermediate theory as interpreted by the Supreme Court.

In 2003, Tarek Mehanna and two of his friends, Ahmad Abousamra and Kareen Abuzahara, formed a plan to travel overseas to receive military training at a terrorist training camp in Yemen, join al-Qaeda, and fight against Americans in Iraq (Verrilli, Carlin, and Palmer 2014, 3). Mehanna and his two friends flew to Abu Dhabi in February 2004,(Verrilli, Carlin, and Palmer 2014, 3) but they failed to obtain training in Yemen, for the training camps in Yemen had closed after the September 11 attacks. Mehanna returned home disappointed. For years after returning home, Mehanna continued discussing with Abousamra and others how to train with Al-Qaeda and fight against Americans. Mehanna’s best friend, Daniel Maldonado, went to Somalia and trained in a terrorist training camp.

In 2005, Mehanna began translating Arab-language material into English and posting these translations on a password-protected jihadist website called At-Tibyan Publication. At-Tibyan was an important forum for Al-Qaeda’s media efforts, and al-Qaeda in Iraq asked At-Tibyan to translate its online magazine and other al-Qaeda material. Mehanna was a member of At-Yibyan’s translation team and served as a moderator on the site. In 2005, an At-Tibyan administrator sent Mehanna a private message enclosing a video of al-Qaeda leader Ayman al-Zawahiri and explaining that al-Qaeda had asked At-Tibyan to translate al-Zawahiri’s message. Mehanna later suggested improvements to the al-Zawahiri video. On another occasion, Mehanna translated a video that exhorted the audience to “come join the jihad in the land of Iraq” and was titled “At Tibyan Publications presents: The Expedition of Shaykh Umar Hadid May Allah have Mercy on Him, Released by the Al Quaidah Network in Iraq.” (Verrilli, Carlin, and Palmer 2014, 6)

Mehanna was charged with three counts involving material support offenses: 1. conspiring to provide material support to a designated foreign terrorist organization, in violation of 18 U.S.C 2339B; 2. conspiring to provide material support for a

conspiracy to kill persons in a foreign country, in violation of 18 U.S.C 2339A; 3. providing or attempting to provide material support for a conspiracy to kill persons in a foreign country, in violation of 18 U.S.C. 2339A. Moreover, Mehanna was also charged with conspiring to kill persons in a foreign country and three other additional counts (Verrilli, Carlin, and Palmer 2014, 6–7).

The defendant mainly provided three important defenses for the speech related crime charges: the contact with the terrorist organization was not direct and, therefore, not enough “coordinated” with the terrorist organization (Verrilli, Carlin, and Palmer 2014, 10); the translation work was not service for a terrorism organization but only “moral support for a terrorist organization” or a “*mere association with people who were not members of*” the organization (Verrilli, Carlin, and Palmer 2014, 12); the trip to Yemen should not be regarded as evidence to prove the terrorism speech-related charges (Verrilli, Carlin, and Palmer 2014, 11) .

However, all those three lines of defense were dismissed by the US Supreme Court. The Supreme Court clarified that a “direct connection” between the individual and a terrorist organization is neither required by the statute nor mandated by the case of HLP [Humanitarian Law Project] (Verrilli, Carlin, and Palmer 2014, 9). It affirmed the “indirect contact” between the defendant and the organization’s members by quoting the general principles of criminal law, which do not allow a defendant to escape liability by acting through an intermediary (Verrilli, Carlin, and Palmer 2014, 14). For example, using an adult intermediary to attempt to persuade a child to have sex does not provide a defense; bribery crimes could be committed through “bagmen”; and terrorist groups could systematically conceal their activities behind charitable, social, and political fronts (Verrilli, Carlin, and Palmer 2014, 15).

The Supreme Court also reviewed the different meanings of “coordination” and “mere association”. First, the court considered the literal meaning of “coordination” in two authoritative dictionaries; furthermore, the court separated the terms “coordination”, “independent” activity, and “mere associate” in the context of “service” by referring to the case of Humanitarian Law Project (Verrilli, Carlin, and Palmer 2014, 15). The Supreme Court stated that the evidence showed that the

At-Tibyan translated propaganda was a *direct response to al-Qaeda requests*, which is more than sufficient to prove the “real coordination” with the foreign terrorist group. The petitioner knew that At-Tibyan coordinated with al-Qaeda and that, through his own translation, he would further At-Tibyan’s goal of aiding al-Qaeda. He then translated another work, knowing that At-Tibyan had obtained it before its official release by Al-Qaeda. Translation as a service performed at the request of a foreign terrorist organization in order to further its mission is out of the scope of “independent advocacy” immune from criminal prosecution according to the First Amendment.

As with the well-established principle that a person cannot escape criminal responsibility by acting through intermediaries, the statute gave the petitioner adequate notice that *providing the requested translation services* to al-Qaeda through At-Tibyan intermediaries was punishable.

To prove that the translation activity was *coordinated* enough, the court concluded that the trip to Yemen to enlist in the training camp had supplied an independently sufficient evidentiary predicate for the conviction on the terrorism-related counts (Verrilli, Carlin, and Palmer 2014, 10). However, the petitioner acknowledged that the court of appeal itself “sidestepped the issue” and “avoided the key legal issues of the case” by basing its decision on the evidence associated with the petitioner’s trip to Yemen rather than his translation-related activities (Verrilli, Carlin, and Palmer 2014, 11). The court further recognized that “a rational jury could not have credited the petitioner’s innocent account of the trip and simultaneously convicted him of conspiring to kill persons in a foreign country and of making false statements about the trip.” The “*strong circumstantial evidence*” proved that the petitioner’s material support convictions were “*highly likely*” to be based on the Yemen conduct. The petitioner’s intent with respect to the Yemen trip and his materially false statement about the trip involved conducts that continued through 2006, as he “continued to seek opportunities to engage in the Jihad well after his return from Yemen” and “conspired to provide false information to the government...long after the Yemen trip.”(Verrilli, Carlin, and Palmer 2014, 23) Therefore, the translation service as a direct response provided to an intermediate

organization requested by the Al-Qaeda and the trip with intention to participate the “training” as circumstance evidence have met the “real coordination” standard in the material support for terrorism laws.

Briefly, in the US jurisprudence, the hybrid scrutiny of Material Support for Terrorism statutes had broadened the boundary of laws prohibiting terrorism related expressions; meanwhile, without requirements of having “direct connection” to the terrorism organizations, but with knowledge of the terrorism organization, translation service provided for intermediates along with strong circumstances evidence could be considered as the elements of incitement to terrorism in specific cases.

## 5.2. The terrorist possession offense in the UK jurisprudence

Similarly to what happens in the US justice system, in the UK criminal justice system, the jury is expected to interpret, assess, and examine the evidence, as well as its overall impact(Awan 2012, 147). However, the principle of “parliament sovereignty” in the UK justice systems had largely determined its difference between the US systems. The courts cannot override Parliament and its statutes, while, in the US justice system, the legislation could be scrutinized and overridden by the court.

Ever since the Northern Ireland troubles of the late 1960s, the UK has been fighting against extremism and terrorism by enacting special provisions, such as the Prevention of Terrorism (Temporary Provisions) Act 1974 (Awan 2012, 145) and the Terrorism Act 2000. The latter was designed to address the challenges of the new forms of terrorism, from the terrorism threats from Northern Ireland to the international terrorism threat led by Osama Bin Laden, in line with the human rights recognized by the European Convention of Human Rights, which became binding on the UK law after the entry into force of the Human Rights 1998.

To suppress terrorist activities at an early stage, many statutory offenses were introduced into the British legislation system, ranging from inciting terrorism overseas(The National Archives n.d., para. 59), to the encouragement of, including glorification, terrorism(The National Archives n.d., para. 1), the possession(The National Archives n.d., para. 57,58) and collection(The National Archives n.d., para.

58) of terrorist material, and the dissemination of terrorist publications(The National Archives n.d., para. 2). The offenses of possession and collection of terrorist material were stipulated early in the Terrorism Act 2000, while the offense of dissemination of terrorist publications was introduced in the Terrorism Act 2006.

The criminal provisions related to terrorism expression cover a broad catalogue of speeches. Specifically, section 1 of Terrorism Act 2006 criminalizes the direct or indirect encouragement of terrorist acts. This section of the Terrorism Act 2006 includes a broad class of statements likely to be understood as direct or indirect encouragement or inducement to terrorism. And a “statement”, according to the description within section 20 (6) of the Terrorism Act 2006, refers to “a communication of any description, including a communication without words, consisting of sounds or images or both.” The definition of a glorifying statement in subsection 3 of section 1 as indirect encouragement includes statements that glorify terrorism as worthy of emulation, as well as any form of praise or celebration (The National Archives n.d., para. 20(2)). The direct and indirect encouragement provisions in Section 1 of the 2006 Terrorism Act broadened the criminalization scope from “specific incitement” to “general incitement to terrorist act”. General statement, such as “we encourage everybody to bomb tube trains”, was covered by the Terrorism Act 2006, which enlarged the scope of incitement compared to specific statements such as “please bomb a tube train on July 7 in London”(Awan 2008, 9).

