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PRAISE OR PERIL? PROBLEMATIC ASPECTS OF CRIMINALISING INCITEMENT TO TERRORISM IN INTERNATIONAL LAW

PLAUSO O PERICOLO? ASPETTI PROBLEMATICI DELLA CRIMINALIZZAZIONE ALL'INCITAMENTO AL TERRORISMO IN DIRITTO INTERNAZIONALE

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ABSTRACT
Free speech is an essential feature of liberal democracies, as it allows for different views and opinions to be expressed. However, proclamations based on corrupt assumptions can lead to horrible events. Because of this, speech can legitimately be limited. This work provides operational guidelines on how to do so while complying with human rights frameworks and with the rule of law in the specific case of incitement to terrorism. On the matter, which is gaining increasing academic attention, opposed opinions and contrasting practices remain. The core issue is: where should the line be crossed between praise, the legitimate expression of a controversial opinion, and peril, an act of speech that creates a real threat of harm? This issue is tackled here from the perspective of international law. Firstly, incitement to terrorism is defined by considering the key elements of this crime separately. Secondly, the legal regime of protection of freedom of speech is looked at to determine whether incitement to terrorism can legitimately be prohibited. Finally, the question of whether criminal law, and especially inchoate offences, constitute an appropriate tool for prevention is asked. An answer is provided here by establishing a distinction between preventive and pre-emptive measures based on the criteria of threat specificity, short time horizon and imminence of harm. Based on this distinction, only pre-emptive prohibitions to incitement to terrorism are considered admissible.

La libertà di espressione è una componente fondamentale delle democrazie liberali, dal momento che garantisce la possibilità di condividere punti di vista e opinioni differenti. Tuttavia, da proclamazioni basate su presupposti immorali possono derivare conseguenze orribili. Per questo motivo, la parola può essere legittimamente limitata. Questo lavoro offre delle linee guida operative per come prevedere limiti alla libertà di espressione nel rispetto dei diritti umani e della *rule of law* nel caso specifico dell'incitamento al terrorismo. Sulla questione, che sta ricevendo una crescente attenzione accademica, esistono opinioni opposte e pratiche contrastanti. Il problema fondamentale è rappresentato dalla difficoltà nello stabilire un confine fra il plauso, ovvero la legittima espressione di un'opinione controversa, e pericolo, intendendo un discorso che genera un reale rischio di danno. L'argomento viene studiato qui dalla prospettiva del diritto internazionale. In primo luogo, viene fornita una definizione di incitamento al terrorismo considerando separatamente gli elementi fondamentali che caratterizzano questo reato. Di seguito, attraverso l'analisi del regime di protezione della libertà di espressione, si valuta se l'incitamento al terrorismo possa essere legittimamente proibito. Infine, si analizza se la legge penale, e in particolare i reati formali, costituiscano uno strumento adeguato al fine di prevenzione.

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Viene fornita qui una risposta stabilendo una distinzione fra misure preventive e *pre-emptive* sulla base dei criteri di specificità del pericolo, brevità dell'orizzonte temporale e imminenza del danno. Secondo questa distinzione, solo le proibizioni *pre-emptive* dell'incitamento al terrorismo sono considerate ammissibili.

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PRAISE OR PERIL? PROBLEMATIC ASPECTS OF CRIMINALISING INCITEMENT TO TERRORISM IN INTERNATIONAL LAW

Morgana Federica Signorini

1. Introduction.

Words have an enormous impact. From private thoughts whispered to a friend, to powerful calls for action declared by leaders, speech is a powerful influence on everyone's personal and public life. Free speech allows for different views and opinions to be expressed, shared and compared. Diversity, valuable in itself, is entwined with freedom of speech, as it is both expressed and multiplied by it. Because of this, free speech has long been considered as an essential feature of liberal democracies. However, there are two sides to the coin of free speech. Just as a kind word can improve someone's day, a harsh judgement may hurt them. And just as positive declarations may create beneficial outcomes, proclamations based on corrupt assumptions can lead to horrible events. An obvious, but inevitable example is the abominable effect of Nazi propaganda. Hitler's ability to stir the passions of the listeners through his words is a well established fact. Vile and hateful ideals, propagated through speech, have sometimes been the origin of acts of genocide. Because of this, speech can legitimately be limited. Common sense, national legislations and international law all provide rules for regulating what people say. Individuals can be scolded if they insult someone, they can be jailed or sentenced to pay damages if they defame others, or they can be prosecuted by international criminal courts if they incite groups to commit genocide. Today, a form of incitement which is increasingly gaining attention is incitement to terrorism. The desirable scope of rules prohibiting incitement to terrorism, and their codification into actual crimes, is far from being a straightforward issue. The extent of the responsibility of the inciter, in particular, is a much discussed topic. While established case law exists in the case of incitement to genocide, opposed opinions and contrasting practices remain in instances of incitement to terrorism. The topic is finding a place in the academic and public debate. Discussion on the matter of terrorism, a characterising phenomenon of our time, is ubiquitous. When it comes to incitement, the core issue is: where should the line be crossed between the legitimate expression of a (controversial) opinion and criminal liability? In fact, prohibiting incitement to terrorism can mean different things. In a broader sense, this concept implies that any expression of support for acts of terrorism is sufficient ground for prosecution. A narrower approach would only allow the application of coercive measures when actual danger of harm results from an assertion. Hence the question: how can a distinction be made between praise and peril?

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In recent years, the issue has become, if anything, more pressing. The threat of international terrorism is a defining feature of our times. Not only that; there is a subtler side to the issue. Since the beginning of the century, global 'crises' have been following one another, the latest being the COVID pandemic. During this 'age of threats'[1], governments have been resorting to emergency powers with increased frequency, with these initiatives often resulting in the erosion of human rights, like the right to travel unhindered or to assemble peacefully. In the case of incitement to terrorism, the affected right is freedom of speech.

The topic of incitement to terrorism is analysed here from the perspective of international law. For conceptual clarity, the first issue to be settled concerns definitions. The first section is thus focused on defining what incitement to terrorism is. The need for conceptual clarity is not limited to an ideal aim; in the legal sphere it is also a requirement to comply with the principle of legality. The analysis starts from the underlying lack of consistency in definitions of incitement to terrorism, looking in particular at UN Resolution 1624 and at European standard, as defined by the 2005 Council of Europe Convention on the Prevention of Terrorism and the 2017 Directive on combating terrorism. After that, the wide-ranging debate on defining terrorism is tackled, as an unavoidable step in order to reach a clear definition of what conduct is prohibited by an offence of incitement to terrorism. Finally, the key elements of this crime are considered separately, in order to discuss their meaning and extent. The aim of all this is to create an understanding of what a prohibition of incitement to terrorism entails. After that, the discussion shifts to establishing criteria for assessing the appropriateness of measures that limit freedom of speech, by looking at their effects. In order to ascertain whether, or to what extent, curbs on free speech can be legitimate, the legal regime surrounding this fundamental right has to be studied. That is the goal of the second section, where the protection of freedom of speech in international law is explored. Relevant documents are presented, focusing especially on the inherent tension between protection and limitation of freedom of speech in the most important human rights charters, in order to understand how far-reaching limitations to freedom of speech can be in theory. Following that, the same issue is explored in the case law of the European Court of Human Rights and the U.S. Supreme Court, with an emphasis on the differences between the two approaches. Based on this discussion, it will be observed that limiting speech for counterterrorism purposes, as is done in the case of prohibiting incitement to terrorism, pertains to legitimate motivations. However, even if restrictions to freedom of speech can be made, it does not necessarily mean that they should. This aspect is discussed at the end of the section, underlying some negative consequences of limiting speech. The first section describes the offence of incitement to terrorism, a coercive measure justified by the goal of increasing security by reducing the occurrence of terrorist attacks.

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In the second section, the focus is moved towards the liberty that is lost in this process, chiefly, freedom of speech. The apparently antithetical nature between these two is synthesized in the final section. Here, the reasoning behind criminalising incitement is tackled, firstly, by analysing various theories justifying criminal law, and especially inchoate offences. This particular category of offences implies a shift from the traditional retributive logic of criminal law, focusing on prevention instead. This trend, which is becoming increasingly common in counterterrorism efforts at least since the 9/11 attacks, is looked at here with a critical eye because of the problematic consequences it carries. A solution to the issue is proposed here by borrowing the distinction between preventive and pre-emptive attack from the law of war. Through the introduction of three parameters, a threshold is set for establishing the correct conditions for employing coercive methods such as prohibiting incitement: while a preventive use of criminal law is not permissible, a pre-emptive one should.

2. Defining Incitement to Terrorism.

Whether or not incitement to terrorism should be criminalised, and how, is a topic which is starting to find its place in the debate on counterterrorism measures. Generally speaking, incitement consists in prompting somebody to commit a crime[2]. Incitement to terrorism specifically refers to advocating the perpetration of terrorist offences. Incitement can be criminalised with the main goal of preventing crimes (or terrorist acts) from being committed. Although the facts as outlined here sound pacific, criminalising incitement to terrorism actually entails several problematic aspects, including possible violations of human rights. The core critical issues concern: a) the lack of clarity in the definition of incitement to terrorism; b) the risk of violating freedom of speech; and c) complexities related to criminalising inchoate offences. The three topics are closely intertwined, but they are considered separately, starting here from definitions. This is an issue of primary importance, as a clear understanding of a concept constitutes the foundation for both theoretically analysing and practically applying it. Clearly defining terms has a great importance. Not only is it fundamental for effective communication in general; in the legal sphere, the need of clear laws also constitutes a core principle and a fundamental element of the principle of legality[3]. More specifically, complying with the principle of legality in this context would imply that provisions prohibiting incitement to terrorism should clearly define what incitement to terrorism is. However, concrete examples from international and regional legal acts show that definiteness is not necessarily a feature of the legal definitions of incitement and lack of consistency in the definition of incitement to terrorism is found among different documents and acts.

UN Resolution 1624, for example, is the first universal legal instrument concerning incitement to terrorism[4], which was adopted by the UN Security Council on 14 September 2005[5], just two months after multiple suicide attacks to the London underground shook the city and the world[6]. The UK's response to these attacks encompassed a series of measures of different nature. These included 'traditional' security measures[7], and also activities aimed at countering terrorist propaganda[8]. Resolution 1624, which was proposed by the UK and unanimously approved by the Security Council, should be seen in connection with these efforts. As a result of hasty preparatory works, the Resolution has been described as 'more of a spontaneous reaction than the product of profound discussion'[9]. As a matter of fact, the debate preceding the adoption of the Resolution was focused on emotional aspects, with its empirical foundations and actual necessity not being properly addressed[10]. Looking at the Resolution, elements creating possible confusion in outlining the illicit conduct can be found from the very start. The preamble of the Resolution opens the door to ambiguity by referring to 'incitement' and 'glorification' back to back[11]. While the two words may appear to be synonyms, the difference between them is quite significant from the point of view of the prohibited conduct. However, neither that, the prohibited conduct, nor the context in which it should be prohibited are further described[12]. No formal or informal definition is given of the term 'incitement' and of the acts it covers. Concern on the lack of clarity has been expressed, among others, by former UN Secretary- General (SG), Ban Ki-moon. The SG warned that the lack of definitions may lead to overly broad interpretations by States, which could turn into violations of fundamental rights[13]. It is worth mentioning that the ambiguous nature of this Resolution is also reinforced by a lack of clarity on its normative nature[14]. Resolution 1624 was adopted under Chapter VI of the United Nations Charter, which, in contrast to Chapter VII, does not empower the Security Council to issue binding decisions[15]. The non-binding nature of the Resolution is further suggested by the chosen wording[16]: in its operative part the Resolution merely 'calls upon' Sates to 'prohibit' incitement to terrorism[17]. The Security Council thus calls on States to prohibit incitement to terrorism without specifically requiring the adoption of a separate criminal prohibition. As a result, some member States resorted to administrative measures[18], while in other cases incitement to any criminal offence is treated as a form of participation, and thus already amounts to an offence[19]. Notwithstanding the fact that several elements account for the non-binding nature of Resolution 1624, it still contains mandatory provisions[20]. Member States are in fact required to report their progress on the implementation of (non-mandatory) measures to the Counter-Terrorism Committee[21]. The monitoring aspect reduces clarity by blurring the line between mandatory and non-mandatory status[22].

This is especially problematic if considered together with the previously discussed vagueness. Moreover: '[t]he ambiguity of the nature of the normative prescriptions laid down in Res. 1624 is all the more troubling, if one realizes the broad scope of the prohibition and the fairly indeterminate character of the relevant conduct'[23].

Resolution 1624 was influenced by the *Council of Europe Convention on the Prevention of Terrorism* (Convention), which had been adopted just a few months before, in May 2005[24]. The Convention is the only regional or international treaty on terrorism which expressly criminalises incitement to terrorism[25], and its adoption undoubtedly helped reach an international consensus on the matter[26]. Article 5 of the Convention requires Member States to 'adopt such measures as may be necessary to establish public provocation to commit a terrorist offence'[27]. The Convention thus differs from Resolution 1624, firstly, because a definition of incitement to terrorism is included; and secondly, because the definition in question explicitly refers to indirect incitement. Reference to indirect incitement is also found in the preparatory works of the Convention[28]. In order to have a more comprehensive understanding of the European regime on incitement to terrorism, the other key regional document to consider is *Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA* (Directive). The Directive has replaced previous frameworks on terrorism in order to update them and to ensure consistency with existing policies[29]. Beside referring to 'directly or indirectly' inciting, the Directive introduces the word 'glorification' in its operative part[30].

Additionally to these, another, more specific, definition is the one proposed in a Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression (Joint Declaration)[31]. Although not having the same legal value as the previous definitions, this one contains several important elements which delineate the illicit conduct more clearly.

After discussing international legal instruments prohibiting incitement to terrorism, a reflection on definitions is necessary. Indeed, scholars, practitioners, governments and international organisations have been discussing the issue for decades; yet, a universally accepted definition of terrorism has not been found. This task is arduous because it is hindered by two crucial factors. Firstly, terrorism is heterogenous[32]. Secondly, it is essentially political[33]. The former of these characteristics implies that there is no single agreed set of actions that defines a terrorist act. The latter factor entails that certain acts can be viewed as either terroristic or legitimate, depending on one's ideology[34]. The expression 'one's man terrorist is another man's freedom fighter' effectively summarizes this point.