However, this is not to say that the provisions aiming to prevent and suppress terrorism radicalization do not provide some safeguards in a sense. For example, safeguards in the provision of glorification of terrorism include the potential<sup>24</sup> (The National Archives n.d., para. 1(4)) public reaction(The National Archives n.d., pt. c 11.1(1)), the mens rea requirement of either intention or recklessness(The National Archives n.d., para. c 11, section 1(2)(b)(ii))<sup>25</sup>, and having the “public” as the target of the statement(The National Archives n.d., pt. c 11, section 1(1)). Still, the restrictions of encouragement and glorification of terrorism in the United Kingdom

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<sup>24</sup> The “actual effect” was not required, as it need only be “likely” to be understood as encouraging terrorism.

<sup>25</sup> If the statement was self-expressive or endorsed, recklessness as to encouraging terrorism is sufficient mens rea.



have been harshly criticized by the International Human Right bodies and scholars, as they are “broad and vague”(Campbell 2008; Renieris 2008, 688)<sup>26</sup> or “redundant”(Ekaratne 2010, 205).

Other than that, the protection of freedom of speech in UK jurisprudence generally relied on two approaches: a narrowing interpretation when parliament’s intention is ambiguous, (Cornford 2017, 295) and the declaration of incompatibility of legislation where a court cannot interpret a statutory provision in a way that is compatible with a Convention right<sup>27</sup>. Since the Human Rights Act 1998 (HRA) came into force on 2<sup>nd</sup> October 2000 and until the end of July 2017, 37 declarations of incompatibility have been made. 25 of them have become final (in whole or in part) and are not subject to further appeal(Ministry of Justice 2017, 32).

When the parliament’s intention was ambiguous, reviewing how judges interpreted the related terms in the strictest restrictions on terrorism expression crimes, sections 57 and 58 of the Terrorism Act 2000, would be an important perspective to know the boundaries of freedom of expression in the UK jurisprudence.

#### 5.2.1. Section 57 and 58 of the Terrorism Act 2000 and parliament’s ambiguous intention

The broadness of the expressive restrictions in English Criminal law could be demonstrated by two provisions: section 57 and 58 of the Terrorism Act 2000.

##### **57 Possession for terrorist purposes**

(1) A person commits an offence if he **possesses *an article in circumstances*** which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

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<sup>26</sup> The United Nations Human Rights Committee criticized the definition of "encouragement of terrorism" in Section 1 of the Terrorism Act 2006 as "broad and vague".

<sup>27</sup> The Human Rights Act 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. The Human Rights Act came into force in the UK in October 2000, the Act sets out your human rights in a series of ‘Articles’. Each Article deals with a different right. These are all taken from the ECHR and are commonly known as ‘the Convention Rights’.

(2) It is a **defense** for a person charged with an offence under this section to prove that his possession of the article **was not for a purpose** connected with the commission, preparation or instigation of an act of terrorism [...]

### **58 Collection of information**

(1) A person commits an offence if—

(a) he **collects or makes** a record of information of a kind **likely to be useful** to a person committing or preparing an act of terrorism, or

(b) he **possesses** a document or record containing information of that kind.

(2) In this section “record” includes a photographic or electronic record.

(3) It is a **defense** for a person charged with an offence under this section to prove that he had a **reasonable excuse** for his action or possession [...]

These two provisions of the Terrorism Act 2000 cover expression documented or otherwise placed in some tangible form (Ekaratne 2010, 23,215). These two crimes, Possession for terrorist purposes and Collection of information, had broader scope than that of the glorification offense, for both these provisions allow convictions for possession of statements created by someone other than the accused (Ekaratne 2010, 23,216). Individuals might be convicted as “terrorists” even based on the materials stored in their computer hard drives.

A literal reading of section 58 could also be very broad. Almost anything that is of general use in carrying out our day-to-day activities is also useful to terrorists. “Terrorists might need clean clothes, so washing machine instructions are useful to terrorists. It might be advantageous to terrorists in distracting the authorities to appear to have a sense of humor, so joke books might be useful to terrorists.” (Hodgson and Tadros 2009, 984,985) “Section 58(1) could cover a multitude of records of everyday common or garden information, which might actually be useful to a person who was preparing to carry out an act of terrorism – e.g. a Yellow Pages directory listing outlets where he could buy fertilizer and other chemicals for making into a bomb, a timetable from which he could discover the times of trains to take him to the city where he was

going to plant his bomb, or an A to Z directory of that city which he could use to find his way to the target.”(Lord Rodger 2009, para. 42)

Those interpretations could lead to unjust convictions and sanctions, for possession of information which is useful to people for all sorts of everyday purposes or which many members of the public could regularly obtain or use. It is unclear to which extent the parliament meant to broaden the scope of the targeted information in Section 58. To avoid unjust convictions and punishments, the court may deviate from the literal meaning to avoid such an absurdity, which is also known as the “golden rule of interpretation.” (Cornford 2017, 294; The Open University n.d.).<sup>28</sup>

5.2.2. The narrow constructions on “likely to be useful” and “reasonable excuse”: different interpretations between 1996 and 2009

There are two key terms, “likely to be useful” and “reasonable excuse”, as requirements in the Section 58 of Terrorism Act 2000. These two terms have been gradually explained and interpreted in a broader way from 1996 to 2009 in different documents and judgments.

Specifically, Section 58 of Terrorism Act 2000 is the current embodiment of a provision which was first found in legislation applying to Northern Ireland and was later extended to Great Britain by the Criminal Justice and Public Order Act 1994. Lord Lloyd of Berwick was asked to review this terrorism legislation and his report, *Inquiry into Legislation against Terrorism*, was published in 1996. (Lord Rodger 2009, para. 41). In this report of 1996, the explanation of “likely to be useful” had been overruled by the Lord Rodger in the case of R v. J in 2009. On the other hand, the interpretation of “reasonable excuses” by Lord Phillips in 2008 in the case of R v. K had been extended by the Lord Rodger in the case of R v. J in 2009 as well..

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<sup>28</sup> This rule was closely defined by Lord Wensleydale in the case of *Grey v Pearson* (1857) HL Cas 61. It has the advantage of avoiding absurdities, but depends on the result of each individual case.

### 5.2.2.1. The scope of “likely to be useful”: from the content of the information itself to the information making purpose

In 1996, “likely to be useful” was a term that was explained as “typically be of use to terrorists, as opposed to ordinary members of the population” (Lord Rodger 2009, para. 43). In terms of how to separate the common use or terrorist use, scholars have provided some theories that could be helpful as guidance, such as how easy or difficult it is to get hold of the information and the range of uses of the information (Hodgson and Tadros 2009, 989).

Later, on 13<sup>th</sup> February 2008, in the Court of Appeal, Lord Phillips of Worth Matravers LCJ, Owen and Bean JJ gave judgment in two appeals. In one of the appeals, R v K [2008] 2 WLR 1026, the Court considered the nature of the documents which fall within section 58(1) shall provide “practical assistance”, rather than simply encourage the commission of acts of terrorism:

“A document or record will only fall within section 58 if it is of a kind that is likely to provide *practical assistance* to a person committing or preparing an act of terrorism. A document that *simply encourages* the commission of acts of terrorism does not fall within section 58.”

This case, from another perspective, limited the scope of the term “likely to be useful”. However, this model of interpretation was changed in the case of R v. J, where Lord Roger in the House of Lords had further expanded the scope of the term “practical assistance” in 2009.

The basic fact of the case of R v. J is as follows: Mr. J was arrested on 15<sup>th</sup> December 2006. He was at that time in possession of a large quantity of digitally stored information, contained in an iPod as well as in his telephone, laptop computer and two collections of digital disks (Lord Rodger 2009, para. 22).

The information he possessed included 1) a large library of bomb-making, guerrilla, poisons, chemical weapons, improvised weapons and other manuals, some with an express terrorist (as opposed to simply military) purpose, such as the

Terrorist's Handbook (Lord Rodger 2009, para. 22); 2) a torrent file named "Military Training torrent"; and 3) a CD-ROM named the "Al Qaeda training manual". There were also 4) the digital file "How can I train myself for jihad?", 5) the file "39 ways to serve and participate in jihad", and 6) a video recording of the West Midlands Police Headquarters, the possession of which gave rise to a reasonable suspicion of a purpose connected with the commission, preparation or instigation of an act of terrorism (Lord Rodger 2009, para. 21).

Mr. J faced six counts. On the first count he was charged with possessing articles for a purpose connected with the instigation, preparation or commission of an act of terrorism, contrary to section 57(1) of the 2000 Act (Lord Rodger 2009, para. 21,23). The other five counts were based on violations of section 58 of the 2000 Act, namely, collection of information. (Lord Rodger 2009, para. 21).

On 5<sup>th</sup> September 2007, Mr. J provided the defense statements on the six counts. As for count 1, he said that the presence of the files and videos was *not for any purpose* connected with the commission, preparation, or instigation of any act of terrorism by himself or anyone else (Lord Rodger 2009, para. 24).

As for count 2, the Military Training torrent file, Mr. J said that he had found and acquired it while planning on alternative careers which he might pursue in the future. The search was *out of curiosity*, to learn the nature of training and undertaking a military career. Furthermore, he said that he was unfamiliar with the procedure for opening it and so he was never able to open it and he was *never aware* of the exact content of the torrent file. For the avoidance of doubt, he denied that the file contained information likely to be useful to a terrorist, he was unaware of his possession of information of this kind and he asserted that he had a *reasonable excuse* for possession of the file (Lord Rodger 2009, para. 25).

As for count 3, the file titled "Al-Qaeda Training Manual", Mr. J said that he purchased, or was given, material relating to Islamic religious, historic and current affairs as a tenet of his Islamic belief. The DVD is one of those items, out of the *Islamic faith*, and he was *unaware* of possessing any information likely to be useful to a terrorist and asserted he had a *reasonable excuse* for possessing the file (Lord

Rodger 2009, para. 26).

As for count 4, with relation to the digital file “How can I train myself for jihad”, Mr. J gave the same kind of explanation as for count 3, a tenet of *Islamic belief*. The file was obtained pursuant to that obligation and contained material of a theological nature relating to the Jihad. He repeated points, for the avoidance of doubt, from count 2 (Lord Rodger 2009, para. 27).

The nature of his defense for count 5, relating to the document entitled “39 ways to Serve and Participate in Jihad” was the same as the nature of the defense for count 4 (Lord Rodger 2009, para. 28).

In relation to count 6, for the avoidance of doubt, he denied that the file contained information likely to be useful to a terrorist, he stated that he was *unaware* of his possession of any information likely to be useful to a terrorist, that he had a reasonable excuse for the creation and possession of the video and that he had no way of knowing that he was committing an offense by videoing what he captured (Lord Rodger 2009, para. 29). There were no sign to indicate that videoing was prohibited in the area and, indeed, the actual images captured were immaterial to him (Lord Rodger 2009, para. 29).

In this case, Lord Rodger clarified that as for the conviction of section 58(1) (b) of possession a document or record containing information of a kind *likely to be useful* to a person committing or preparing an act of terrorism, three elements shall be proved beyond reasonable doubt: the defendant 1) had control of a record which contained information that was likely to provide practical assistance to a person committing or preparing an act of terrorism; 2) knew that he had the record; and 3) knew the kind of information which it contained(Lord Rodger 2009, para. 50).

In the case of R v. J in 2009, Lord Rodger agreed with how Lord Phillips of Worth Matravers LCJ had interpreted the term in 2008, in the case of R v. K, as likely to provide “practical assistance” to a person committing or preparing an act of terrorism: a document that simply “encourages” the commission of acts of terrorism does not fall within section 58 (Lord Rodger 2009, para. 17). Lord Rodger also partially agreed with what Lord Lloyd had said in his report that section 58 “was to

catch the possession of information which could typically be of use to terrorists, as opposed to ordinary members of the population”(Lord Rodger 2009, para. 43). However, he suggested that the “practical assistance” shall be interpreted as “*be designed to provide practical assistance*” to a person committing or preparing an act of terrorism.

In this sense, he focused on the information making process, rather than the content of the information itself. He expanded the punishable scale to the information making purpose or background when the intention of the offender is not clear, and argued that the content of the information for “the use for ordinary population” is excluded, while the “information of where to obtain explosives” or “an ordinary crook planning a bank robbery” might also be included in the scope. “It is not necessary that the information should be useful *only* to a person committing an act of terrorism”. “The information on *where to obtain* explosives is capable of falling within section 58(1), even though an ordinary crook planning a bank robbery might also find it useful.”(Lord Rodger 2009, para. 43) From this perspective, Lord Rodger interpreted the term “practical assistance”, not only by reviewing the content of the information, but by considering the background reason for someone who collects, records or possesses the information.

In terms of the mens rea, Lord Roger clarified in the judgment of the R v. G case that the Crown must prove beyond a reasonable doubt that the defendant knew that he had the document or record and that he had control of it(Lord Rodger 2009, para. 46). He had to be aware of the nature of the information,(Lord Rodger 2009, para. 47) but it was not necessary for him to know everything that was in the document or record; a glance of the content or the title could be enough (Lord Rodger 2009, para. 48). The accused may have gathered and stored the information with the aim to pass it on to someone else, or with the intention of using the information himself to prepare an act of terrorism, or without having any clear idea of what he intended to do with it (Lord Rodger 2009, para. 49).

#### 5.2.2.2. The “reasonable excuse”: “without terrorism purpose” is not enough

The offense under section 58(1) does not depend on the defendant having a terrorist purpose(Lord Rodger 2009, para. 75). The mere fact that the defendant’s purpose was not that to commit an act of terrorism is not enough to exempt him from the conviction of section 58. For example, an intention to use information for a bank robbery may well be an explanation for why the defendant had the information, but it cannot be a “reasonable” excuse for having it(Lord Rodger 2009, para. 79). The “reasonable excuse”, according to the interpretation of Lord Rodger in 2009, shall reach the level of “justification” (Cornford 2017, 293).

The standard of “justification” seems to exclude some innocent excuses from the scope of the defense, such as curiosity and personal amusement. However, in 2008 the court of appeal still held that a lack of terrorist purpose is enough as a “reasonable excuse” for the purpose of section 58(3) (Cornford 2017, 290).

Although section 58 is classified as “terrorism offence”(Cornford 2017, 292),<sup>29</sup> Lord Rodger held that terrorist intention is not readily formed at an early stage: when the defendant’s actual intention cannot be established,(Lord Rodger 2009, para. 49) “without terrorism purpose” is not enough to reach the level of “reasonable”.

Lord Rodger further suggested that in particular cases, to consider if the defendant’s excuse is reasonable, the jury could consider issues such as the defendant’s age, his background, his associates, his way of life, the precise circumstances in which he collected or recorded the information, and the length of time for which he possessed it.(Lord Rodger 2009, para. 81) As for “mental illness”, it does not make the excuse automatically “reasonable”. In the M’Naghten’s Case (1843) 10 Cl & F 200, the defendant remained responsible although he was suffering from paranoid schizophrenia at the time and his actions were a direct consequence of his illness.(Lord Rodger 2009, para. 81,88) The jury may well take into account particular facts and circumstances in individual cases, ranging from mental illness to solely a

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<sup>29</sup> The court of appeal and scholars in academic had held other interpretations to limit the scope by considering the wider statutory context of section 58.



condition of memory lapses.(Lord Rodger 2009, para. 81) The “out of curiosity” excuse was not considered “reasonable” in 1993 in the case of R v. McLaughlin,<sup>30</sup> and it depends on different cases.(Lord Rodger 2009, para. 83)

On the other hand, Lord Rodger also left part of his duty to protect freedom of expression to the wise discretion of the prosecutors.<sup>31</sup> He believed in the wise discretion of the prosecutors on the public interest and the cases that do not merit it,(Lord Rodger 2009, para. 85) for they would take all the relevant circumstances into account before deciding charges(Lord Rodger 2009, para. 80). This mechanism is reinforced in the context of section 58, where the prosecution requires the consent of the Director of Public Prosecutions (The National Archives n.d., sec. 117).

### 5.3 The glorification of terrorism offense in the Italian Jurisprudence

The Italian criminal justice system is a system without the tradition of “sovereignty of parliament”, which is different from the UK. On the other hand, in the Italian legal system, there is a mechanism of “constitutional review” of legislation.

Italian criminal law has criminalized many terrorism related offenses to fulfill the international law obligations and to meet the need of public safety in the post 9/11 era. Approximately five weeks after the 9/11 attacks in 2001, the Italian government introduced its first counterterrorism legislative package on 18<sup>th</sup> October in 2001. The legislation, Decree Law 374, codified the crime of “Associazioni con finalità di terrorismo anche internazionale o di eversione dell'ordine democratico” in article 270-bis. (Palma 2002, 1; Counter-Extremism Project 2017, 8). The current version of Art.270-bis of the Italian criminal law code punishes anyone who promotes, sets up, organizes, manages, finances or takes part in associations whose purpose is the committing of acts of violence intended as terrorism or the subversion of democracy.(Roach 2015, 275) Since 2001, by codifying Article 270-bis, the Italian

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<sup>30</sup> The defendant in the case of R v. McLaughlin was convicted against the provisions of the Northern Ireland Act 1978 and he tendered that he had a reasonable excuse that the possession of the radio scanner is for his own personal use and listened to police message is for his own pleasure and interest. The Court of Appeal considered the appellant was not recording the information to pass on terrorists and therefore, he was recording it for innocent purposes, therefore, it could be a reasonable excuse.