A different position on the matter has been expressed by Antonio Cassese. The distinguished jurist has argued that, although disagreement on certain aspects of terrorism persists, 'a customary rule on the objective and subjective elements of the crime of international terrorism in time of peace has evolved'[35]. This position has also been held by Cassese while presiding the Appeals Chamber of the Special Tribunal for Lebanon (STL)[36]. The Appeals Chamber, after reviewing all relevant instruments, attested the existence of a customary rule on the notion of terrorism as an international crime[37]. The Chamber indeed detected a consistent interpretation of terrorism in international and multilateral treaties[38]. Moreover, it found that despite minor variations, most domestic laws concerning terrorism share the core concept that 'terrorism is a criminal action that aims at spreading terror or coercing governmental authorities and is a threat to the stability of society or the State'[39]. Finally, the Chamber observed that national courts had generally upheld a broadly accepted definition of terrorism[40]. In conclusion, the Chamber argued that the notion of terrorism to be applied by the STL consists of the following elements: '(i) the volitional commission of an act; (ii) through means that are liable to create a public danger; and (iii) the intent of the perpetrator to cause a state of terror'[41]. In contrast to this noteworthy point of view, most commentators agree on the lack of a generally accepted definition[42]. The omission of any 'political purpose' element from the STL definition in relation to the fact that it has 'not yet been so broadly and consistently spelled out and accepted as to rise to the level of customary law'[43] is a testimony to differences still existing on the matter[44]. Moreover, the STL definition has been criticised for its breadth, which results in the automatic classification of freedom fighters as terrorists 'irrespective of their adherence to the law of armed conflict'[45]. However, this definition is still useful as it contains references to key features of terrorism as an international crime. Commenting on the three elements of conduct, purpose and motivation, Cassese claimed that general consensus could be found to exist on the following definition:

> 'terrorism consists of (i) acts normally criminalised under any national penal system [...], whenever they are performed in time of peace; those acts must be (ii) intended to provoke a state of terror in the population or to coerce a state or an international organization to take some sort of action, and finally (iii) are politically or ideologically motivated.'[46]

This, paired with cross references to relevant treaties on prohibited acts of terrorism could be sufficient to narrow down what is intended by terrorism in national law or international conventions, and what is considered as 'terrorism' throughout this work.

After establishing what is intended by terrorism, the elements of incitement to terrorism as an offence can be analysed. Generally speaking, incitement occurs when an individual prompts somebody to commit a criminal act[47]. The rationale behind criminalising incitement lies in the intention to prevent an actual crime from being committed[48]. Moreover, '[i]t is an axiom of the common law that any person who encourages another person to engage in criminal misconduct is guilty as if he or she committed the criminal act'[49]. As a matter of fact, in many domestic penal systems, incitement to commit violence (or a criminal act more generally) exists as a crime. For example, Article 414 of the Italian *Codice Penale* criminalises public incitement to commit an offence[50].

Incitement is also administered by international law[51]. In the case of international crimes, it is considered a form of instigation, inducement, encouragement or persuasion to perpetrate the crime[52]. The only case in which incitement is punishable even if it does not result in the perpetration of an act is incitement to genocide[53]. As has been discussed above, conceptual confusion on the matter persists among scholars and practitioners, and that creates uncertainties in the drafting of laws as well. Indeed, 'international instruments are not unequivocal in the way they delimit the scope of the term 'incitement to terrorism' for the purpose of criminalisation'[54]. Indeed, in order to legitimately characterise incitement to terrorism as a crime, certain elements have to be present in the definition. These are thoroughly discussed in this section, with reference especially to the works of Bibi van Ginkel, researcher at the International Centre for Counter-Terrorism, and of Yael Ronen, law professor at the Hebrew University of Jerusalem. Both authors have identified five elements that contribute to defining the scope of incitement to terrorism as a criminal act[55]: a) the actus reus, meaning the actual conduct being criminalised; b) the content of speech; c) the public aspect of incitement; d) the role of intent; e) whether there should be a concrete link between speech and a criminal act. These will be explored separately, together with an additional element: f) the scope of the offence.

2.1 Actus Reus

The first element which must be considered when drafting an offence is the *actus reus*, meaning the actual target conduct being criminalised. Since in this case the prescribed act refers to terrorism, it is essential to understand what is intended by it. On this point, van Ginkel recalls that defining terrorism is necessary in order to avoid overly broad and disproportionate limitations of freedoms[56]. However, as already seen, the task is hindered by the lack of a universally accepted definition of terrorism. This can be overcome, Ronen suggests, by referring to the numerous international treaties which identify specific acts as terrorist[57].

As a matter of fact, Article 1 of the Convention identifies as terrorist offences those acts which are within the scope of a number of treaties, listed in its Appendix[58]. A similar reference cannot be found in Resolution 1624, which however, mentions Resolution 1566 of 2004 on *Threats to international peace and security caused by terrorist acts*[59]. Resolution 1566 refers to 'international conventions and protocols relating to terrorism'[60], thus effectively delimiting the scope of what is intended by terrorism. In short, it can be stated that provisions criminalising incitement to terrorism should define what terrorism is, either directly or by referring to international treaties.

2.2 Content of speech: direct vs. indirect incitement

After establishing the target conduct, the type of speech being criminalised should be clarified in order to further define the scope of the crime[61]. Chiefly, the question is whether indirect incitement should be criminalised or not. The distinction between direct and indirect incitement requires further discussion. To put it simply, *direct* incitement is 'speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action'[62]. On the other hand, *indirect* incitement, which is often referred to as 'glorification' or '*apologie*', includes more general statements supporting certain crimes or, in the case examined here, acts of terrorism[63]. When it comes to criminalisation, there is no straightforward interpretation or application of either notion of incitement. Indeed, what is considered direct or indirect incitement will be different for different legal systems[64]. This has become apparent when discussing the most important international and regional documents on the matter of incitement to terrorism. For example, incitement as presented in Resolution 1624 should be understood as direct. That can be inferred, firstly, from the fact that glorification is only mentioned in the preamble, and not in the operative part of the Resolution. Secondly, the UN Secretary-General's *Report on the protection of human rights and fundamental freedoms while countering terrorism* clarifies certain aspects of Member States' obligations contained in the Resolution[65]. On the other hand, as already seen, EU Directive 2017/A/541 explicitly criminalises indirect provocation[66], and so does the Convention. Variety in approaches to what is considered incitement to terrorism also appears in the relevant case law. In *Hogefeld v. Germany* for example, measures intended to limit indirect incitement were upheld by the European Court of Human Rights[67]. During her imprisonment, Birgit Hogefeld was denied permission by the Frankfurt Court of Appeal to be interviewed by journalists, in order to prevent her 'from promoting the ideology of the Red Army Faction (RAF), and from influencing supporters of the organisation'[68]. As a result, she claimed her freedom of speech was infringed. Because of Hogefeld's role in the organisation, and considering the ambiguity of some of her statements, the European Court of Human Rights (ECtHR) deemed the limiting measures acceptable.

Specifically, the Court contended that supporters of the RAF could interpret Hogefeld's statements as an appeal to continue their activities. However, no direct calls to action were made by the applicant. As a result, this case appears to represent an instance of restricting indirect incitement. A different approach was taken by the Norwegian Appeal Court[69] in 2015. In this case, a man had shared online posts supporting several terrorist attacks[70], and was consequently charged for public incitement to murder with terrorist intent. The Norwegian judges contended that 'charges of 'glorification of terrorism' [are] inapplicable since 'glorification of already committed acts are not punishable''[71]. The defendant was thus acquitted, as his statements lacked the necessary 'degree of concretisation' in order to be considered incitement[72]. The comparison of the two cases presented here is not, however, as straightforward as it may appear, for several reasons. First of all, the first case was discussed (although in the end it was dismissed) by an international court, while the second was judged by a domestic court. Secondly, the defendants' notoriety was significantly different: Hogefeld was (in)famous as a representative of the RAF, and because of this her statements would have probably had a much wider appeal. Careful analysis of elements of the context in which statements are made, such as this, are particularly relevant. Indeed, the International Criminal Tribunal for Rwanda (ICTR) has observed that context is essential for determining whether assertions constitute incitement or not[73]. Finally, it should also be mentioned that the means of communication were different: interviews by the press in one case, and social media in the other. Although Facebook makes it possible for comments to be seen by virtually everyone, it could be argued that an interview by Hogefeld would have had a more profound impact than the Norwegian defendant's social media posts. All this notwithstanding, the decision of the ECtHR has been criticised for applying a weak standard of defending dissident advocacy[74].

Ronen's position on the matter is that indirect incitement (or glorification) should be criminalised as well. According to the author, the prohibition should encompass more than mere calls to action, as speech glorifying terrorist causes contributes to creating the environment in which terrorists are bred[75]. As a result, Ronen finds the Secretary-General's guidelines 'disappointing', insofar as the resulting offence 'is so narrowly defined that it may fail to address the phenomenon for which it was tailored'[76]. Others strongly disagree with Ronen in seeing such a (close) link between glorification and terrorist acts. According to Professor Ben Saul, for example: 'there is no comparable proximity between indirect incitement/*apologie* and actual terrorist harm'[77]. Moreover, in the UN Secretary-General's view, although statements supporting terrorism may be controversial or even offensive, 'it is important that vague terms of uncertain scope such as 'glorifying' or 'promoting' terrorism not be used when restricting expression'[78].

Another relevant input on the matter comes from the International Criminal Tribunal for Rwanda (ICTR). In the case of incitement to genocide, it argued that a direct call to action is essential in order for speech to classify as incitement[79]. In its Judgement in the case *Akayesu*, the ICTR recalled that: 'The 'direct' element of incitement implies that the incitement assumes a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement.'[80]

To be sure, whichever position one takes on the matter, it is crucial to clarify what type of content of speech is proscribed when drafting laws[81]. After that, in order to assess whether speech constitutes direct incitement, a case-by-case analysis is advisable. The ICTR has adopted such an approach in *Akayesu*, taking into consideration that cultural and linguistic elements contribute to determining whether incitement is direct or indirect[82].

2.3 Public scope

Incitement can be public or private. These two types of incitement have different aspects and carry different, and differently dangerous, consequences:

> 'Whilst public incitement […] is primarily dangerous because it leads to the creation of an atmosphere of hatred and xenophobia and entails the exertion of influence on people's minds, incitement in private is dangerous because the instigator succeeds in triggering a determination in the instigatee's mind to commit a particular crime.'[83]

In this sense, private incitement could represent the triggering factor leading individuals to go from holding extreme opinions to actually taking violent action[84]. However, restricting private speech poses important issues, as it would amount to invasion of privacy, if not outright censorship[85]. Private incitement can simply be considered instigation, that can be punished when the crime occurs[86]. It is generally accepted that incitement, as distinct from instigation, should be public[87]. Indeed, incitement to terrorism is intended as public in Resolution 1624, the Convention[88] and the Directive[89]. Such an interpretation is also in line with the generally accepted understanding of incitement to genocide. This is important, as restrictions to incitement to genocide constitute the most prominent, and the most fully legally developed, application of limitations to free speech[90]. The public aspect of incitement is actualized in its effects. Scholars have observed that both genocide and terrorism usually arise from a specific environment in which violent actions are condoned, if not encouraged, by the relevant community[91]. The moral constraints of a group of people can be censored through several psychological and social mechanisms, thus allowing them to justify or commit certain acts[92]. Among these mechanisms, several can be enacted through public incitement.

For example, dehumanisation of the target group is a recurrent tool, used not only by terrorist organisations, but in general by groups holding extremist ideologies[93]. Through dehumanisation, enemies are not regarded as persons, but rather as an inherently inferior group[94].

One final consideration regarding the distinction between private and public incitement has to do with the internet. Needless to say, the internet has revolutionised communication. That has had sizeable effects on incitement as well. Already in 2006, it was argued that 'the omnipresence of the Internet and the opportunities it offers for spreading inciting messages have considerably aggravated [the] danger [of incitement]'[95]. As a matter of fact, thanks to new technologies terrorist organisations have been able to reach an unprecedented scale[96]. Indeed, several individuals participate in terrorist activities only in the virtual sphere, by fighting a mediatic battle[97]. These individuals support their cause by globally disseminating content which could result in inciting others[98]. Moreover, and more specifically, the internet poses serious challenges 'as it relates to public vs. private speech in the incitement context'[99]. Because of its features, the distinction between the private and public spheres seems to be less sharp. On one hand, it is not clear if communications can ever be considered 'private', when they are still somehow accessible. Rediker maintains that 'members-only websites' should not be considered a public space[100]. However, conversations happening on closed forums could still be accessed by simply registering. On the other hand, open-access content, including for example videos on YouTube or inflammatory tweets, is still searched and experienced by each individual in a private setting. In short, through the internet both private and public incitement occur, making it difficult for legislators and law enforcement agencies to draw an unequivocal line between the two.

2.4 Mens rea.

As observed above, intent plays a decisive role for the purpose of setting apart 'simple' criminal (or even legal) actions, from terrorist acts. Indeed, intent is mentioned as a requirement in all relevant international documents as well. Both the UN Secretary-General[101] and the Convention[102] explicitly mention intent when defining what incitement to terrorism is, thus confirming its relevance. According to Ronen, the *mens rea* criterion serves to ensure no abuse of the prohibition is made[103]. That is consistent with the author's position, who argues in favour of a lax definition of the conduct constituting incitement to terrorism: the more remote the speech from terrorism, the greater the role of intent[104]. Including intent as a requirement is also necessary to distinguish instances in which the supposed incitement derives from recklessness[105].