<sup>31</sup> He argues that police and prosecutors can be trusted to remedy any over-inclusiveness that might remain on his interpretation of the offence.

criminal law system started to sanction anyone who participated in terrorism related offenses in the form of organizational offense. As shown clearly by the Italian Supreme Court in the cases No.25863(2009) and No.12252(2012), Article 270-bis aims at punishing the mere establishment of an association, whether or not the planned terrorist acts are actually carried out. However, the association must achieve a certain level of organization: there shall be both the *realistic possibility* of the execution of the terrorist or subversive plot(Roach 2015, 275) and the intention and ability to use terrorist methods.(Roach 2015, 275)

In 2005, the Italian government passed additional counterterrorism legislative measures, known as Decree Law 144, then converted into Law n.155. In article 15 of Law n. 155, new terrorism related offenses were introduced to fight terrorism expression crimes, such as those described in Articles 270 quater, quinquies and sexies: namely, recruitment for the purposes of terrorism and international terrorism, training for terrorism and international terrorist activities, and conducts with terrorist purposes (Gazzetta Ufficiale n. 177 2005). Law 155 further enhanced the penalty for crimes where the instigation or apology concerns terrorist offenses or crimes against humanity, according to the third paragraph of article 414 of Italian criminal law code(Gazzetta Ufficiale n. 177 2005).

In February 2015, the Italian government passed new legislative measures—known as Decree Law 7—following the United Nations Security Council Resolution 2178 to disrupt the flow of foreign fighters. Decree Law 7, dated 18 February 2015, was then converted into Law n.43 on 17 April 2015. Article 2 of Law n.43 enhanced the punishment for an individual who commits a crime with the use of internet, which was newly inserted in the third paragraph of Article 414 of the criminal law code. In addition, the law permits the Ministry of the Interior to maintain a list of websites that are utilized by terrorists for recruiting activities, and it gives authorities permission to instruct Internet service providers to block access to such websites.

Article 414 of the Italian criminal law code regulated offenses related to incitement to crime. Beside the offense of public incitement to commit a crime under

the first paragraph of Art.414, the Penal Code also punishes the glorification of an offense in the third paragraph and fourth paragraph of Art.414. Offenses listed in article 414 have made any incitement, even indirect incitement (glorification), to commit terrorism related crimes punishable by criminal law.

### 5.3.1. Article 414 of the Italian criminal law code, its constitutional review and the “concrete danger” standard before 2015

Italian criminal law does not define the glorification of terrorism as a specific criminal offense(Galli 2012, 92). However, it regards terrorism related crimes as specific crimes, with glorification as an aggravating circumstance according to Law n. 155, which came into force in 2005, and the issue of the use of internet as a specific mean introduced by Law n.43 in 2015, which is also considered an aggravating circumstance for the punishment of the glorification of committing a crime.

Specifically, the first time that terrorism related crimes and crimes against humanity were codified as specific types of offenses of glorification of committing a crime in the fourth paragraph of Article 414 of the criminal law code in 2005, when Law n. 155 came into force.

414. Instigation to commit crime

[...]

4. Apart from cases of Article 302, if [...] the apology [...] refers to crimes of terrorism or crimes against humanity, the punishment is increased by half. [...]

Ten years later, the use of internet of apology, either to generally commit an offense or specifically with terrorism purposes, was codified as an aggravating circumstance for the penalty by Law n.43, which came into force on 17 April 2015.

414. Instigation to commit crime

[...]

3. The punishment established in paragraph 1.1) is also applicable to anyone who publicly commits the apology of one or more crimes.  
If the conduct is committed through informatic or telematic instruments,

the punishment provided for the present paragraph as well as the first and second paragraph is increased.<sup>32</sup>

4. Apart from cases of Article 302, if the instigation or the apology referred to in the preceding paragraphs refers to crimes of terrorism or crimes against humanity [...] the punishment is increased up to two-thirds, if the conduct is committed through informatic or telematic instruments.

Although the question of the compatibility of the restrictions on expression crimes with relation to terrorism have not yet been reviewed by the Constitutional Court of Italy, the Supreme Court in Italy had tried to limit the scope of these crimes by way of interpretation, based on an old judgment by the Constitutional Court on the crime of apology (C. Cost. 65/1970).

In that judgment, the Constitutional Court had declared the definition of apology in Article 414 compatible with the Constitution, provided that the conduct causes a “clear and present danger” of the commission of new offenses. In the subsequent time, different theories and notions of this danger gradually emerged in Italian jurisprudence.

Recent cases decided by the Italian Supreme Court, which challenged the previous notion of “concreteness” and “grade of danger” of in the definition of apology in Italian jurisprudence.

Specifically, in 1970 the prohibited apologetic behavior criminalized in article 414 of the criminal code was reviewed by the Italian Constitutional Court, to verify its compatibility with Article 21 of Italian Constitutional Law, recognizing freedom of expression:

“The last part of Article 414 of the criminal law code does not limit, in any way, the criticism on the legislation or jurisprudence, nor the activities of propaganda of individuals, parties, movements, groups, aimed at promoting the removal of any incriminating rules, even when it is applied concretely. It is not a crime of apology to affirm that facts foreseen by the legislation in force as crimes have, or may have, subjectively or objectively a moral or social content; that the perpetrator may have acted for reasons of particular

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<sup>32</sup> Art.64 increase of punishment in case of only one aggravating circumstance: when an aggravating circumstance occurs, and the increase of punishment is not determined by the law. The punishment is increased 30% the penalty that should be imposed for the crime committed.

moral or social flight; that the perpetrator of an offense may have acted for reasons of particular moral or social value, as it is further recognized by Art. 62, n.1<sup>33</sup> of the criminal law code.

Unlike a critique to the law, unlike propaganda for its update, unlike a supporting statement on the offender's motives, which are all legitimate manifestations of thought, a direct public apology does constitute a violation of criminal law...

Apology is punishable..., therefore, it is not just the manifestation of a simple thought, but it integrates suitable behavior concretely to encourage the commission of crimes.

One of the important developments of this judgment of the Constitutional Court is to introduce into the offense of apology to commit a crime non-written requirement of concrete capability to encourage the commission of a crime (Pelissero 2010, 235). This sentence overruled the criterion of “presumed danger” reaffirmed in a past judgment in 1958 by the joint section of the Italian Supreme Court. The “presumed danger” criterion did not focus on reviewing if the apology is able, in the concrete case at issue, to arouse the impulse for the renewal of the praised fact. Following the 1970 Constitutional Court’s judgment, the danger that an apology is accepted and followed has been considered by the jurisprudence as an implicit meaning of the conduct (Pelissero 2010, 234).

Around 1970, judges in Italy recognized a more balanced and cautious interpretation of the protection of public order and the liberty of thought manifestations. This interpretation limited the relevant criminal apology to the conducts with “a *capacity* of suggestion able to raise an *immediate* danger of future crimes and, therefore, to disturb the public order”. (Pelissero 2010, 234).

More specifically, after the Constitutional judgment n. 65 in 1970, the Supreme Court of Italy started focusing on the interpretation of incitement or apology according to two factors. One is the grade of danger, the other one is the temporal factor (Pelissero 2010, 236–37).

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<sup>33</sup> The article 62 of Italian criminal law is related to the “common attenuating circumstances”, mitigate the crime, when there are no constitutive elements or special mitigating circumstances, the circumstances followed. Number 1 of article 62 of Italian criminal law is stipulated that “having acted for reasons of particular moral or social value”

In a case of apology through television and newspapers in 2001, in order to establish the grade of danger the Supreme Court of Italy relied on the possibilities of the commission of the crime in the wake of the apologetic message, inferred from factors such as the personality of the apologist, the kind of audience to which he had addressed his message, and the factual circumstances surrounding the event.(Sossi and Fabbri 2001, 820) Other judgments insisted on the requirement of an immediate risk of the commission of the crime: “The longer the perspective of the realization of the instigation is extended over time, the less it creates concrete dangers for the benefit that is intended to be protected”.(Gallo and Musco 1984, 100)

Other parameters also evolved to identify the “level of concreteness” and “grade of danger” required by case law in Italy. For example, the direct or indirect contact with the target audience, the overall context the message is inserted into, the possibility of receiving the message, whether it uses a foreign language, the location where the message dissemination or the apologetic activities takes place, the length of the edition of the volume, and its knowledge by the common people (Pelissero 2010).