It should be noted that terrorism, in general, implies a double intent[106]. As Cassese observes:

> 'First, the subjective element *(intent)* proper to any underlying criminal offence: the requisite psychological element of murder, wounding, kidnapping, hijacking and so on *(dolus generalis).* Second, the *specific intent* of compelling a public or a prominent private authority to take, or refrain from taking, an action *(dolus specialis).*'[107]

In the case of incitement to terrorism, that is especially relevant, considering that the proscribed conduct consists of speech. Double intent is also consistent with the requirements of incitement to genocide[108]. Indeed, even though the Convention only mentions simple intent[109], Ronen observes that the very notion of terrorism already encompasses a specific intent. As a result, the intent of those who incite to terrorism has a double connotation[110]. That notwithstanding, the application of this notion is not unambiguous, and the jurisprudence of the European Court of Human Rights is, in fact, controversial[111]. In the case *Sürek v. Turkey*, for example, the Court upheld a prohibition on speech without finding clear intent to incite violence[112]. In 1993, an issue of a weekly review was seized on orders of the Istanbul National Security Court on the ground that it disseminated propaganda against the indivisibility of the State, as it concerned areas of Turkey which are claimed by the Kurdistan Workers Party (PKK) as a separate country[113]. Sürek, the major shareholder of the publishing company, was charged, and then found guilty, of disseminating propaganda under the Prevention of Terrorism Act[114]; he then submitted his case to the ECtHR. The Court upheld the penalty on the ground that the article was considered 'capable of inciting to further violence in the region', although Sürek was neither the author nor the editor of the article, nor did he have any affiliation with the PKK[115]. Finally, it should be noted that attempting to prove intent may have side effects. Proving intent requires looking at the general context, including a person's beliefs. This approach could lead to targeting individuals associated with a specific religious or ideological group, thus possibly resulting in discrimination[116].

2.5 Causal link with concrete offence.

In general, it can be stated that some risk that incitement will actually result in a terrorist act must be found in order to establish a link between speech and actual violence. As van Ginkel puts it: 'One of the crucial elements in determining the scope of the act of incitement to terrorism depends on the imminence and the likelihood of the actual act being committed'[117]. Ronen highlights the role of having a criterion establishing the risk of actual harm as a balancing factor to avoid excessive restrictions[118]. However, the author argues, the link should not be too strict, otherwise it would defy the purpose of the prohibition of incitement[119].

According to Ronen, standards like the one suggested by the UN Secretary-General in his guidelines for the interpretation of Resolution 1624 ignore the role incitement plays in creating an environment conducive to terrorism[120]. The SG refers to incitement as a 'context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring'[121]. The opposite criticism has been directed towards the European standard, which according to some does not set a close enough proximity between speech and the resulting action[122]. In the Convention, Article 5 refers to speech which 'causes a danger that one or more such[terrorist] offences may be committed'[123]. Directive 2017/541 clarifies that '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'[124]. In conclusion, it should be mentioned that the difference in the degree of proximity contributes to defining whether incitement to terrorism should be considered an inchoate offence or not.

2.6 Scope of the offence.

Lastly, a brief reference to the scope of the offence it seems appropriate. Incitement to terrorism is referred to as a domestic crime both in the Convention and in Resolution 1624[125]. Of course, the fact that no international agreement on the matter can be reached is partially responsible for this. However, it is worth reflecting on whether this is fully appropriate. Terrorism is a transnational phenomenon[126]. This has become quite clear. One may take for example the November 2015 Paris attacks: the attackers were a mix of French and Belgian nationals, and they easily crossed the border between the two countries. Thus, a transnational response to terrorism would seem appropriate. In the specific case of incitement to terrorism, an argument for keeping it as a domestic offence could be that incitement is meant for a specific public, and maybe even limited by language. However, the use of the internet clearly challenges such an argument, as nearly anything which is shared online can be easily accessed and translated globally.

In conclusion, a provision that criminalises incitement to terrorism should: i) include a definition of the criminal conduct, in order to avoid excessive applications of the restrictions; ii) clearly state whether incitement is considered to be direct or indirect; iii) only be directed towards public acts; and iv) include at least two balancing factors, namely proof of (double) intent, and proximity to concrete terrorist acts. Only after analysing in detail what a prohibition to incite entails can its appropriateness be assessed. Indeed, criminalising incitement to terrorism implies limiting freedom of speech of individuals. And while infringements to freedom of speech are allowed, they need to comply with specific requirements in order to be legitimate in light of commonly accepted notions of universal human rights. This issue will be explored next.

3. Legal Regime of Freedom of Speech.

eedom of speech is one of the key human rights constituting the foundation of democratic states. Without it, many other rights could not be enjoyed[127]. Its relevance is further underpinned by its inherent duality: freedom of speech is both a social and an individual right[128]. As a result, violating it does not constitute merely an individual problem, but it harms the whole society[129]. Nevertheless, freedom of speech is not an absolute right. Therefore, it may be limited when it affects other rights[130]. The idea of protecting freedom of expression dates back to the post World War II climate of adopting standards for the protection of human rights[131]. Although limitation of speech was far from unknown even beforehand, the totalitarian regimes of the Twentieth Century were particularly vicious in exercising their power of censorship. As a response, liberal democracies reaffirmed the importance of freedom of speech as a fundamental value[132]. In this climate, the first protection of freedom of speech was set in Article 19 of the 1948 Universal Declaration of Human Rights (UDHR)[133], considered the beginning of modern standard of protection of human rights[134]. The importance of freedom of speech is not exhausted in itself: it is also instrumental to the enjoyment of other rights (i.e., freedom of association)[135]. As a result, it is an inalienable element of democracy. Generally speaking, obligations for states to respect freedom of speech exist under international law[136]. Indeed, Art. 19 is also mentioned in the preamble of Resolution 1624[137]. Besides the UDHR, restrictions to freedom of speech should also follow the criteria set out in the 1966 International Covenant on Civil and Political Rights (ICCPR)[138], which is mainly concerned with guaranteeing freedoms that are proclaimed to be inherent to human dignity[139]. Freedom of speech is protected by Article 19, paragraph 2 of the ICCPR[140]. States' obligations to respect and promote civil and political freedoms are recalled; however, duties of citizens to observe these rights are also indicated[141]. Among regional charters protecting human rights, the most relevant for this discussion is the European Convention on Human Rights (ECHR). The ECHR was signed in 1950, and it is now integrated in the domestic legal system of most of the party states[142]. The extent of its application cannot be un-derstood without referring to the ECHR's case law[143]. Freedom of speech is protected by Article 10 of the ECHR[144]. The standard of protection of freedom of speech in the UDHR, the ICCPR and the ECHR is quite similar, and it comprises the freedom to hold an opinion and to express it, to receive and impart information, and to do so by any means and regardless of frontiers. Although this is not explicitly stated, the protection is extended to the press, to which a special status is granted because of its role as a 'political watchdog'[145].

Notwithstanding its importance for democracy, freedom of speech can conflict with other equally fundamental rights[146]. This is summarised in the concept of 'duties and responsibilities' connected to freedom of speech, which is expressed in the third paragraph of Article 19 of the ICCPR[147]. Quite similarly, the second

paragraph of Article 10 of the ECHR focuses on the boundaries of freedom of speech, by defining a limitations regime[148]. While the concept of duties and responsibilities, is not directly connected to specific professional categories, such as military personnel or civil servants, the press can be considered as deserving a higher standard of protection to individuals who work for it, in light of their role in imparting information of public concern[149]. Both articles also refer to certain conditions that must apply in order for limitations to be legitimate, chiefly that they must be provided for by law and necessary. Further restrictions to freedom of speech that are particularly relevant in this context are also outlined in Article 7 of the UDHR[150] and in Article 20 paragraph 2 of the ICCPR[151]. In these articles, protection from incitement is considered as a fundamental right, and legal prohibitions of incitement are thus envisioned. On the basis of these standards, it can be stated that measures prohibiting incitement to terrorism can potentially comply with international human rights protection standards, if they follow certain requirements. The scope of these requirements is explored next by analysing the derogation regimes of the ICCPR and of the ECHR.

Despite its indisputable importance, freedom of speech is not an absolute right. However, general consensus exists only on the prohibition of very few forms of speech[152]. Examples of limitations to freedom of speech aiming at balancing other rights are provided in Article 7 of the UDHR and in Article 20 of the ICCPR, presented above. More in general, prohibition of speech encompasses: 'war propaganda (Article 20[1] of the ICCPR),incitement to genocide (Genocide Convention), other forms of incitement (Article 20[2] of the ICCPR), and racist hate speech (Article 4 of the International Convention against Racism)'[153]. Other cases of limiting speech can occur, provided they remain grounded in the legal framework[154]. Issues arise when prohibitions exceed these limits. This may occur as derogations to the protection of freedom of speech can be invoked by states in case of an emergency situation[155]. Derogation regimes are included both in Article 4 of the ICCPR[156] and in Article 15 of the ECHR[157]; these are two among only four international human rights charters containing an explicit derogation clause[158]. The two articles are quite similar, as Article 15 of the ECHR was modelled on Article 4 of the ICCTR[159]. The standard set out in these articles is generally recognised as the norm[160]. Both articles set three conditions to be met when derogating from rights:

i) There must be a public emergency threatening the existence of the nation;
ii) Derogating measures must be strictly required by the situation, and
iii) Derogation measures must be consistent with other obligations under international law.

Among these factors, the first two are the most important. Indeed, they have also received much more attention in the ECtHR practice[161]. The concepts of public emergency and strict requirement are thus discussed next. The discussion is based on two main sources. Guidance for the interpretation of all derogations and limitations to the ICCPR is provided in the Siracusa Principles on the Limitation and Derogation provisions in the International Covenant on Civil and Political Rights (Siracusa Principles)[162]. The Siracusa Principles were proposed by the American Association for the International Commission of Jurists to prevent States' abuse of provisions allowing limitations to fundamental rights and freedoms[163]. The principles are meant as a contribution to efforts for establishing a 'uniform interpretation of limitations on rights enunciated in the Covenant'[164]. The more relevant provisions are taken into account here. Other than that, the ECtHR's case law is used to help determine the scope of these provisions. Particular attention is given to their application to instances of terrorism.

3.1. 'Public emergency'.

By definition, states of emergency are temporary: they can only be resorted to in case of extraordinary events threatening the normal functioning of a state[165]. Although exceptional measures can be adopted in emergency frameworks, states are still required to comply with human rights standards[166], as both the ICCPR and the ECHR clearly state. According to Article 39 of the Siracusa Principles, a situation of public emergency arises when States are: 'faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the state; and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant'[167]. It is further clarified that neither internal conflicts nor economic difficulties are by themselves sufficient to declare a public emergency[168].

The ECtHR has set criteria for establishing whether a situation is serious enough to justify a state of emergency in the *Lawless v. Ireland* case[169]. This key case constitutes the first application of human rights law in an international court. Here, the court clarified the expression 'public emergency threatening the life of the nation'[170]. Gerard Lawless claimed in 1957 that the Republic of Ireland violated the ECHR by illegally detaining him[171]. The point of litigation consisted in the fact that Lawless was arrested in July 1957 and detained until December of the same year without trial, which, according to the defendant, constituted a violation of his rights. The Irish Government held that Lawless' detention was carried out according to existing emergency legislation, on the basis of the fact that his former activities and his behaviour at the time of the arrest provided cause for concern[172].

Thus, the Court was tasked with establishing whether the specific situation constituted an emergency. In this context, the ECtHR explained that it intended a situation of emergency for the nation as: '*une situation de crise ou de danger exceptionnel et immi-nent qui affecte l'ensemble de la population et constitue une menace pour la vie organisée de la communauté composant l'État.*'[173]. On the basis of this definition, and after examining the context, the Court concluded that the situation was dangerous enough to justify the use of emergency measures[174], thus ultimately dismissing the case.

Additional clarifications on how to identify emergency circumstances were provided by the ECtHR in the *Greek case*[175]. Four European countries brought this case to the EctHR denouncing multiple human rights violations committed by the Greek 'Regime of the Colonels'[176]. In this case, building on the definition set in *Lawless*, the Court established four criteria to assess whether any situation constitutes an emergency[177]: '(1) It must be actual or imminent. (2) Its effects must involve the whole nation. (3) The continuance of the organised life of the community must be threatened. (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health, and order, are plainly inadequate'[178]. The second element does not necessarily require the situation to affect the whole territory of a nation directly. Indeed, it was explained by the Court that a crisis affecting a limited portion of a nation can be sufficient to threaten the life of that nation as a whole[179]. That is particularly relevant in the case of terrorist attacks, as typically they only involve limited areas. It can be questioned whether terrorist attacks constitute sufficient grounds for establishing states of emergency. Indeed, 'usually, acts of terrorism do not impede the application of normal measures and do not threaten the continuance of the organised life of the community'[180]. As a matter of fact, most EctHR cases involving Article 15 have occurred in instances of terrorism[181]. Therefore, there is no universal answer to the question posed above, and so whether a terrorist attack constitutes sufficient ground to trigger emergency powers must be decided on a case-by- case basis[182].

3.2. 'Strictly required'.

The Siracusa Principles set out several important points on what 'strictly required by the exigencies of the situation' means. Generally speaking, it can be argued that: 'The severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.'[183] When ordinary measures are sufficient, emergency powers should not apply[184]. It should be stressed that the duty of assessing the necessity of derogation measures is primarily attributed to States[185]. This is consistent with the practice of the ECtHR, which has repeatedly stressed the importance of States' margin of appreciation[186].

The margin of appreciation largely depends on the fact that national authorities are closer and more familiar to the situation and thus are considered more adequate at determining its nature[187]. However, this is not an unlimited power, and the ECtHR can decide when measures went beyond what is strictly required[188]. The evaluation encompasses factors such as 'the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation'[189].

Quite recently, the declaration of a state of emergency as a consequence of terrorist attacks has raised concern on whether the applied measures were excessive. France has declared a state of emergency on 14 November 2015 with a presidential decree[190], the only European State to do so after a terrorist attack in recent years[191]. Actions conducted through the extraordinary powers in result of the emergency regimes were harshly criticised for their impact on human rights[192]. The state of emergency was extended several times and it officially ended only in November 2017[193]. However, several measures of the emergency regime were transposed into law[194]. As a result, serious concerns have been raised on the fact that provisions originally intended as extraordinary and temporary have become permanent[195]. These concerns are addressed in the next section.