### 5.3.2. The case of Halili El Mahdi, the current “concrete danger” standard and the changing criminal policy

Although Italy had criminalized some terrorism expression crimes, such as training, recruitment, incitement and glorification, since 2005, there were rarely criminals convicted for terrorism expression crimes before 2015. It is to be presumed that the prosecutors tend to avoid applying the law.(Vigano’ 2015, 609)

This situation started to change after 2015: there have been an increasing number of criminals convicted as terrorists owing to their expressive conducts by the Supreme Court of Italy.

A recent Supreme Court case dealing with the glorification of terrorism defines the boundaries of freedom of speech in the case of terrorism expression crimes with the use of internet in the current Italian jurisprudence.

El Mahdi Halili was a Tunisian citizen born in Italy (Vox 2018). In 2015, at the

age of 23 years-old, he was investigated for public apology of the Islamic State, as well as participation in a terrorist organization. In particular, he had published on two websites two documents with the title “the Islamic State, a reality that I would like to introduce to you”, which was considered as an act of propaganda of the Islamic State.(Rocchi 2015, 2)

The judge for preliminary investigations at the Court of Brescia ordered his arrest for the alleged offense. Questioned by the prosecutor, the suspect, admitting to be the author of the document, claimed to have only wanted to *report* what the Islamic State said about itself, and denied that he had adhered to the content of the final message of the text, which invited Muslims to support the "Islamic Caliphate"; he also denied having been interested in the construction of explosives (although it turned out that he had downloaded a document on the subject on his computer), as well as having intended to join the fight.

In front of the judge for preliminary investigations, H.E.M. admitted that he was aware that in the West the Islamic State is not recognized as a State and is considered a terrorist organization, but he claimed to disagree on some actions taken by the same organization.(Rocchi 2015, 2)

However, the Supreme Court recognized that the apologetic nature of the document was clear: it was not a merely informative or journalistic document at all; instead, the texts were coming directly from the terrorist organization and the parts written by the defendant had a clear aim to convince the reader that membership of the Islamic State is the only correct choice, even from a strictly religious point of view.

The apology also aimed to encourage the readers to become members of international terrorism organizations, and thereby to commit a criminal offense under Art.270-bis of the Italian Criminal Law Code. The requirement of a concrete danger arising from the apology was, therefore, referred not only to the commission of terrorist attacks, but also to the mere participation in a terrorist association (in this case, the defendant had published on the Internet a paper that presupposed and accepted the fighting nature and violent conquest by a terrorist organization, the

execution of acts of terrorism, and exalted its spread and expansion, even with the use of weapons).(Rocchi 2015, 5)

Compared with previous rulings, the concrete danger was not characterized in terms of “immediacy”. Actually, the requirement was extended to cover conducts that might be carried out in a foreign country.

[...]the offense *committed partly also abroad*,... it is sufficient that in the territory of the State...the action has been completed, *in whole or in part*, [...] because the punitive power of the State may be considered extended to all participants and all criminal activity, wherever realized, it is sufficient that in Italy any participation activity has been carried out by any of the offenders (Section 1, No. 41093 of 06/05/2014 - Dep. 03/10/2014, Cuomo and others, Rv. 260703)[...]

[...] The formation of a partnership, connected by "cellular" or "network" organizational structures, is able to operate simultaneously in more countries, even at different times and with physical, telephone or informatics contacts, even discontinuous or sporadic among the various groups in the network, [...]

[...] one of the functional support conducts to the terrorist activity of organizations recognized and operating, are those aimed at proselytism, the dissemination of propaganda documents, assistance to members, financing, the preparation or acquisition of weapons or false documents, enrollment, training, with the affirmation of Italian jurisdiction in the case of a cell operating in Italy for the pursuit of the purpose of international terrorism on the basis of the activity of indoctrination, recruitment and training for the martyrdom of new followers, to *be sent to the war areas* if necessary, and the collection of money for the economic support of the fighters of the “Jihad” *abroad*....

Secondly, in terms of “the grade of danger”, on the one hand, the danger includes not only the commission of acts of terrorism but also someone’s participation in an association of this type (Article 270-bis of the Criminal Code, paragraph 2), on the other hand, the danger relies on *the diffusion and sharing* of documents with an apologetic nature rather than on the possible realization of their content.

[...] the adhesion that was requested in the addressees was not only



“ideological”, to use the expression of the applicant, highlighting the characteristic of a document written in Italian and addressed to an audience of subjects rooted in the territory national, made with incisive style and able to arouse interest and sharing:

As we can see, in the case of H.E.M. the judge broadened the concrete danger standard that established before and Italian prosecutors were more prepared to charge those who commit glorification of terrorism: in a more recent case, the offender D. had shared an ISIS propaganda video on Facebook was convicted of the crime of apology of terrorism by the Supreme Court of Italy (Case n.55418 from 25 September 2017).<sup>34</sup>

In this context, the criminal procedure and penalty system in Italy started to choose a model that would protect human rights by applying proportional sanctions on terrorism apologists, such as using custody at home(Zirulia 2015) and confiscation on the offenders convicted of conducts with the purposes of terrorism<sup>35</sup>, rather than long-term imprisonment. On the other hand, the criminal law procedure that evaluates the existence of the guilt necessary in the contradictory of the parties before three different jurisdictional bodies (Judge for preliminary investigations, Court of Review and Supreme Court of Italy) also played an important role in protecting human rights(Zirulia 2015).

In the following chapter, how traditional terrorism had grown into modern terrorism in China is introduced, as well as which type of terrorism expression crime is criminalized in Chinese criminal law. It is not only the scope of terrorism expression crime in criminal law is broader than the selected countries, but also the applied scope by Chinese Courts. Some suggestions are provided as a roadmap for Chinese criminal justice system to take in order to protect freedom of speech contemporarily.

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<sup>34</sup> Share ISIS propaganda video and approve its contents integrating apology to terrorism

<sup>35</sup> It was stipulated in article 270-sexies of criminal law in Italy, which inserted by the art. 4, paragraph 1, lett. b), L. July 28, 2016, n. 153.

## 6. Combating modern terrorism in China: compared conclusions and future developments

### 6.1. Historical terrorism issue background, modern terrorism and its exhaustive criminalization in China

Terrorism in China is a persistent issue ever since China entered the international arena.

The northwestern part of China, Xingjiang, has been historically plagued by three forces: separatism, factionalism and terrorism. Muslim Uyghurs in the northwestern region of China had historically struggled for independence from mainland China (Cai 2014). Before the incorporation of Xingjiang into the People's Republic of China in 1949, two short-lived "East Turkestan Republics" (ETRs) were established (Zhou 2017, 3). The first one is from 1933 to 1934, when the warlord Sheng Shicai suppressed the Islamic republic revolution and ended the war situation in Xinjiang (He 2013, 23). The second "East Turkestan Republic", the revolutionary coalition government of the Ili-Tacheng-Altay area of Xinjiang, was established from 1944 to 1949 (Crotty 2005, 227; He 2013, 23). During the first 40 years after the establishment of the People's Republic of China, from 1949 to 1989 when the Soviet troops withdrew from Afghanistan, there were still sporadic resistances from Uyghur people, especially in southern Xinjiang (Zhou 2017, 3). The China Information Office of State Council reported in 2002, one year after 9/11, that from 1990 to 2001, the "East Turkestan" terrorist forces inside and outside Chinese territory were responsible for over 200 terrorist incidents in Xinjiang, resulting in the deaths of 162 people of all ethnic groups, including grass-roots officials and religious personnel, and injuries to more than 440 people. (Information Office of State Council 2002) On 15<sup>th</sup> December 2003, the Chinese Ministry of Public Security first issued an official list of East Turkestan terrorists and terrorist organizations,<sup>36</sup> their leaders, sources of funding and connections with other terrorist organizations (China News 2003). At the end of the

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<sup>36</sup> Namely, East Turkestan Liberation Organization (ETLO), the East Turkestan Islamic Movement (ETIM), the World Uyghur Youth Congress (WUYC) and the East Turkestan Information Centre (ETIC)

first decade of the 21<sup>st</sup> Century, terrorist attacks still concentrated in the western part of China: for example, prior to the opening of the Beijing Olympic Games in 2008 large scale terrorist riots were launched in Xizang, and on 5<sup>th</sup> July 2009 the same happened in Urumqi, the capital of Xinjiang (Zhou 2017, 3).