Indeed, one particularly significant implication of the fact that derogations must be strictly necessary, is that these need to be temporary[196]. Instead, a tendency to normalise emergency measures enacted for counterterrorism purposes has been observed[197]. Normalisation is defined as: 'a process through which emergency measures prompted by extraordinary events become institutionalised over time as part of the ordinary criminal justice system, long after the circumstances that initiated them have disappeared.'[198]. Presenting measures as necessary in order to face an emergency serves to facilitate their acceptance[199]. Often, measures violating certain rights are justified on the basis of the fact that terrorism is an exceptional threat that needs exceptional measures to be tackled[200]. However, these measures have often been integrated into regular activities[201]. Former Special Rapporteur Scheinin observed in 2009 that legislation introducing extraordinary measures after the 9/11 attacks initially included sunset clauses and review mechanisms, since they were intended as temporary[202]. However, these were disregarded in later policies[203]. As a result, extraordinary powers meant for counterterrorism were then used for unrelated activities as well[204]. One additional problem is that States seem to follow each other's lead in this unvirtuous cycle[205]. As a result, some of these measures, instead of being discontinued after their purpose is achieved, are actually made into international standards[206]. The sense of perpetual emergency is both the result and the motor of these trends. Partly, this also depends on certain characteristics of terrorism, chiefly, its ideological foundation and its perceived effects.

The former point sets apart terrorism from other crimes because it does not aim at breaking just one or few laws, but rather the entire legal order[207]. The latter point entails that threats of terrorist attacks are perceived as much more substantial than they actually are. This can be appreciated clearly by looking at the picture made by artist S. Hertrich on the basis of research on risk conducted by Dr. Peter M. Sandman[208] (Figure 1). It makes the point that terrorism is perceived by the public at large as the most significant threat to security, totally out of proportion with an objective measure of actual dangers. On the basis of such a strong perception from citizens, governments feel both compelled and legitimised to put in place strong counter-terrorism legislation. In turn, emergency measures contribute to increasing citizens' sense of threat[209]. The justification for extreme measures thus derives from the idea that the very survival of the state is jeopardized by terrorism. However, while terrorists surely commit horrible actions, and spread panic among people, in most circumstances they do not actually have the power to destabilise governments. Indeed, usually 'acts of terrorism do not impede [...] the continuance of organized life of the community'[210]. The very fact that these organisations resort to terrorism, which is a type of asymmetric warfare[211], implies that they have inferior means[212].

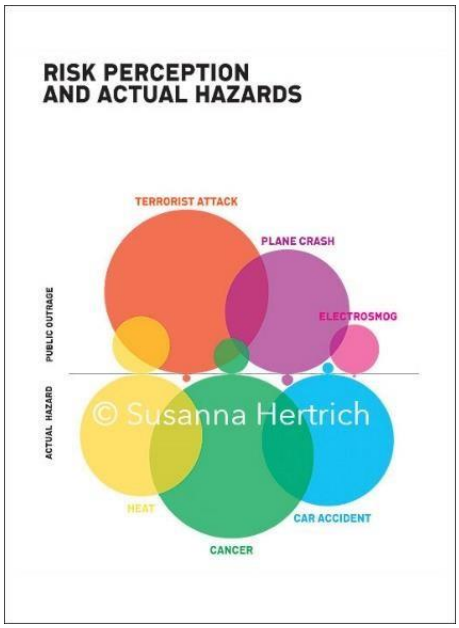

Figure 1 - Risk I, S. Hertrich, 2010.

Professor Ian Cram has commented on several concerns that rise from granting governments extraordinary powers in times of crisis from a human rights point of view, providing concrete evidence to support these arguments[213]. Two are of particular interest here: 'governments tend to panic in emergencies and act irrationally by overstating the case for greater security' and 'governments systematically ratchet up security measures during emergencies and then fail subsequently to restore the pre-emergency equilibrium between liberty and security once the emergency is past'[214]. Cram maintains that 'the evidence to support the [first] thesis is overwhelming', and it has indeed become ''staple' of academic commentaries'[215]. To support the second point, the author refers to legislation concerning terrorism-related threats in Northern Ireland, recalling that concerns on the normalisation of emergency measures had already been expressed in the 1980s[216].

Indeed, recipients of restrictions to freedom of speech have challenged these measures on several occasions. Particularly important cases have reached the attention of higher courts. Specifically, attention here is given to the European Court of Human Rights and to the U.S. Supreme Court. The two courts have been selected in order to display the difference between the European approach, that directly prohibits incitement and is focused on content, and the American approach, that does not explicitly bans incitement, but it is still potentially more restrictive of speech[217].

3.3. ECtHR Jurisprudence.

The contributions of the ECtHR to establishing the importance of freedom of speech, while also setting its limits, are notable. Within the extensive case law on Article 10 violations, several cases were related to terrorism. As a result, the ECtHR's jurisprudence is considered particularly relevant, and it is analysed here with a focus on the notions of 'necessary in a democratic society' and on proportionality. Indeed, necessity and proportionality are often considered especially important when evaluating counterterrorism policies that establish limitations to human rights[218]. Generally speaking, in its assessments the Court aims at finding a balance between freedom of speech and other fundamental rights, an approach that is summarised by the concept of 'democratic society'[219]. Several fundamental principles on the framework of Article 10 infringements have been set by the ECtHR throughout the years. In particular, the role of freedom of speech has been extensively emphasized, starting with the 1976 case *Handyside v. United Kingdom*[220]. Here, the Court stated that:

> 'Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. […] it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a mat-

> ter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.'[221]

Before proceeding with the discussion, it should be mentioned that in certain cases concerning freedom of speech the ECtHR has applied Article 17, which establishes the prohibition of abuse of rights[222]. The so-called abuse clause implies that the protection of Article 10 is lifted for stances which are 'contrary to the text and spirit of the Convention'[223]. Originally, Article 17 was intended as a safeguard of democracy against the rise of new totalitarian regimes; however, its scope has progressively broadened[224]. Indeed, Article 17 has been mentioned in the *Leroy v. France* case discussed later. Although the Court found that it was not applicable in *Leroy*, it recalled that instances of racism, antisemitism and islamophobia go against the underlying values of the Convention, and thus justify the use of Article 17[225]. However, the abuse clause has been used almost exclusively in instances of National Socialism supporters or Holocaust deniers[226], and its application has not been consistent[227]. Because of this, the abuse clause is disregarded here.

Despite the extensive case law by the ECtHR on the matter, there is no universal standard for establishing what constitutes a legitimate violation of freedom of speech. Rather, the Court needs to tailor its analysis to the specific circumstances of each case[228]. In order to do so, the ECtHR applies a necessity test[229]. This three-pronged test consists in assessing if the violation of freedom of speech: 1) Was prescribed by law; 2) Pursued a legitimate aim; and 3) Was necessary in a democratic society[230]. 'Prescribed by law' does not refer merely to the existence of a law that imposes limitations to freedom of speech, but also to its interpretability[231]. The Court recognised that laws may need to be phrased with a degree of vagueness to allow them to adapt to changing circumstances[232]. However, infringements of freedom of speech cannot be based on broad provisions which would allow an arbitrary application[233]. As far as legitimate aims are concerned, these surely include granting national security[234]. These first two prongs of the test are more easily appraised, and the analysis usually focuses on the third ('necessary in a democratic society')[235], which is explored next.

The general principles for assessing the necessity of infringements of Article 10 are well established in the Court's case law[236]. They were initially set in *Handyside v. United Kingdom*, and they have been reiterated several times since then[237].

On the meaning of 'necessary' in this expression, the Court has stated that it implies the existence of a 'pressing social need'[238]. The assessment is conducted by the ECtHR on a case-by-case basis, following a multifactorial test[239]. The ECtHR does not require a strict causal link[240]; however, it does consider the credibility of the threat[241].

A famous case in which the analysis of the 'necessary in a democratic society' aspect was particularly important is Leroy v. France[242]. Leroy was convicted for '*complicité d'apologie du terrorisme*' and '*apologie du terrorisme*' for an illustration published after the 9/11 attacks[243]. Leroy brought a case to the ECtHR, arguing that his freedom of speech had been violated[244]. In its assessment, the ECtHR observed that there was no disagreement on the fact that there had been an infringement of Article 10, and proceeded to apply the three-part test[245]. The analysis was focused on the 'necessary in a democratic society' aspect, which takes several paragraphs[246]. The analysis of the Court concerned three aspects, with a special focus on the first two: i) the wording of the caption which described the cartoon; ii) the context in which the cartoon was published; iii) the difficulties related to counterterrorism, and in particular the unstable situation of the Basque region[247]. According to the analysis of the Court: i) Leroy expressed his support for a violent act, which was explicit in the caption; ii) the attacks shocked the entire world, and this context could not be ignored; and iii) the fact that the region was politically unstable meant that the publication could reasonably be expected to stir violence[248]. Significantly, the Court did not take into consideration the author's intent[249]. Instead, it focused on the fact that public order could have been affected by the cartoon[250]. In light of all this, the ECtHR ruled that there had been no violation of Article 10[251]. In order to reach this verdict, the Court also considered the moderate size of the punishment, stating that: '*la nature et la lourdeur des peines infligées sont aussi des éléments à prendre en considération lorsqu'il s'agit de mesurer la proportionnalité de l'ingérence*.'[252] Indeed, determining whether the interference to Article 10 was 'proportionate to the legitimate aim pursued' is a fundamental step of the ECtHR's evaluation[253]. Thus, the concept of proportionality is discussed next.

Proportionality is not explicitly mentioned in human rights treaties; however, this principle governs their application[254]. In its narrower meaning, proportionality evaluates the magnitude of punishment with respect to the seriousness of the crime[255]. Applied to human rights infringements, proportionality is used to determine the legitimate extent of limitations[256]. In the specific context of counterterrorism policies, the importance that these be proportional when they entail a limitation of freedoms has been stressed by the UN Secretary General[257] and the necessity of assessing that limitations of Article 10 are proportionate has been recognized by the ECtHR[258]. Interference is considered disproportionate if its application is excessively broad or if unreasonable burden is imposed on individuals[259].

From a practical point of view, guidelines on the application of this principle can be found in the background paper written in the context of the OSCE Workshop 'Preventing Terrorism: Fighting Incitement and Related Terrorist Activities'[260]. Here it is stated that, in order for a decision to be compliant with the principle of proportionality, this should: '1) impair as little as possible the right in question; 2) be carefully designed to meet the objectives in question; and 3) not be arbitrary, unfair or based on irrational considerations'[261]. In view of all the considerations presented thus far, the three criteria can also be applied to the context of legislation prohibiting incitement to terrorism. In order to comply with the first element, laws should be designed in such a way as to minimally impact freedom of speech. It will be shown that a smaller interference is assured if the prohibition only applies to direct incitement. In this way, the prohibition, a coercive measure, is only applied to cases in which a link with clear threat is established. Instead, instances of *apologie*, ghastly and offensive as they may be, should not be prohibited. On the second point, 'carefully designed' suggests first and foremost that definitions should be clear and precise, not leaving space to any excessive interpretation. As already discussed, this is necessary for provisions to comply with the principle of legality as well. Moreover, this suggests the introduction of an evaluation mechanism as the only way to assess whether the objectives are actually being met. Indeed, the two points are closely linked, as the lack of clear definitions hinders any evaluation process[262]. Finally, the third aspect is especially crucial in instances of terrorism. It is quite apparent that the sensitive nature of the phenomenon, and its reliance on fear, can generate irrational thoughts and, consequently, laws. This can be avoided by crafting evidence-based policies. As has been observed, while 'there is little to no evidence that criminalising such speech will deter terrorism, there is very strong evidence that it will deter free expression'[263].

In conclusion, it can be stated that European standards and practices allow the limitation of freedom of speech if this violates other rights or if it is necessary for public security. Criminalisation of incitement to terrorism is considered among legitimate prohibitions[264], as is proved by Article 5 of the Convention presented before.

3.4. U.S. Jurisprudence.

Freedom of speech is considered a foundation of democracy in the legal tradition of the United States as well[265]. The American standard is quite relevant as comparison, since it offers the strongest protection to freedom of speech[266]. More precisely, content-based or viewpoint- based prohibitions of speech are not allowed in the U.S. system[267]. In theory, that applies to terrorist speech as well[268]. Indeed, the only instance in which freedom of expression could legitimately be restricted is when it is connected to an imminent concrete result[269]. However, alternative indirect routes have been pursued to tackle terrorism related speech[270].

The U.S. standard of protection of freedom of speech was introduced with the 1969 case *Brandenburg v. Ohio*[271]. Brandenburg organised a Ku Klux Klan rally, which was also televised[272]. During the rally he affirmed from a podium to a partially armed crowd that: 'We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken'[273]. Brandenburg was fined and sentenced to spend time in prison by the Ohio Supreme Court, but later appealed, arguing that his freedom of speech as protected by the First Amendment had been violated[274]. In order to determine the acceptability of Clarence Brandenburg's speech, the U.S. Supreme Court set a two-pronged test of imminence and likelihood, which is still applied today[275]. Significantly, this standard does not allow the prohibition of indirect incitement[276]. On the ground of the standard set in *Brandenburg*, the U.S.A. also added a reservation on Article 20 when joining the ICCPR[277]. Indeed, the U.S. have generally been less inclined than European courts to restrict freedom of speech[278], including in cases of terrorist speech[279].

Several critical aspects of the Brandenburg test have been emphasized. For example, it has been argued that it does not comply with the principle of proportionality, since incitement to *all* lawless action, even minor crimes, is forbidden[280]. The most problematic aspect, however, is that while supposedly maintaining a very high protection of freedom of speech, alternative routes have been pursued by the U.S. government to tackle terrorist speech[281]. For example, non-citizens can be deported if they express support for terrorist activity[282]. Alternatively, terrorist related speech can be restricted indirectly through the offence of providing material support to terrorist organisations[283]. Since in these indirect limitations of incitement the issue of freedom speech is not explicitly tackled, very few safeguards are granted[284]. As a result, every speech related to terrorism can potentially be prohibited[285]. The relevance of this standard has also been recently questioned as it relates to social media, and it is possible that a new standard will be adopted for internet incitement[286]. Indeed, it seems that applying the *Brandenburg* standard to the internet has shed light on the intrinsic limitations of this approach. Given the general relevance of the role of the internet in instances of terrorism, the discussion would need to be much more extensive. However, because of space limitations, discussion on internet-based speech is left out of this work.

In conclusion, because of its proven inadequacy, the U.S. standard appears to be less indicated for evaluating instances of limiting freedom of speech. Instead, the approach of the ECtHR, given the attention dedicated to balancing different rights, and the fact that it is modelled specifically on each case, seems more advisable.