Meanwhile, the increasing rate of internet penetration and the enhancement of mobility of internet access in China since 2007 provided the possibility for China to be influenced by international terrorism through the internet. The internet penetration rate in China has been climbing up every year since 2000. It took about 10 years for China to reach 100 million internet users. Along this process, in 2006 Internet users exceeded 10% (the exact percentage of internet users was 10.5%) of the Chinese population for the first time. After that, it took about only 2 years for China to reach 200 million internet users. At the end of 2007 the internet users in China were 210 million. However, there were still large differences in internet access between urban and rural areas in 2007.(The State Information Center and China information association 2008, 410) The disproportion between mobile device use and fixed device use started changing as well. The percentage of fixed device use started to decrease from 28.1% in 2006 to 27.8% in 2007, while the growth of the percentage of mobile internet users never stopped since 2001 (The State Information Center and China information association 2008, 411). In 2010, the number of mobile device users exceeded 300 million (302.7 million).(eMarketer 2017) In 2016, according to the China Internet Network Information Center (CNNIC), 95.1% of internet users in the country used a mobile device to access the internet.(eMarketer 2017)

On the other hand, terrorism in China after the 2010s started to manifest features like mobility and dispersion, along with a rising number of mass knifings and bombings in high-traffic public areas (Tanner and Bellacqua 2016, 4). A landmark event would be the car bomb explosion in Beijing's Tiananmen Square on October 28<sup>th</sup>, 2013(Tanner and Bellacqua 2016, 1). Following the attack, Abdullah Mansour, the leader of the Pakistan-based and Uighur-led Turkistan Islamic Party (TIP), an international terrorism organization formed in 2006 by Uighurs who fled to Afghanistan and Pakistan in the 1990s, released a propaganda video praising the

plotters and warned of future attacks(Gohel 2014, 16). Meanwhile, this international terrorist group, started to exploit cyberspace in China, issuing videos to call for jihad by Uighurs in Xinjiang(Botobekov 2016).<sup>37</sup> Militant Uighur groups also likely deepened their collaboration with a dense web of international terrorist organizations, which potentially enhanced their capabilities(ForeignAffairs.com 2014). Other international terrorist groups recognized by the Chinese government, the World Uyghur Congress and the East Turkestan Islamic Movement (ETIM)(ForeignAffairs.com 2014), had also sent radicalization documents to the Uighurs via internet(VICE News 2015).<sup>38</sup>On July of 2015, 109 Uighur Refugees planned "to join jihad" in the Middle East were allegedly radicalized by documents sent to them by these two groups.

On 27<sup>th</sup> July 2014, China officially expanded its crackdown on terrorist activities into a new battlefield: cyberspace.(Tiezzi 2014) A documentary made cooperatively by China's State Internet Information Office, Ministry of Public Security and State Council Information Office drew a direct connection between the online material and terrorism in China. It said that every one of the terrorist attacks in contemporary China had been related to video and audio propaganda found online. The documentary included interviews in which accused terrorists talked about how they gathered with others to watch the videos and grew more and more passionate about jihad. It also noted an extreme rise in the number of videos posted online by ETIM from 8 in 2010 to 109 in 2013. According to this documentary, the rise in online material correlates with the increase of the number of actual attacks carried out in China (Tiezzi 2014).

Compared with the widely spread internet materials and attacks made by lone wolves, the role of the internet in the phenomenon of Chinese foreign terrorist fighters is not that apparent, but more related to local factors: Chinese foreign terrorist fighters

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<sup>37</sup> TIP has posted more than 30 videos and other propaganda material on the internet. A careful study of this material makes it clear that significant changes have occurred in the ideological and strategic goals of the TIP since 2010

<sup>38</sup> On July of 2015, 109 Uighur Refugees planned "to join jihad" in the Middle East were allegedly radicalized by documents sent to them by the exiled World Uyghur Congress and the East Turkestan Islamic Movement, which China has deemed as a terrorist group.

do still largely come from the northwestern part of China, the province of Xinjiang. Data from foreign fighter registration forms collected by (ISIS) officials on the Syria Turkey border showed that there were 114 foreign fighters coming from Xinjiang, making up over 95% of those who joined ISIS from China in 2013-2014.(Rosenblatt 2016, 2) Chinese foreign fighters are highly concentrated (97%) in this specific region, and the percentage is far higher than that of the second-ranked country, Lebanon, which has a 79% concentration in a specific region (Rosenblatt 2016, 23). Similarly, Chinese Islamist fighters, like many other foreign recruits with an average religious education(Rosenblatt 2016, 27), are all similarly as partially driven by local concerns (The Washington Post 2016).

To fight against the modern terrorism phenomena, following the implementation of UN Resolutions 2170 (2014) and 2178 (2014), China promulgated a series of laws, such as the new National Security Law (July 2015) and the State's first Anti-Terrorism Law (December 2015) and Cyber Security Law (November 2016), and exhaustively criminalized all forms of terrorism expression offenses, including apology of terrorism or extremism, incitement to commit terrorist activities, and possession of terrorism or extremism related articles.

These terrorism expression offenses were criminalized in Chinese Criminal Law by the 9th Amendment, which was adopted on 29<sup>th</sup> August 2015 and came into force on 1<sup>st</sup> November 2015.

Either in cyberspace or in the physical sphere, terrorism expression behaviors could be regarded as crimes according to the Chinese criminal law code. Article 120-5 of the criminal law code criminalized terrorism manifestations in the public physical sphere by sanctioning anyone compelling others to wear costumes or symbolic garments in public places to advocate terrorism and extremism.<sup>39</sup> Articles 120-3 and 120-6 sanction the possession of terrorism or extremism related articles and either direct incitement to commit terrorist activities, or indirect incitement, the apology of

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<sup>39</sup> Article 120-5 of Chinese criminal law: Forcing Others to Wear Costume or Symbol that advocates Terrorism or Extremism: Whoever forces anyone else to wear the costume or symbol that advocates terrorism or extremism in a public place by means of violence or coercion, etc. shall be sentenced to imprisonment of not more than three years, criminal detention or control in addition to a fine.

terrorism or extremism. Those two articles are the main regulations that could be applied to fight against the current terrorism expression crimes in the age of the internet.

Article 120-3: Apology of terrorism or extremism, incitement to commit terrorist activities

Whoever *defends* terrorism or extremism or *instigates* others to commit terrorist activities, by means of preparing or distributing any book, audio or video material or any other article advocating terrorism or extremism or by means of instructing or issuing information, shall be sentenced to imprisonment of not more than five years, criminal detention, surveillance or deprivation of political rights, in addition to a fine; *or, if the circumstances are serious*, one shall be sentenced to imprisonment of not less than five years in addition to a fine or confiscation of property.

Article 120-6: Possession of terrorism or extremism related articles

Whoever illegally holds any book, audio or video material, or any other article, while *obviously aware* that it advocates terrorism or extremism, shall, if the *circumstances are serious*, be sentenced to imprisonment of not more than three years, criminal detention or surveillance, in addition to a fine, or be sentenced to a fine only.

Other newly introduced specific crimes include the preparation or facilitation of terrorism organizations to commit terrorist attacks, such as preparing weapons, organizing or actively participating in training, contacting persons, making plans for terrorist activities,<sup>40</sup> or training, recruiting and trafficking personnel<sup>41</sup> for terrorist purposes, or knowingly providing internet services to the offenders for committing

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<sup>40</sup> Article 120-2 of Chinese criminal law: "Whoever falls under any of the following circumstances shall be sentenced to imprisonment of not more than five years, criminal detention, surveillance or deprivation of political rights in addition to a fine; or be sentenced to imprisonment of not less than five years in addition to a fine or forfeiture of property if the circumstances are serious.

"(1)Preparing lethal weapons, hazardous articles or other tools for conducting terrorist activities; (2) Organizing training on terrorist activities or mild participating in training on terrorist activities;(3) liaising with organizations or individuals involved in terrorist activities outside the country;(4) Making a plan or any other preparation for conducting terrorist activities."

<sup>41</sup> The 120-1(2) of Chinese criminal law: "those recruiting or transporting personnel for terrorist organizations or for the purpose of carrying out terrorist activities or terrorist activity trainings" are sentenced to up to five years imprisonment, short-term detention, controlled release or deprivation of political rights and a concurrent fine; where circumstances are serious, the sentence is five or more years imprisonment and a concurrent fine or confiscation of property.

crimes.<sup>42</sup> Some of those criminalized preparation or facilitation offenses for terrorist purposes could also be committed in expression form. In case of overlaps, Chinese criminal law has ruled the principle of choosing the crime with a more severe penalty to punish the offender.<sup>43</sup>

In this sense, terrorism expression offenses in China have reached an extremely broad scope. However, will the counter modern terrorism law be applied by Chinese courts? Or is it just a symbolic law which is abandoned to be used? To what extent has the law been interpreted in practice by Chinese courts and will it be further interpreted to protect freedom of expression? Those questions will be answered in the following part.

## 6.2. A broader sanction scope on modern terrorism expression crimes in Chinese courts

Since the counter modern terrorism law came into effect in November 2015, and until April 2018, Chinese Courts have sanctioned 32 terrorism expression criminals. 21 criminals were convicted for incitement or apology of terrorism by article 120-3 in the criminal law code, and 14 criminals were convicted by article 120-6 for the crime of possession of terrorism related articles. Among those criminals, one was convicted by article 120-2 of the criminal law code for preparation to committing terrorist activities. Some of the criminals were convicted by more than one terrorism expression crime.<sup>44</sup>

Among these cases, there are two joint-crimes cases where the offenders were convicted by article 120-3 for apology or incitement to terrorism. One of them was committed by three young criminals: YQ. Xiong, born in 1996, who was convicted for possession of terrorism related articles and for the offense of preparation for terrorism purposes, and two other young modern terrorists, ZY. Lei, born in 1997,

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<sup>42</sup> Article 287-2 of Chinese criminal law

<sup>43</sup> Article 133-1, 329 in Chinese criminal law code and article 120-2, 260-1, 280-1,286-1, 287-1, 287-2, 307-1.4, 307-1.3 Last paragraph of article 120-2: "Whoever commits any other crime while committing a crime as provided for in the preceding paragraph shall be convicted and punished according to the provisions on the crime with the heavier penalty."; Chen Hongbing, Understanding Relevant Provisions of "Other Crimes" in Criminal Law Amendment (9), law and political science, 2016 (2),17.

<sup>44</sup> Data collected by the author, through online cases database <http://wenshu.court.gov.cn/>

convicted for incitement to terrorism, and Y. Yang, born in 1992, convicted for apology of terrorism. They knew each other via internet chat groups and lived in different areas of China. Each of them didn't expect the others to commit terrorism related crimes either going abroad to support IS or making bombs to commit terrorist attacks, but they all provided mental support by means of sending audios or videos to each other aiming to broaden their influence.

Notably, Chinese female modern terrorists in the analyzed cases did not play as important a role as propagandists as western women did. There is only one case in which Chinese woman was convicted for terrorism apology crimes.(Wu Xiaojun, Lin Bingbing, and Sun Wei 2018) Chinese women are more likely to be involved in terrorism related articles possession crime cases, however, the possibility of radicalization among Chinese women is still uncertain.

Differently from the H.E.M. Case in the Italian Supreme Court, among those 21 cases delivered by Chinese courts for crimes of terrorism incitement or propaganda, none of the offenders was the author of the apologetic content. Rather, offenders in those 21 cases had all disseminated terrorism related inflammatory or apologetic content via the internet: by doing this gesture online, the offenders had expressed their supportive attitude and intended to make more people browse the same content, which is similar to the latest ruling in the more recent case in the Italian Jurisprudence, committed by offender D. in 2017 (Case n.55418 from 25 September 2017).

In terms of terrorism related articles possession cases, unlike the scope in the rulings in the UK jurisprudence, Chinese courts neither considered if the information was of "practical use" for terrorism related purposes nor if the information was "designed to provide practical use". Possession of non-practical material that merely glorifies terrorists' activities could amount to a crime of possession of terrorism related articles. However, similarly to what happens in the UK, many of the excuses in terrorism related articles possession cases are not justified by the jurisprudence in China, such as not having the specific intention to possess terrorism propaganda articles,(H. Zhang, Wang, and Lu 2017) the quantity of the material being very low (Li, Zhang, and Feng 2017) and the possession being out of personal curiosity.(Du



Xinchun, Li Zicai, and Li Qiangji 2017; Yi 2017; Zheng 2017; Y. Gao, Li, and Sun 2017)

Specific intention to commit terrorism related activities is not required to be the mens rea so as to convict possession crime offenders, but rather, knowing that the information contains terrorism content and possessing it are enough for the conviction according to Article 120-6. According to the Opinions of the Supreme People's Court, the Supreme People's Prosecution Organ and the Ministry of Public Security on Several Issues concerning the Application of Law in the Handling of Criminal Cases Involving Violent Terrorism and Religious Extremism,(Supreme People's Court,Supreme People's Procuratorate,Ministry of Public Security 2014, pt. 3) some factors, such as occupation and educational background of the suspects, could be regarded as standard of proof to account subjective status. While this standard that is applied in almost all terrorism related articles possession cases falls below the “strong circumstances evidence” standard as in the US jurisprudence.

There is only one case, the one of Guo Zhicai for possession of terrorism related articles, delivered by a Chinese local court in 2017,(Ren, Li, and Chen 2017) where the judge applied a similar standard of “strong circumstances evidence” to prove the mens rea aspect as it was applied in the case of Mehanna for incitement to terrorism in the US jurisprudence. Mr. Guo had arrived in Turkey when he was almost 19-year-old. He made a real connection with other foreign fighters there and continuously contacted them through the internet and kept browsing and possessing terrorism propaganda articles after he came back to China. But in Chinese Jurisprudence, the coordination requirement is applied in deciding the case for possession of terrorism related articles, rather than the incitement to terrorism as in the US.

Offenders convicted for possession of terrorism related articles by Chinese courts could not be regarded as criminals “for terrorist purposes”, since some of the offenders possessed the terrorism related articles for economic benefits reasons,(Wang 2016) or by negligence of not deleting it at the time.(Zhao, Wu, and Zhao 2017)

Briefly, although the terrorism apology crimes convicted by Chinese courts before April 2018 generally coincide with the boundaries determined in the Italian

jurisprudence, owing to the institutional design of second instance as last instance and the excessive pursuit of efficiency in procedural law, the guarantees in Chinese criminal procedurals still need to be improved: among these cases that analyzed, only 2 cases are convicted for the second instance for the final conviction, other cases are convicted by the first instance in local courts, judgments could also be delivered through summary procedure. On the other hand, the scope of the offense of possession of terrorism related articles in China's jurisprudence is broader than in the UK, for it also sanctions those who possess non-practical materials. The "strong circumstances evidence" standard in US jurisprudence is rarely used to constrain Judges' discretion in Chinese courts.

The modern terrorism scopes determined by Chinese courts were broader than those delivered in the Supreme Court in other countries, but the most recent cases and guiding opinions issued in April and June 2018 in the Chinese criminal justice system have actively provided a basis for Chinese courts to protect freedom of speech in the internet age. It is predictable that the disproportional conviction phenomenon in terrorism expression crime cases would be changed owing to these recent typical cases and guiding opinions issued by China's Supreme People's Court and China's Supreme People's Prosecution Organs.

On 16<sup>th</sup> April 2018, China's Supreme People's Court issued three *Typical Cases*<sup>45</sup> related to combating terrorism and protecting national safety. One of those cases is the crime of terrorism apology with the use of the internet. (People's Court Daily 2018)

In early 2016, suspect Zhang had *downloaded* videos and pictures with violence or terrorism content on the internet through mobile phones. From February to October 2016, suspect Zhang from time to time *uploaded* those pictures and videos to the QQ.com space *for others to browse*. The court heard the case legally and held that the defendant committed the crime of apology of terrorism or extremism. The court sentenced the defendant with imprisonment for 2 years and three months and a fine of 5000 RMB.

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<sup>45</sup> Typical Case, Bulletin Case and Guiding Case are three types of cases that courts in China could refer in adjudging similar cases. Guiding case can only be issued by the Supreme People's Court, while all other levels of court could issue typical or bulletin cases. (Hu 2014)

This *Typical Case* issued by China's People's Supreme Court clearly revealed that the offense of online "apology" of terrorism in Chinese criminal law aims to punish the behavior of "dissemination of information", intentionally making terrorism related content available for others to browse. The content of the terrorism apology videos and pictures was confined to violence or terrorism, while the actus rea is "dissemination of information".

Two months later, on 15<sup>th</sup> June 2018, China's Supreme People's Procurator Organ issued the "Opinions on Several Issues Concerning the Application of Law in the Handling of Terrorist Activities and Extremist Crimes" jointly with China's Supreme People's Court, the Ministry of Public Security, and the Ministry of Justice (Chinanews.com 2018). The Opinion provided several minimum standards for the conviction for possession of terrorism related articles, such as the minimum quantity limits; or repeatedly held or held various types of terrorism related articles; or causing serious consequences or having harmful social effects. Deducing the mens rea by reviewing one's educational background or occupation conditions is substituted by more objective perspectives, such as "once imposed on criminal sanctions or administrative punishment because of committing terrorist or extremist activities within two years".

On the other hand, the Opinion also clarified that different types of terrorism related crimes are subjected to the Jurisdiction of the Court at different levels. Some cases shall be subjected to the intermediate court as of first instance, where summary procedure of criminal procedure is not allowed to be applied.

Last but not least, this Opinion underlines that when handling terrorism or extremism cases, courts shall apply a differentiated approach to carry out educational measures to de-radicalize the involved suspects.

### 6.3. Conclusions: the roadmap for China's criminal justice system to protect freedom of expression

Along with the globalization process, China is inevitably influenced by the global terrorism war taking place in the post 9/11 world. The expansion of

pre-criminal law swiftly responded to the new threats, but also challenged the principle of harm and last resort function of classical criminal law. Overall, when confronted with modern terrorism expression crimes, China's law and practice again substantially and institutionally verified the conclusion that Asian legal systems are generally more often willing than western constitutional democracies to restrict speech via laws on the grounds of public morality, public welfare, and peace, order and security (Dixon and Ginsburg 2015, 6).