From the beginning of this discussion the fact that freedom of speech is not an absolute right, and that it can thus be limited, has been stressed.

Conditions determining the legitimacy of restricting speech have been explored here. However, even if restrictions to freedom of speech *may legally* be made, it does not necessarily follow that they *should*. Firstly, criminalising statements supporting terrorism might result in 'unjustifiably criminalising a range of legitimate expression in a democratic society, including attempts by academics, journalists and religious leaders to fathom (and hence to reduce) the causes of, and motivations for, terrorism'[287]. Moreover, several other counter-productive effects can result from bans of terrorism-related speech[288]. Limitations can contribute to favouring more radicalised ideas[289]. Banning ideas may serve to confer to them a legitimacy they would otherwise not have[290]. Depriving individuals and communities of a legitimate means of expressing concerns can result in a sense of alienation[291]. Additionally, if speech is restricted, beneficial effects of open debate cannot occur[292]. In the specific case of beliefs which underpin terrorism, public debate allows them to be disproved, while criminalisation drives them underground[293]. Repressive measures can end up reinforcing extremist narratives[294] and aiding terrorist recruitment[295]. However, free speech and prohibitions of incitement to violence can be 'mutually supportive'[296]: where there is a healthy debate, violent positions can be more easily isolated and opposed. The topic of whether prohibiting incitement to terrorism is an appropriate tool for counterterrorism purposes is further discussed in the next section.

4. Incitement to Terrorism: from Inchoate Offence to Pre-emptive Tool.

The notion of criminal liability has been broadened to include acts which are increasingly remote from the actual crime[297]. In this 'pre-crime' paradigm, crime is not regarded as wrong behaviour that should be punished, but rather as a risk that should be prevented[298]. This attitude has been described by sociologist Ulrich Beck through the notion of 'risk society'[299]. Beck describes the way present actions are influenced by the potential element of risk in the future as follows:

> 'The center of risk consciousness lies not in the present, but in the future. In the risk society, the past loses the power to determine the present. Its place is taken by the future, thus, something non-existent, invented, fictive as the 'cause' of current experience and action. We become active today in order to prevent, alleviate or take precautions against the problems and crises of tomorrow and the day after tomorrow - or not to do so.'[300]

The argument is relevant to describe what is happening in counterterrorism efforts, and especially to prohibitions of incitement to terrorism. Indeed, the main goal of this element of criminal law is to prevent future terrorist attacks from happening.

Through this attitude, however, the danger is that suspicion becomes sufficient to trigger coercive action[301]. One of the most striking examples of this trend has been described by Human Rights Watch in a recent report[302] which sheds light on the worrying 'precautionary' practices being carried out by Chinese officials in the Xinjang region[303]. In particular, the international organisation has obtained information on 'predictive policing' activities which often lead to detention on the basis of legal but 'suspicious' behaviours[304]. According to official sources, are a crucial part of China's counterterrorism programme[305]. To a more limited extent, many democratic countries seem to be going in a similar direction. The traumatising events which have characterised the 21st century since its beginning have prompted governments to act in a preventive rather than punitive capacity[306]. In fact, counterterrorism frameworks of many democratic countries seem to be targeting actions increasingly remote from actual harm, or in other words, aiming to target threats before they become facts[307]. Several countries are targeting early behaviours considered to be leading towards terrorist acts. This category of preparatory offences are called *inchoate crimes*. It has actually been argued that the very notion of 'terrorist' is inchoate in nature since '[u]nder counter-terrorism legal frameworks, serious sanctions can be applied in advance of or without charge or trial and can be imposed or continued despite a not-guilty verdict'[308]. The next section explores whether inchoate offences, tools of criminal law, are an appropriate option for preventive counterterrorism activities.

The term inchoate indicates something 'partially completed or imperfectly formed'[309]. More specifically, according to *Black's Law Dictionary* inchoate offences are 'a step toward the commission of another crime, the step itself being serious enough to merit punishment'[310]. Inchoate offences are acts that: '(i) are *preparatory* to prohibited offences; (ii) have not been completed, therefore *have not yet caused any harm*; and (iii) are *punished on their own*; that is, in spite of the fact that they have not led to a complete offence'[311]. What makes a step 'serious enough' for criminalisation? Acts that constitute inchoate offences generate criminal liability even if the primary criminal act does not occur[312], but the implicated actions have to go beyond 'mere preparation'[313]. The three categories of inchoate offences that are usually criminalised by domestic law are attempt, conspiracy and incitement[314]. These are also 'especially prominent in the context of terrorism prosecutions'[315]. In international criminal law, three subcategories of inchoate offences can be identified[316], depending on their relation with the intended crime. The intended crime can either: a) annul the inchoate offence; b) merge with the inchoate offence; or c) have no effect on the inchoate offence. The first category comprises attempt, which by definition can only exist if it is not successful[317]. In the second category we find planning or conspiracy, which shift from preparatory crimes to aggravating circumstances if the intended crime is perpetrated[318].

Finally, the third category includes preparatory conducts which are punished whether or not the criminal act follows[319]. In this last class we find incitement to genocide, the only form of incitement which is generally criminalised under international law[320]. What brings together all these categorisations are two crucial determinants which allow an act to qualify as an inchoate offence, and thus be criminalised albeit being remote from the actual harm[321]:

i) Sufficient risk of harm: 'the conduct that creates a risk or danger of the ultimate harm occurring such that this justifies official intervention before it comes about'; the harm does not need to occur[322];
ii) Intent: the offender intends harm to occur[323].

These two elements respectively concern the objective and the subjective elements of the offence. As far as the subjective element is concerned, it has already been mentioned above that intent is particularly relevant for crimes of incitement to terrorism. That is because speech as an act is remote from actual harm occurring: 'as we move further from the feared resulting harm, a higher degree of *mens rea* is required in order to maintain a broadly consistent level of culpability'[324]. That notwithstanding, it is also important to stress that mere intent is not culpable[325]. Without going into a philosophical discussion on what intentions are, it suffices to note that: 'intentions are difficult to distinguish from fantasies and desires […] and intentions are revocable'[326]. Therefore, while intent surely is a necessary component in culpability assessment, it is not sufficient. Indeed, it must be considered alongside with the objective element. Earlier considerations on the *actus reus* of incitement to terrorism had primarily concerned the 'terrorism' aspect of the offence. Here, the focus is rather on what makes a non-criminal act (namely, speech) liable for criminalisation. In this sense, the 'sufficient risk of harm' criterion presented above requires the criminalised conduct to be *directly* linked to harm, not just potentially connected to it[327]. Establishing what this entails in practice is not an easy task. In the case of attempt, for example, this principle could imply that an individual should act beyond a mere phase of preparation in order to be convicted[328]. In the case of incitement to terrorism, it would suggest that indirect incitement is not sufficient for criminalisation.

It is worth noting that, albeit being closely related, inchoate offences are distinct from aiding and abetting. Indeed, aiding and abetting consists in providing 'practical or material assistance' or 'encouragement or moral support' to the commission of a crime[329]. The key difference with inchoate crimes is that this accessorial mode of liability requires a complete offence[330]. Instead, as already mentioned, inchoate offences 'are punishable by virtue of the criminal act alone, irrespective of the result thereof, which may or may not have been achieved'[331]. Because of this, inchoate offences have been criticised by academics as they result in the broadening of criminal liability[332].

What justifications exist for inchoate offences? Criminal law is traditionally intended as a punishing tool. Punishment is based on a retributive logic: if one performs acts that are prohibited, they are consequently (and proportionally) punished[333]. In the case of inchoate offences, however, this rationale does not seem adequate. Indeed, these offences imply a shift in criminal law. Criminal responsibility is broadened as liability is linked to intent rather than harm[334]. If an individual kills someone, they are punishable by law; if an individual steals something, they are punishable by law; if an individual plants a bomb in the car of a political opponent and it explodes, they are punishable by law. That is not the case for inchoate offences, since the criminalised actions are not punishable *per se*, but only in connection with a criminal act that does not even need to be completed[335]. Buying a knife is not punishable by law, unless it can be demonstrated that the knife is bought with the intention of killing someone; meeting friends is not punishable by law, unless during the meeting plans to rob a bank the next day are discussed. These acts are not punished because they cause damage, but rather to prevent damage from happening in the future. Inchoate offences, thus, do not constitute harm in themselves: they merely relate to harm[336]. What about screaming in a public place that representatives of the opposing political faction should be killed? In this last example, the conduct which could constitute an inchoate offence (speech) is even more remote from harm. Indeed, the notion of *actus reus* has been extended by governments and lawmakers to include a variety of behaviours, some of which are not evidently culpable or suspicious in themselves[337]. This is especially true in the case of terrorist inchoate offences[338]. To sum up, criminalisation of inchoate offences broadens the boundaries of criminal law by including acts that would not traditionally be targeted by it; thus, it requires further justification[339]. Several arguments are explored here, briefly referring to general principles of criminalisation, and then focusing on relevant concepts in the case of incitement to terrorism.

A prominent categorisation of rationales behind criminalisation is the one proposed by philosopher Joel Feinberg[340]. According to his theory, there are four main grounds justifying state intervention[341]. These can be summarised as follows:

> 'it is only legitimate for a government to intervene through the criminal law if (1) harm is inflicted on a third party, or there is at least a risk of harm to third parties (harm principle); (2) psycho-social suffering is inflicted on a third party (broader interpretation of harm, offence principle); (3) damage is caused to the actor himself (paternalism); or (4) moral considerations are at the root of criminalisation (principle of morality).'[342]

Among these, the two most discussed justifications in literature are the harm principle and paternalism[343]. Prohibitions of incitement to terrorism seem to be primarily motivated by the former[344], which is thus further discussed here.

The harm principle, which was first introduced by John Stuart Mill in his influential publication *On Liberty*, implies that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'[345] This concept applies to the criminalisation of incitement to terrorism as, in this case, power comes in the form of coercive measure enacted to limit speech, while the prevented harm are terrorist attacks[346]. Generally speaking, the practical rationale underlying this is that if a conduct is serious enough to be punished by law, then it is reasonable to design legal tools which prevent it from happening[347]. In this sense, preparatory crimes allow for an intervention at an early stage[348], thus possibly reducing the incidence of harm[349].

In international criminal law, several alternative rationales to the retributive one can be identified for justifying punishment. According to a logic of deterrence, for example, punishment can be used to deter either an individual (specific deterrence) or others (general deterrence) from violating a law[350]. Alternatively, punishment can be used for rehabilitation[351]. Finally, it can be intended as a tool of social communication through which contempt for a specific action is expressed[352]; viewed as such, punishment performs a symbolic function[353]. This last point, in particular, would seem to fall under the fourth theory of justification presented by Feinberg, implying a principle of morality. In this sense, criminalisation would serve the purpose of stigmatizing 'particular social evils'[354]. According to this moral argument, culpability is not affected by the actual outcome of the criminal's actions[355]. Whether the attempted crime occurs or not, the acting individual should still be punished[356].The ICTR, for example, has stated in *Akayesu* that acts of incitement: 'are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure.'[357]. While surely relevant in the case of genocide, the morality principle calls for utmost caution in its application to other instances of incitement, as freedom of speech also applies to ideas that 'offend, shock or disturb'[358] someone's moral standards. Moreover, in the specific case of incitement to terrorism, because of its inherent ideological heterogeneity and moral ambiguity[359], these considerations are even less appropriate to justify coercive measures. Finally, the very notion of terrorism carries a strong symbolic meaning, which is suggestive of a sense of imminent threat[360]. Thus, using the offence of incitement to terrorism as a morally condemning tool would likely contribute to exacerbating feelings of terror among the general public, while affording no certainty of beneficial effects.

Criminal justice surely finds a place in counterterrorism efforts[361]. Terrorist acts can often be qualified as crimes even without considering the 'terrorism' aspect and criminal law can thus be used as a reactive tool[362]. In this framework, some prevention also results from the regular functions of criminal law, which include deterrence, communication of contempt, and so on[363].

Moreover, if procedural standards are complied with, then a higher protection of human rights would be guaranteed[364]. The issue, however, comes from extending the use of coercive methods to conducts that are increasingly remote from actual terrorist acts in the name of prevention. Recent trends from the last decade show an increase in the criminalisation of preparatory acts[365]. This development, aimed at anticipating risk, has been generally observed in criminal justice even before 2001, however, especially after 9/11, inchoate offences have been used extensively in counterterrorism efforts[366]. As already observed, the main rationale behind these practices consists in hindering harm: 'criminalisation of incitement is an early-prevention measure against the materialization of the target conduct, justified when the target conduct is particularly harmful'[367]. Inchoate offences are therefore characterised by their remoteness from an actual criminal act. If, however, criminalisation is too far apart from actually harmful acts, individuals could be punished 'irrespective of whether they have yet caused any identifiable harm'[368]. The risks connected to criminalisation of early conducts have been recently stressed by Dr. Fionnuala Ní Aoláin, the current *Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, in her report concerning 'Human rights impact of policies and practices aimed at preventing and countering violent extremism', where concerns were raised on the 'increased regulatory focus on thought and action in the so-called 'pre-criminal' or, more accurately, 'pre-terrorist' space'[369]. Indeed, inchoate offences, including incitement, are becoming increasingly popular[370], especially in counterterrorism activities. To be sure, it is certainly reasonable for governments to 'want to stop terrorism before it occurs'[371]. However, preventive measures need to respect the rule of law[372]. Instead, according to Dr. Ní Aoláin's analysis, criminalising preparatory acts carries alarming consequences, including criminalising 'legitimately protected rights under international and domestic law' and destabilising 'fundamental tenets of the rule of law'[373]. More specifically, the main concern with laws limiting speech is that they may fail to require intent to commit terrorist acts[374]. This concern is not unjustified. As a matter of fact, legislation targeting inchoate offences connected to terrorism has been introduced in several states[375]. A recent decision of the Spanish *Audiencia Nacional* contributes to prove this point[376]. The specialised court has recently confirmed a nine month and one day prison sentence for the rapper Pablo Hasél[377]. Hasél was condemned in 2018 for insulting the crown and glorifying terrorism[378]. His conviction was based on 64 inflammatory tweets and one music video[379]. This ruling, together with the controversial convictions of several other singers and artists, prompted large outrage and public debate on free speech in Spain[380]. The country has long struggled with terrorism, and thus its penal code contains several articles on crimes of terrorism, and '*apologìa*' and '*enaltecimiento*' (glorification) are both criminalised[381].