Substantially, not only all forms of terrorism expression offenses are criminalized in Chinese criminal law, but the law has been applied by Chinese Courts in an extremely broad way, at least broader than in the selected western countries: the US, the UK and Italy. Institutionally, neither a constitutional law court exists in the justice system, nor the right/freedom guaranteed in Chinese constitutional law is directly applicable to individual cases, but largely relies on the provisions in specific laws. The role of Chinese courts is not constitutionally designed as in the structure of check and balance system in the US, therefore, the "judicial review" is not within the courts duties, which is particularly recognized as an evident difference between the Chinese and other common law systems.

However, there are also many other factors beyond the law that have had an important role in influencing the construction of freedom of expression, for example the geopolitical inequalities, international political orders, technology development and the history each country went thorough, etc. If we come back to the justice system and laws, the constitutional law of different countries shall be respected and analyzed in the first place, since criminal laws are the reflection of the monopoly of the state power, it persistently raises this issue of who the criminal laws are protecting and on behalf of whom the justice speaks (Berger 2014, 5).

There are rarely other countries that apply protection of freedom of expression in their constitutional laws to the same extent as the First Amendment of the USA, if the codified constitutional law is applicable. For example, article 21 of the Italian Constitution does not cover behavior which may encourage the commission of crimes. The Constitutional Court of Italy had also considered that behavior such as criminal

incitement should not be protected by article 21(Onida et al. 2013, 299). In China, article 33-4 of the Chinese constitutional law stipulates that “Every citizen is entitled to the rights and at the same time must *perform the duties* prescribed by the Constitution and other laws”(The National People’s Congress 2018). In terms of freedom of speech, China’s constitutional law clearly stipulates the related duties of citizens when they exercise their freedom of speech<sup>46</sup> rather than only declaring that citizens of PRC enjoy the right of freedom of speech<sup>47</sup>. Article 51 of China’s constitution codifies that “citizens of the People’s Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens.”(The National People’s Congress 2018) Some kinds of expressions are not protected according to China’s constitutional law. For example, article 4 stipulates that “...discrimination against and oppression of any ethnic groups are prohibited; any act which undermines the unity of the nationalities or instigates the nation division is prohibited.”(Zhang M. 2014).

The protected boundary of freedom of expression in China’s constitutional law is reflected in the rule of proportionality in Chinese criminal law, codified in article 5 in the general part of the criminal law code, stating that “the severity of punishments must be commensurate with the crime committed by an offender and the criminal responsibility he bears.”

The rules of proportionality and commensuration are also reflected in China’s contemporary criminal policy of tempering justice with mercy and strictness. This criminal policy complies with the principle of rule of law to a greater extent compared

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<sup>46</sup> Article 38, 51, 53, 54, of constitutional law of China. Below the Chapter II The Fundamental Rights and Duties of Citizens: Article 38: The personal dignity of citizens of the People’s Republic of China is inviolable. Insult, libel, false accusation or false incrimination directed against citizens by any means is prohibited; Article 51 Citizens of the People’s Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens; Article 53 Citizens of the People’s Republic of China must abide by the Constitution and the law, keep state secrets, protect public property, observe labor discipline and public order and respect social ethics. Article 54: It is the duty of citizens of the People’s Republic of China to safeguard the security, honor and interests of China; they must not commit acts detrimental to the security, honor and interests of China.

<sup>47</sup> Article 35 of constitutional law of China: Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.

with other criminal policies of “harsh strike”<sup>48</sup> and “two fewer, one leniency” for particular needs of social security or stability issues. The “harsh strike” policy largely encouraged to use criminal law to solve social problems in a swift and harsh means, while the “two fewer and one leniency” was a policy of granting leniency in charges and sentences with regard to minorities as compared to Han for the same criminal offenses, proposed in 1984 by Peng Zhen and Hu Yaobang. However, this criminal policy has been criticized as against the justice equality principle as it overly considers the ethnic factor of the people.

It is important to combat terrorism crime in China by solving problems in roots, however, the roadmap for China’s criminal justice system to further protect freedom of expression shall be taken at least in the following ways: a) the law that combating modern terrorism expression offenses shall be proportionally regulated by comparing its severity between other crimes in China’s own criminal law system(Jiang 2013, 101–3). b) In specific cases, the law shall be used less and with cautious. Justice activism (X. Gao and Li 2015, 27) are supposed to be encouraged to play its important role in Chinese criminal justice system to realize justice in individual cases.

As for the legislation itself, in Chinese criminal law, the modern terrorism expression crimes could be regarded as the most severe crime with the least fault compared with other crimes. Taking the crime of possession of terrorism related articles as an example<sup>49</sup>, it imposes the same level of statutory penalty as the crime of illegal possession of firearms,<sup>50</sup> but without prerequisites such as the breaking of regulations of firearm controls. There are neither similar restrictions as drug possession crimes<sup>51</sup>, or counterfeit currencies possession crimes<sup>52</sup>has, nor it deploys explanatory justificatory reasons, such as refusing to explain the origins or the use as the possession of the State secrets crime has<sup>53</sup>, in narrowing the criminalized scope of

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<sup>48</sup> This criminal policy was firstly proposed by Dengxiaoping. There are commonly recognized of 4 times of “harsh strikes”, 1983, 1996, 2000-2001, and 2010.

<sup>49</sup> Possession of illegal terrorism articles are deployed with up to 3 years imprisonment as basic penalty in Article 125 of China’s criminal law.

<sup>50</sup> Article 128 of China’s criminal law

<sup>51</sup> The article 172 in criminal law code of China

<sup>52</sup> The article 348 in criminal law code of China

<sup>53</sup> The article 282-2 in criminal law code of China

possession of terrorism related articles in Chinese criminal law.

In terms of the law of possession of terrorism related article, the legislators of China and Chinese courts had to take fully into consideration that China has applied long-term political regimes, such as, establishing ethnic minorities autonomous regions, which was gradually institutionalized in the constitutional document “common program” of 1949 and codified in constitutional law of 1954 and of current 1982 constitutional law of PRC, and contemporary de-radicalization strategies(Zhou 2017, 4) to decrease potential conflicts between different ethnic groups and construct an equality, unity, multi-aid and harmonious society to limit radicalization possibilities<sup>54</sup>. Those political strategies and efforts led by China’s Communist Party are essentially different from the political strategies held by the American Government, which have essentially brought about the international terrorism issue. The radicalization possibilities in China shall be considered and compared with other countries with different counter-terrorism policies. Even though the criminalization of these offenses is out of public safety consideration, the scope of counter modern terrorism law in theory and in practice shall also be narrower than in the United Kingdom, according to the different nature of the constitutions.

In handling individual cases, it was around 2007 that the law making function of Chinese courts developed to face the rapid social change, vague in criminal law and human right protection in economic cases. The mass media had called the case of Xu Ting made China embraced the era of judicial discretion.(Zhu Yuan and CHINA DAILY 2008) After that, justice activism was officially proposed by the president of the Supreme Court of China,Wang JunSheng, for solving economic cases and constructing a harmonious society in 2009.(www.npc.gov.cn 2009) In 2012, there were also cases delivered by Chinese intermediate courts, which started to protect freedom of speech with the use of the internet, considering the public interests and the offenders’ actual criminal intention.(Liu 2016)

From a comparative perspective, it is still necessary for Chinese criminal justice system to learn from other jurisdictions to interpret the law in a proportional way and

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<sup>54</sup> Article of 38 of constitutional law of China amendment in 2018

take the reference of discretion rules in the prosecution system to prudently use the law in combating terrorism expression crime. In a sense, the Italian experience is worth taking as reference considering the similarities of a proportional protected “freedom of expression” in the constitutional text and the similar function of courts in criminal law cases: there is the constitutional law obstruction for the Italian legal system to become a legal system founded on judicial precedent<sup>55</sup>. The creation of criminal laws, just like their repeal, cannot depend on “case law–based rules, but only on an act of will on the part of the legislator”.(Baccaglini, Paolo, and Cortese 2017) But Italian judges are indirectly obliged to consider the guidelines and precedents of the European Court of Justice.(Baccaglini, Paolo, and Cortese 2017) Therefore, even when the legislator aims to broaden the scope of the legal term in the laws, the judge could indirectly refer the law of higher order, national or supranational, or precedents from supranational courts to retain a narrow scope. In this sense, to balance the will of the legislator and the substantial justice, the scope of criminal law cases prosecuted and determined by Italian criminal justice system shall be closely paid attention by China.

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<sup>55</sup> Article 110 of Italian constitutional law and 107-3 of Italian constitutional law



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