These provisions were criticised by former Special Rapporteur Martin Scheinin for being too vague[382], which prompted a revision of the law[383]. However, Spain remains one of six European countries to have prohibited glorification[384]. Another country that has made a broad use of the crime of *apologie* is France. As seen above, France's society and legal system have been deeply impacted by several heinous terrorist attacks, and as a result of a law passed just after the Charlie Hebdo attacks in 2015, more than a hundred people had been charged of '*apologie du terrorisme*' within two weeks[385]. Later, the scope of glorification of terrorism has been broadened, through the introduction of Law 731/2016[386]. However, even before glorification was introduced in the penal code through this law, provisions existed to criminalise incitement to terrorism[387]. Particularly, Art. 24(4) of the *Loi du 29 juillet 1881 sur la liberté de la presse* punishes indirect incitement to commit acts of terrorism and the *apologie* of those acts[388]. Despite having had limited impact, the provision is notable because it was used to convict cartoonist Denis Leroy for '*complicité d'apologie du terrorisme*'[389], a case which received much public attention. A different approach, which equally undermines democratic principles, consists in extending the concept of 'material support' to terrorist acts, a development which can be taken as far as to include incitement as well[390]. That has been the case in the U.S., where explicit limitations of freedom of speech are not tolerated. A significant example comes from the 2001 USA Patriot Act. The Act introduced a number of inchoate offences in order to allow the prosecution of preparatory acts[391]. In particularly, it made it a federal offence to 'knowingly provide material support' to organisations designated as terrorist[392]. The notion of 'material support', initially intended as a way of defunding terrorist organisations[393], has been significantly broadened[394] to include speech-related conducts[395]. Specifically, 'material support or resources' is defined in the material support status 18 U.S.C. § 2339A (b)(1) as:

> 'any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.'[396]

Through this definition, mention of advice and assistance makes speech-related conducts amenable to criminalisation without explicitly referring to incitement[397]. Some authors[398] have argued for adding incitement to terrorism to the definition of material support, on the basis of the fact that acts of incitement are committed in support of the objectives of a terrorist organisation. However, the existing definition has already proved sufficient for convicting individuals spreading propaganda.

An example is the case of Javed Iqbal, who was sentenced in 2009 to five years in prison for broadcasting a television channel connected to Hezbollah[399]. Despite his claim of not sharing the ideology promoted on this channel[400], Iqbal was convicted for 'violating the criminal prohibition against providing material support to a terrorist organisation'[401]. Unsurprisingly, the constitutionality of this provision has been challenged in later cases[402]. In *Holder v. Humanitarian Law Project*, for example, the defendants argued that 'the statute is too vague, in violation of the Fifth Amendment, and that it infringes their rights to freedom of speech and association, in violation of the First Amendment'[403]. The non-profit organisation Humanitarian Law Project was convicted for providing two designated terrorist organisations, the *Partîya Karkerên Kurdistanê* (PKK) and the Liberation Tigers of Tamil Elam (LTTE), with legal advice on how to comply with international humanitarian law[404]. The Supreme Court 'regarded advocating for and coordinating with foreign terrorist organizations as a form of providing material support to such organisations'[405], and thus found the restriction of freedom of speech to be compliant with constitutional requirements[406]. Despite the position held by the Supreme Court, criticism on this practice has not ceased, as it is seen as a way of limiting speech in an indirect way[407]. Both approaches still consist in the use of criminal law, traditionally a repressive tool[408], to prevent terrorism. Generally speaking, this is questionable, as prevention is not traditionally linked with criminal law. Preventive measures are usually non-punitive, and they aim to 'reduce opportunities to commit crime or address the broader context in which people commit crimes through a range of social and environmental strategies'[409]. Instead, coercive tools are best suited to a retributive purpose. Several factors have contributed to the popularity of criminal law measures with preventive aim[410]. Among these, a key role was played by the initiative of the United States of America after 9/11. Right after the attacks, the U.S. administration pursued the prevention of terrorism through various policies[411]. Internationally, this initiative has been presented as inherent to the concept of the 'war on terror'[412]. The most important implications of these developments are discussed next.

The rationale of terrorism prevention has been initially used by former President of the United States George Bush to justify several measures enacted in response to 9/1[413]. In just a few months after the attacks, several pieces of legislation were introduced[414]. In addition, the US initiated military action on the grounds of preventing terrorist attacks[415]. By launching its 'war on terror' the USA provided a justification for its military intervention in Afghanistan (2001) and Iraq (2003). Associating terrorism related acts to acts of war carries substantial consequences. From a practical point of view, the law of war is different from civilian legislation.

Although there are regulations aimed at guaranteeing protection of human rights during conflicts[416], if individuals are classified as belligerents rather than civilians, they can legitimately be targeted[417]. There are different criteria for establishing who belongs to the former category. According to the International Committee of the Red Cross (ICRC), combatant status is conferred to a) members of the armed forces, and participants in a *levée en mass*[418]. The first group comprises all members of regular armed forces - with the exception of medical and religious personnel - but also members of irregular militia and volunteer corps[419], among which terrorist groups could be considered. However, specific conditions have to be met in order to apply this standard[420]. Instead, the American standard is far broader than this[421]. According to the United States Department of Defense Law of War Manual:

> 'Being part of a non-State armed group that is engaged in hostilities against a State is a form of engaging in hostilities that makes private persons liable to treatment in one or more respects as unprivileged belligerents by that State. Being part of a non-State armed group may involve formally joining the group or simply participating sufficiently in its activities to be deemed part of it.'[422]

As a result of this, the convenient declaration of a war on terrorism would allow the United States to apply different standards of human rights protection to those they identify as members of groups they consider belligerent. This carries implications for freedom of speech as well. As a matter of fact, speech could be considered direct participation to a conflict, albeit in narrowly defined circumstances[423]. Moreover, since communication and broadcasting systems classify as military objectives if used for war efforts, even civilian use of the internet could be considered as a military operation[424]. On the basis of this expansive and controversial interpretation, an individual sharing, for example, ISIS propaganda online would become a lawful military target, if it can be proved that this action contributes to advance the group's military objectives[425]. As a result, provisions would be administered by military law instead of civilian criminal law. Furthermore, from an ideological perspective, framing terrorism as war is a way of somewhat simplifying the moral grey areas of the matter by using a 'good versus evil' or 'us versus them' rhetoric. This may seem politically useful, but it might actually be counterproductive in practice, resulting in heightening already existing tensions. The arguments that can be put forward against this interpretation of terrorism as war are manifold. The most basic counterargument, which is sufficient by itself, is that terrorism is merely a form of crime, albeit a very serious one[426], and thus applying war standards and tools to counterterrorism would be misplaced. That notwithstanding, useful considerations can be derived from the terrorism-as-war discourse, and specifically from the distinction between preventive and pre-emptive war. This concept is proposed here as a way for setting apart legitimate restrictions of speech from excessive measures.

According to generally accepted international law, a subtle distinction can be drawn between preventive and pre-emptive war. The issue became of international interest after the 2003 war in Iraq[427], a conflict which was initiated by an armed attack led by the United States. In order to provide a political justification and a legal basis for the attack, former President Bush resorted to the concept of preventive action[428]. In international law, armed attacks could be justified on the grounds of self-defence[429], according to Article 51 of the UN Charter[430]. However, in order for the justification to be valid, the threat in response to which an attack is launched has to be imminent and specific[431]. These are indeed the two fundamental criteria which set apart preventive and pre-emptive war. Military actions taken in response to a generalised, long-term risk[432], where 'the threat is not imminent and the evidence is not obvious'[433], are *preventive*. On the other hand, *pre-emptive* actions are taken in the case of a specific, imminent threat[434], 'where you see a force arrayed against you'[435]. According to international law, only the latter are permitted[436]. An adapted version of this classification can be used for evaluating the appropriateness of criminalising speech. The following criteria are described in light of previous discussions and they are meant to further delimit the criminalisation of incitement to terrorism. The focus here is on the content of the criminalised speech.

4.1 Specific Threat.

In the case of war, specificity implies that there is not just a vague idea that country A could potentially harm country B's interests, but rather that a defined danger is well known. Applied to criminalisation of incitement, this criterion would require that the inciter is not making a general statement, but rather giving precise indications on when or where to commit a terrorist act. A more in-depth analysis, however, suggests that such a strict application may not be sufficient. In *On Liberty*, Mills describes an hypothetical scenario in which an angry mob is gathered outside the house of a corn dealer[437]. In this situation, the otherwise permissible statement that 'corn dealers are starvers of the poor' could justifiably be punished[438]. That depends on the fact that although there is no specific indication to commit a crime, the sentence creates an immediate risk for the corn dealer[439]. What makes a difference in this case is *context*. The relevance of context in determining the admissibility of utterances has been remarked by the ECtHR in seminal cases. In *Zana v. Turkey*, for example, the ECtHR found that speech that could be dangerous in light of an ongoing conflict can legitimately be restricted[440]. Mehdi Zana is the former mayor of Diyarbakır, a Turkish city located in an area severely impacted by violent clashes between armed forces and the PKK[441]. Zana was indicted for a statement that was published on a newspaper in 1987 which showed support for the PKK[442].

After being refused by four courts, claiming they did not have jurisdiction[443] (and possibly hesitant for the possible political implications of the indictment), the case was eventuallyruled by the Diyarbakır National Security Court[444]. In 1991, the Court convicted Zana for having ''defended an act punishable by law as a serious crime' and 'endangering public safety''[445]. Zana claimed in his defence that he had always advocated for non-violent action and thus deemed his conviction to be unjustified[446]. The ECtHR, however, found Zana's statement to be 'contradictory and ambiguous'[447] and thus considered the interference with his freedom of speech to be justified[448]. The decision was largely affected by context[449], as at the time of the statement the area was extremely unstable[450]. The ECtHR also took into consideration Zana's political standing[451] and the size of the newspaper that published the statement[452]. It is quite apparent, then, that in this case no specific time or location for an attack were indicated by Zana; however, elements of context proved sufficient for determining dangerousness. This derives from the fact that, as the ICTR noted in *Akayesu*, 'incitement may be direct, and nonetheless implicit'[453]. Something similar could be said for the *Hogefeld* case, discussed earlier. In that case, no statement was even made, as the notoriety and role of the defendant were sufficiently worrying in the eyes of the court to prevent her from releasing an interview at all.

Despite these cases, an agreement on how relevant context actually is in determining whether a statement should be punished does not exist. According to some, incitement without any call to action merely classifies as hate speech[454]. Zana's statement could even be regarded as a mere political opinion. Professor Ian Cram has highlighted the lack of scrutiny on part of the ECtHR in *Hogefeld*, and he has deemed the Court's standard in reviewing national restriction 'relaxed'[455]. That also applies to several ECtHR cases originating from Turkish anti- terrorism laws, such as *Zana* or *Sürek*. Legislation limiting expressions which could undermine the territorial integrity of Turkey had been adopted during the 1980s as a response to the (often violent) separatist struggle of the Kurds[456]. In these cases, Cram sees a 'broader pattern of weak protection for dissident expression'[457].

4.2 Short Time Horizon.

The time horizon criterion implies that it would not be enough to ascertain that country A might possibly challenge country B's power or predominance at some point in the future to justify an attack from country A; rather, the attack of an enemy should be expected momentarily. In the case of incitement, this would imply that statements are not generally referring to actions in an undefined time, but rather that a precise time frame for an attack to occur is indicated. Lack of a limited time frame of the possible effects that acts of incitement may have is problematic; however, it is not uncommon.

For example, the Convention on the Prevention of Terrorism contains no specified time frame in which the incitement act should result in actual harm[458]. The issue is even more controversial for provisions in the UK. Indeed, the Terrorism Act 2006 prohibits statements that glorify the 'commission or preparation (whether in the past, in the future or generally)' of terrorist acts[459].

4.3 Imminence of Harm.

The argument that it is necessary to have at least some link between speech and actual violent actions when criminalising incitement to terrorism has already been introduced. However, different positions were presented. According to Ronen, for example, the link between speech and terrorist act should not be too strict, as that would defy the purpose of incitement to terrorism as an offence[460]. In the author's view, criminalisation of incitement to terrorism is needed to avoid the creation of an environment conducive to terrorist acts[461]. This can be described as a preventive approach to the criminalisation of speech. In light of the discussion in this section, it seems possible to affirm that attributing such a function to criminal law tools is misplaced. As a result, a closer link between speech and action seems more advisable. This would imply that even a specific call to commit a crime (or a terrorist act) could be protected if there is no evidence that this is likely (objective element), *and* meant (subjective element) to result in clear action[462]. Thus, definitions of incitement to terrorism should include references to an 'imminent risk of acts of terrorism'[463]. The notion of imminence is particularly relevant under the U.S. standard of protection of freedom of speech.

In conclusion, on the basis of this analysis it may be inferred that criminalisation of indirect incitement to terrorism is an excessive measure. Only if a concrete and forthcoming danger can be expected to result from the incitement should this be prosecuted. Such an application of criminal law constitutes a pre-emptive measure according to the distinction presented here, and should thus be admissible. This conceptual distinction between preventive and pre-emptive measures aims at finding a reasonably balanced threshold for applying restrictions to freedom of speech through criminal law. Undoubtedly, this does not imply that preventive action should not be pursued for countering terrorism. Several policies can be enacted in order to reduce the likeness of future terrorist attacks. For example, intelligence gathering and covert monitoring of potentially dangerous individuals are viable options[464]. However, these measures should also be required to comply with human rights protection standards, and should not include qualification of certain acts as crimes[465]. Indeed, it seems more appropriate to challenge the diffusion of extremist discourse through other means than banning it. As the former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue, noted in 2012:

> 'Penal codes alone [...] will rarely provide the solution to the challenges of incitement to hatred in society. Accordingly, while a legal prohibition and prosecution may be of key importance in some cases, a more effective toolbox containing positive measures is also necessary to tackle the root causes and various facets of hate, including broad-based societal programmes to combat inequality and structural discrimination, in addition to creative policies and measures to promote a culture of peace and tolerance at all levels.'[466]

In light of all this, criminalising incitement to terrorism can be justified if it respects certain parameters. However, generally speaking criminalisation of preparatory conducts does not seem the most appropriate and effective response to terrorism. Instead, different policies are recommended. Specifically, positive measures that promote an open dialogue are more effective[467]. In order to have these, however, it is essential to guarantee freedom of expression[468]. Instead, criminalising incitement to terrorism seems to be doing exactly the opposite by limiting free speech.

5 Conclusions.

The primary aim of this work consisted in underlying the most problematic aspects of criminalising incitement to terrorism. The very concept of 'incitement to terrorism' is already problematic in itself. While at a first look it seems easy to understand, a closer examination shows that it is fact a complex issue. This point was proven by pointing to inconsistencies in the definitions of incitement to terrorism across the most important sources of international law on the matter. The most significant implication is that different definitions carry different effects on human rights. Ultimately, prohibitions of incitement to terrorism were found to be often excessive. Accordingly, criteria for designing balanced and legitimate measures were presented. The discussion further aimed at identifying key rules of limiting freedom of speech, in order to set standards through which it can be assured that the burdens of coercive methods in terms of liberties forgone do not exceed the benefits in terms of increased security. By analysing the most important regimes governing freedom of speech violations, it was concluded that prohibiting incitement to terrorism is in fact admissible, if certain parameters are met. Provisions violating human rights, however, should always be residual. Measures that are designed to be exceptional cannot become regular instruments of government. It has also been shown that criminal law is not an ideal tool for prevention. While prevention may indirectly derive from prohibitions, better policies exist for addressing the broader factors ultimately inducing individuals to carry out terrorist acts. When arguing in favour of criminalising indirect incitement, the core justification authors provide is that speech supporting terrorism has the power to create an environment that leads to terrorism. Part of this argument does hold true: terrorism often arises from a specific context where it is nurtured by narratives justifying it.

However, while this issue must surely be tackled, criminal law is not the only option. The opinion presented here is that, on this point, many authors incur in a logical short- circuit by not considering that other tools different from, and potentially more effective than, criminal law exist. Nevertheless, terrorism poses a consistent security threat, and tools for effective and rapid intervention are necessary. In this context, one key contribution of this work is establishing a distinction between prevention and pre-emption. On the basis of a concept borrowed from law of war, acts of incitement that are vague, distant and remote are not considered sufficient grounds for allowing violations of freedom of speech. On the other hand, if the incited act is described in a specific way, planned shortly, and harm is imminent, then speech can justifiably be punished.

It could be argued that this distinction is too subtle and artificial to effectively apply in practice. A recent case, however, provides an appropriate example to test the usefulness of this approach. On 6 January 2021, former President of the United States Donald Trump, spoke at the 'Save America' rally in Washington D.C.[469]. During the gathering, he continuously reiterated the concept that the presidential elections he had just lost had been rigged, and that something needed to be done about it[470]. Trump urged the crowd to 'fight like Hell and if you don't fight like Hell, you're not going to have a country anymore', to which the crowd responded by repeatedly chanting 'fight for Trump'. Moments after the end of the speech, a violent mob stormed the U.S. Capitol[471] resulting in what have been described by FBI officials as acts of domestic terrorism[472]. The extent of Trump's responsibility in these actions has been questioned and portions of his speech were also referred to for his (second) impeachment[473]. Is this incitement to terrorism? And can it be punished by criminal law? This work looked for key elements to identify the correct answers to this kind of questions in a legally sound way through the concepts of specificity of the threat, time horizon, and imminence of harm, resulting in a valuable contribution to the debate concerning incitement to terrorism. These parameters are easily applied to Trump's speech.

Towards the end of his speech former President Trump urged the crowd to march from the Ellipse, near the White House, where they were gathered at the moment, to Capitol Hill, just two kilometres away: 'So we're going to (…) walk down Pennsylvania Avenue, (…) and we're going to the Capitol and we're going to try and give (…) our Republicans, the weak ones, (…) the kind of pride and boldness that they need to take back our country. (…) So let's walk down Pennsylvania Avenue.'[474]

Trump gives precise indications, even describing which route the participants should follow (specific threat); he clearly states that these actions are to be carried out immediately (short time horizon); and there is an undoubtedly immediate link between these words and the resulting acts of domestic terrorism (imminence of harm).

All the suggested criteria are met. Thus, according to the proposed standard, this speech would constitute sufficient ground for legal action.

Deciding what words can legitimately be prohibited is a hard task, but it is not impossible. This work provides operational guidelines for designing prohibitions of incitement that are compliant with human rights frameworks and with the rule of law. The parameters proposed here provide support for pursuing the goal of granting security while avoiding excessive restrictions of freedom of speech. It can be stated in conclusion that there is a way to discern praise, an expression of support for terrorism that is still protected by freedom of speech, from peril, an act of speech that creates a real threat of harm.

6. Notes.

[1] The expression was used in 2003 by former UN Secretary-General Kofi Annan in the opposite sense: 'We should not see this as an age of threats, but as one of many new opportunities'. UN News. (14 January 2003). Despite threats, world should see 2003 as year of new opportunities, Annan says. https://news.un.org/en/story/2003/01/ 56322.
[2] Jaconelli, J. (2018). Incitement: A Study in Language Crime. In Criminal Law, Philosophy, 12, 245–265.
[3] Gallant, K. S. (2008). *The Principle of Legality in International and Comparative Criminal Law*, Cambridge Studies in International and Comparative Law, Cambridge.
[4] Ronen, Y. (2005). Incitement to Terrorist Acts Under International Law. In *Leiden Journal of International Law*, (23)3. p. 3.
[5] UN Security Council. (14 September 2005). Resolution 1624, S/RES/1624. Preamble.
[6] Ronen, *op. cit.*, p. 5.
[7] 'Following the attacks, the UK adopted a series of counter-terrorism measures, including deportation of foreign extremist Islamic clerics, closure of certain mosques, proscription of extremist Muslim groups and extension of control orders to British residents advocating terrorism', *ibid*.
[8] Barak-Erez, D. and Scharia, D. (2011). Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law. In *Harvard National Security Journal*. 22. p. 21.
[9] Ronen, *op. cit.*, p. 12.
[10] Ronen, *op. cit.*, p. 13. The adoption of unnecessary measures in the wake of terrorist attacks will be further explored later in this work.
[11] According to the interpretation of some commentators, the word 'glorification' only appears in the preamble as a way of finding a compromise with the US approach; see Barak-Erez & Scharia, *op. cit.*, p. 21. Others, however, consider the two terms to be used as synonyms in the Resolution; see OSCE Office for Democratic Institutions and Human Rights (ODIHR). (19-20 October 2006). *Human Rights Considerations in Combating Incitement to Terrorism and Related Offences*. Vienna. p. 4.
[12] Ronen, *op. cit.*, p. 18; Petzsche, A. (2017). The Penalization of Public Provocation to Commit a Terrorist Offence. Evaluating Different National Implementation Strategies of the International and European Legal Framework in Light of Freedom of Expression. In *European Criminal Law Review*. 7(3). p. 243.

[13] van Ginkel, B. Incitement to Terrorism: A Matter of Prevention or Repression?. *ICCT Research Paper*. The Hague. p. 19. Also see the last section of this work.
[14] Bianchi, A. (2006). Security Council's Anti-Terror Resolution and Their Implementation by Member States: An Overview. In *Journal of International Criminal Justice*. 4(5). pp. 1044-1073. p. 1047.
[15] Barak-Erez & Scharia, *op. cit*., p. 22; Bianchi, *op. cit*., p. 1048.
[16] Barak-Erez & Scharia, *op. cit*., p. 22; Ronen, *op. cit*., p. 8; Bianchi, A., *op. cit*., p. 1048.
[17] S/RES/1624. para. 1.
[18] Ronen, *op. cit.*, p. 6.
[19] UN Counter-Terrorism Implementation Task Force (CTIFT). (2014) *Conformity of National Counter-Terrorism Legislation with International Human Rights Law*. New York. para. 52. Differences in the application of the prohibition also reflect different traditions in regulating freedom of speech; In this sense, Resolution 1624 can be considered an attempt to find a compromise between the US and the European approaches to the matter (see Barak-Erez & Scharia).
[20] van Ginkel, *op. cit*., p. 18.
[21] '*Calls upon* all States to report to the Counter-Terrorism Committee, as part of their ongoing dialogue, on the steps they have taken to implement this resolution;', S/RES/1624. para. 5.
[22] van Ginkel, *op. cit*., p. 18; Ronen, *op. cit*., p. 8; Bianchi, A., *op. cit*., p. 1048.
[23] Bianchi, A., *op. cit*., p. 1048.
[24] Ronen, *op. cit*., p. 19.
[25] *Ibid*.
[26] Barak-Erez & Scharia, *op. cit*., p. 20.
[27] Council of Europe. (2005) *Convention on the Prevention of Terrorism*. Art. 5.
[28] van Ginkel, *op. cit*., p. 16.
[29] European Union. (15 March 2017). *Directive 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*. Art. 5.
[30] De Coensel, S. (2020). Incitement to Terrorism: the Nexus Between Causality and Intent and the Question of Legitimacy – A Case Study of the European Union, Belgium and the United Kingdom. In Paulussen, C., Scheinin, M. (ed,s). *Human Dignity and Human Security in Times of Terrorism*. Asser Press. The Hague.
[31] 'incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring'. ODIHR. *op. cit*. p. 8.
[32] Horgan, J. (2003). The Search for the Terrorist Personality. In Silke, A. (Ed.). *Terrorists, Victims and Society*. Wiley. p. 22.
[33] Aitala, R. (2018). *Il metodo della paura*. Laterza. p. 11.
[34] These two points refer to the objective and subjective elements of terrorism, respectively.
[35] Cassese, A. (2006b). The Multifaceted Criminal Notion of Terrorism in International Law. In Journal of International Criminal Justice. 4(5). p. 935.
[36] Special Tribunal for Lebanon. (16 February 2011). *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging.* STL-11-01/1. The STL was established in 2007 by the UN Security Council to prosecute

those who assassinated former Lebanese Prime Minister Rafiq Hariri and others; see Raul Diaz, G. (2020). Reflecting on the Ethical and Legal Implications of the State-Led War Against International Terrorism. In *European Journal for Security Research*. 5 pp. 143-197.
[37] *Interlocutory Decision on the Applicable Law*, paras. 84-85.
[38] *Interlocutory Decision on the Applicable Law*, paras. 88-90.
[39] *Interlocutory Decision on the Applicable Law*, para. 97.
[40] *Interlocutory Decision on the Applicable Law*, para. 100.
[41] *Interlocutory Decision on the Applicable Law*, p. 4.
[42] Callamard, A. (2015). Religion, Terrorism and Speech in a 'Post-Charlie Hebdo' World. In *Religion and Human Rights*. 10. 208; Staffler, L. (2016) Politica criminale e contrasto al terrorismo internazionale alla luce del d.l. antiterrorismo del 2015. In *Archivio Penale*. 3 p. 7.
[43] *Interlocutory Decision on the Applicable Law*, para. 106.
[44] Weatherall, T. (2015). The Status of the Prohibition of Terrorism in International Law: Recent Developments. In *Georgetown Journal of International Law*. 46(2). p. 605.
[45] Raul Diaz, *op. cit*., p. 166.
[46] Cassese, (2006b), *op. cit*., p. 937.
[47] Jaconelli, *op. cit*., p. 246.
[48] Ronen, *op. cit*., p. 13.
[49] Corn, G. S. (2018). Criminal and Military Incitement Response Tools: Prosecution and Security Detention. In Bayefsky, A. F. and Blank, L. R. (ed.s). Incitement to Terrorism. *Nijhoff Law Specials*. 95. Brill Nijhoff. Leiden. p. 121.
[50] Galli, F. (2012). Italian counter-terrorism legislation: The development of a parallel track ('doppio binario'). In *EU counter-terrorism offences: What impact on national legislation and case law?*. Éditions de l'Université de Bruxelles. p. 92.
[51] Cassese, A. (2008). *International Criminal Law*. Oxford University Press. p. 218.
[52] *Ibid*.
[53] *Ibid*.
[54] van Ginkel, *op. cit*., p. 20.
[55] Ronen, *op. cit*., pp. 20-30; van Ginkel, *op. cit*., pp. 12-14.
[56] van Ginkel, *op. cit*., p. 13.
[57] Ronen, *op. cit*., p. 20.
[58] *Convention.* Art. 1. The treaties listed in the Appendix are: Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on 14 December 1973; International Convention Against the Taking of Hostages, adopted in New York on 17 December 1979; Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997;

International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999; International Convention for the Suppression of Acts of Nuclear Terrorism, adopted in New York on 13 April 2005.
[59] S/RES/1624, preamble.
[60] UN Security Council. (8 October 2004). *Resolution 1566* . S/RES/1566. para. 3.
[61] Ronen, *op. cit*., p. 22; van Ginkel, *op. cit*., p. 13.
[62] UN General Assembly. (6 August 2008). *Protection of human rights and fundamental freedoms while countering terrorism*. A/63/223. para. 62.
[63] Jaconelli, *op. cit*., p. 248.
[64] *Ibid*.
[65] UN General Assembly. (28 August 2008). *The protection of human rights and fundamental freedoms while countering terrorism*. A/63/337. para. 8.
[66] Meijers Committee. (16 March 2016). *Note on a Proposal for a Directive on combating terrorism*. para. 11a.
[67] Rediker, E. (2015). The Incitement of Terrorism on the Internet: Legal Standards, Enforcement, and the Role of the European Union. In *Michigan Journal of International Law*. 36(2). p. 344. Birgit Hogefeld was a member of the Red Army Faction (RAF), a German terrorist organisation also known by the public as the Baader-Meinhof Group. The far-left movement was responsible for several attacks between the Seventies and the Nineties. Hogefeld was arrested in 1993, and she was sentenced to life imprisonment in 1996. See European Court of Human Rights. (20 January 2000). *Hogefeld v. Germany.* Application no. 35402/97.
[68] *Hogefeld v. Germany*, para. 5.
[69] Mchangama, J. (3 July 2015). Drawing the line between free speech and online radicalisation. In *Open Democracy*; Callamard, (2015), *op. cit*., p. 225.
[70] Mchangama, *op. cit*.
[71] *Ibid*.
[72] *Ibid*.
[73] Timmerman, W. K. (December 2006). Incitement in international criminal law. In *International Review of the Red Cross*. 88(864). p. 843.
[74] Cram, I. (2009). *Terror and the War on Dissent: Freedom of Expression in the Age of Al-Qaeda*. Springer. p. 96.
[75] Ronen, *op. cit*., p. 22.
[76] Ronen, *op. cit*., p. 24.
[77] Saul, B. (2005). Speaking Terror: Criminalising Incitement to Violence. In *University of New South Wales Law Journal*. 28(3). p. 15.
[78] A/63/337, para. 61.
[79] Rediker, *op. cit*., p. 327.
[80] International Criminal Tribunal for Rwanda. (September 1998). *Prosecutor v. Akayesu*. Case No. ICTR-96-4-T. para. 557.
[81] van Ginkel, *op. cit*., p. 13.
[82] *Prosecutor v. Akayesu*, paras. 557-558.
[83] Timmerman, (2006), *op. cit*., p. 825.
[84] Not all those who are radicalised actually end up committing violent acts. For further discussion on the topic, see Canna, S.; St. Clair, C.; Chapman A. (2012). *Strategic Multilayer Assessment (SMA).*

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[85] Ronen, *op. cit*., p. 26.
[86] *Ibid*.
[87] *Ibid*.
[88] Barak-Erez & Scharia, *op. cit*., p. 9.
[89] De Coensel, *op. cit*., p. 277.
[90] Rediker, *op. cit*., p. 326.
[91] Gordon, G. S. (2018). Freedom of Expression, Hate Speech, and Incitement to Terrorism and Genocide: Resonances and Tensions. In Bayefsky & Blank. *op. cit.* p. 17; Ronen, *op. cit.*, p. 15.
[92] Victoroff, J. (2005). The Mind of the Terrorist: A Review and Critique of Psychological Approaches. In *The Journal of Conflict Resolution.* 49(1).
[93] UN Secretary-General, as quoted in Ronen. *op. cit*. p. 15.
[94] Gordon, G. (2017). *Atrocity Speech Law: Foundation, Fragmentation, Fruition*. Oxford University Press. p. 20.
[95] Timmerman, (2006), *op. cit*., p. 852.
[96] Ronen, *op. cit*., p. 15.
[97] Winter, C. (2015). *'The Virtual Caliphate': Understanding Islamic State's Propaganda Strategy*. Quilliam. p. 37.
[98] *Ibid*.
[99] Rediker, *op. cit*., p. 323.
[100] Rediker, *op. cit*., p. 348.
[101] A/63/337, para. 6.
[102] *Convention*, Art. 5.
[103] Ronen, *op. cit*., p. 30.
[104] van Ginkel, *op. cit*., p. 14.
[105] Rediker, *op. cit*., p. 346.
[106] van Ginkel, *op. cit*., p. 14.
[107] Cassese, (2006b), *op. cit*., p. 940.
[108] Timmerman, (2006), *op. cit*., p. 841; Gordon, (2017), *op. cit*., p. 14.
[109] Gordon, (2017), *op. cit*., p. 14. The Explanatory Report states that '[…] there has to be a specific intent to incite the commission of a terrorist offence', Council of Europe. (2005). *Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism.* para. 99.
[110] Ronen, *op. cit*., p. 30.
[111] Ronen, *op. cit*., p. 29.
[112] *Ibid*.
[113] European Court of Human Rights. (8 July 1999). *Sürek v. Turkey (No. 3)*. Application no. 24735/94.
[114] *Sürek v. Turkey (No. 3)*, paras. 9- 14.
[115] *Sürek v. Turkey (No. 3),* paras. 40-43.
[116] Meijers Committee, *op. cit*., para. 8a.
[117] van Ginkel, *op. cit*., p. 14.
[118] Ronen, *op. cit*., p. 28.
[119] *Ibid*.
[120] *Ibid*.

[121] A/63/337, para. 61.
[122] van Ginkel, op. cit., p. 14.
[123] *Convention,* Art. 5.
[124] *Directive 2017/541*.
[125] Gordon, (2017), *op. cit*., p. 15.
[126] Ronen, *op. cit*., p. 17.
[127] UN Human Rights Committee. (12 September 2011). *General comment No. 34, Article 19: Freedoms of opinion and expression*. CCPR/C/GC/34. para. 3.
[128] Úbeda de Torres. A. (2003). Freedom of Expression under the European Convention on Human Rights: A Comparison With the Inter-American System of Protection of Human Rights. In *Human Rights Brief*. 10(2). p. 6.
[129] *Ibid*.
[130] ODIHR, *op. cit.,* pp. 5-6.
[131] Callamard, A. (2017). The Control of 'Invasive' Ideas in a Digital Age. *In Social Research: An International Quarterly*. 84(1). p. 119.
[132] Callamard, (2012), *op. cit.,* p. 121.
[133] Article 19 of the UDHR states that: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'. UN General Assembly. (10 December 1948). *Universal Declaration of Human Rights*. 217 A (III).
[134] Renieris. E. M. (2009). Combating Incitement to Terrorism on the Internet: Comparative Approaches in the United States and the United Kingdom and the Need for an International Solution. In *Vanderbilt Journal of Entertainment and Technology Law*. 11(3). p. 679. Gordon. (2017). op. cit., p. 6.
[135] Macovei, M. (2004). *Freedom of Expression. A guide to the implementation of Article 10 of the European Convention on Human Rights*. Council of Europe Human Rights Handbook. p. 6.
[136] Rediker, *op. cit.,* p. 331.
[137] S/RES/1624, preamble.
[138] *Ibid*.
[139] UN General Assembly. (16 December 1966). *International Covenant on Civil and Political Rights (ICCPR)*. Preamble.
[140] 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'. *ICCPR*, Art. 19(2).
[141] *Ibid.*
[142] Macovei, *op. cit.,* p. 5.
[143] *Ibid*.
[144] The first paragraph establishes the scope of this protection: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.' European Court of Human Rights. (1950). *European Convention on Human Rights (ECHR)*.

[145] Macovei, *op. cit.,* p. 11.
[146] Macovei, *op. cit.,* p. 6.
[147] 'The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.' *ICCPR*. Art. 19(3).
[148] 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.' *ECHR*. Art. 10(2).
[149] Macovei, *op. cit.,* p. 21.
[150] 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.*UDHR*. Art. 7.
[151] 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' *ICCPR*. Art. 20(2).
[152] Callamard, (2017), *op. cit.,* p. 124.
[153] *Ibid*.
[154] *Ibid*.
[155] Bianchi, A, *op. cit.*, p. 1060.
[156] 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'. *ICCPR*, Art. 4(1).
[157] 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'. *ECHR*, Art. 15(1).
[158] The other two are the American Convention on Human Rights and the European Social Charter; Istrefi, K. (18 April 2020). To Notify or Not to Notify: Derogations from Human Rights Treaties. In *OpinioJuris*.
[159] European Court of Human Rights (ECtHR). (31 August 2020a). *Guide on Article 15 of the European Convention on Human Rights - Derogation in Time of Emergency*. para. 2.
[160] Callamard, (2017), *op. cit.,* p. 123.
[161] Sottiaux, S. (2008). *Terrorism and the Limitation of Rights. The ECHR and the US Constitution*. Hart Publishing. Portland. p. 50.
[162] UN General Assembly. (16 August 2006). *Protection of human rights and fundamental freedoms while countering terrorism: Report of the Special Rapporteur*. A/61/267. Para. 19.

[163] UN Commission on Human Rights. (28 September 1984). *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.* E/CN.4/1985/4. Introduction.
[164] *Ibid*.
[165] UN Counter-Terrorism Implementation Task Force (CTIFT). (2014). *Conformity of National Counter- Terrorism Legislation with International Human Rights Law*. New York. Para. 32.
[166] *Ibid*.
[167] *Siracusa Principles*, Art. 39.
[168] *Siracusa Principles*, Artt. 40&41.
[169] CTIFT, *op. cit.,* para. 32.
[170] Sottiaux, *op. cit.,* p. 51.
[171] Lawless was a member of the Irish Republican Army (IRA), the notorious armed group that aimed at taking away Northern Ireland from British control. The defendant had been previously arrested for activities in connection with the IRA between 1956 and 1957. The defendant had been previously arrested for activities in connection with the IRA between 1956 and 1957. European Court of Human Rights. (14 November 1960). *Lawless v. Ireland (No. 1)*. Application no. 332/57. European Court of Human Rights. (1 July 1961). *Lawless v. Ireland (No. 3)*. Application no. 332/57. para. 4.
[172] *Lawless v. Ireland (No. 3)*, para. 5.
[173] *Lawless v. Ireland (No. 3)*, para. 28. The English version reads: 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed;'. The French text is preferred here for two reasons: i) because it is the authentic one, and ii) because it includes the word 'imminent' to describe the crisis, which was omitted in English; see Sottiaux, *op. cit.,* p. 51.
[174] *Lawless v. Ireland (No. 3)*, para. 30.
[175] Sottiaux, *op. cit.,* p. 51.
[176] European Court of Human Rights. (5 November 1969). *Greek Case*. Denmark v. Greece, Application no. 3321/67; Norway v. Greece, Application no. 3322/67; Sweden v. Greece, Application no. 3323/67; Netherlands v. Greece, Application no. 344/67.
[177] *Greek case*, para. 112.
[178] *Greek case*, para 113.
[179] CTIFT, *op. cit.,* para. 32; ECtHR, (2020a), *op. cit.,* para. 9.
[180] A/63/337, para. 21.
[181] Sottiaux, *op. cit.,* p. 49. On this point, the ECtHR has observed: 'Terrorism in Northern Ireland met the standard of a public emergency, since for a number of years it represented a 'particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties [of Northern Ireland] and the lives of the province's inhabitants' […]. So, too, did PKK terrorist activity in South-East Turkey […] and the imminent threat of serious terrorist attacks in the United Kingdom after 11 September 2001 […], and the attempted military coup in Turkey in 2016'. ECtHR. (2020a). *op. cit.,* para. 12.
[182] CTIFT, *op. cit.,* para. 32.
[183] *Siracusa Principles*, Art. 51.
[184] *Siracusa Principles*, Art. 53.
[185] *Siracusa Principles*, Art. 52.

[186] As the Court observed in *Ireland v United Kingdom*: 'It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 (art. 15-1) leaves those authorities a wide margin of appreciation.' European Court of Human Rights. (18 January 1978). *Ireland v. United Kingdom*. Application no. 5310/71. Para. 207.
[187] ECtHR, (2020a), *op. cit.,* para. 11.
[188] ECtHR, (2020), *op. cit.,* para. 18.
[189] ECtHR, (2020a), *op. cit.,* para. 20.
[190] *Décret n° 2015-1475 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955*.
[191] Amnesty International. (2017). Dangerously Disproportionate: The Ever-Expanding National Security State in Europe. London. P. 12.
[192] Amnesty International. (2016). *Upturned Lives: The Disproportionate Effect of France's State of Emergency*. London. P. 6.
[193] Hartmann, C. (1 November 2017). Two years after the Paris attacks, France ends state of emergency. In *Reuters*.
[194] *Ibid*.
[195] Amnesty International, (2017), o*p cit*. p. 12.
[196] CTIFT. *op. cit.,* para. 33.
[197] Galli. F. (2013). Freedom of thought or 'thought-crimes'? Counter-terrorism and freedom of expression. In Masferrer, A., Walker, C. (ed.s). *Counter-Terrorism, Human Rights and the Rule of Law: Crossing Legal Boundaries in Defence of the State*. Edward Elgar. P. 124.
[198] *Ibid*.
[199] *Ibid*.
[200] McCulloch, J. & Pickering, S. (2009). Pre-crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror. In *The British Journal of Criminology*. 49(5). p. 637.
[201] *Ibid*.
[202] UN Human Rights Council (HRC). (28 December 2009). *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*. A/HRC/13/37. Para. 48.
[203] *Ibid*.
[204] *Ibid*.
[205] *Ibid*.
[206] *Ibid*.
[207] Hirsch Ballin, E. (2020). Restoring Trust in the Rule of Law. In Paulussen & Scheinin (ed.s)., *op. cit.,* p. 28.
[208] Hertrich, S. (2010). *Risk I – III*.
[209] Amnesty International, (2017), o*p cit*. p. 8.
[210] A/63/337, para. 21.
[211] In asymmetric conflicts, the weaker competitor employs alternative methods to confront its stronger antagonist: 'asymmetrical warfare is acting, organizing and thinking differently than opponents in order to maximize one's own advantages [and] exploit an opponent's

weaknesses'; see Campbell, K. T. (Winter 2007). Asymmetrical Threats: A Vital Relevancy for Information Operations. In *Army Space Journal*.
[212] Martin, G. (2012). *Understanding Terrorism: challenges, perspectives, and issues (4th ed.)*. Sage. p. 321.
[213] The arguments are originally disputed in *Terror in the Balance: Security, Liberty, and the Courts* by Adrian Vermeule and Eric Posner.
[214] Cram, *op cit*. p. 10.
[215] Cram, *op cit*. p. 12.
[216] 'The draconian Civil Authorities (Special Powers) Act 1922 in Northern Ireland was originally a measure subject to annual, and later quinquennial, renewal. In 1933, it was made permanent so that ''in a sense Northern Ireland (was) being treated in a permanent state of emergency.'' Concern has been expressed that the current state of anti-terrorist measures are in danger of becoming de facto permanent features. A common complaint about emergency powers is their retention for longer than necessary'. Bonner (1985). *Emergency Powers in Peacetime*, as quoted in Cram, *op. cit.,* p. 14.
[217] Gordon, (2017), *op cit.* p. 14.
[218] 'Where a counter-terrorism measure seeks to impose a limitation on a right or freedom, this limitation must be necessary in the pursuit of a legitimate counterterrorism objective and the impact of the counter-terrorism measure on rights or freedoms must be strictly proportional to the nature of that objective'. A/63/337, para. 54.
[219] Úbeda de Torres, *op. cit.,* p. 8.
[220] Cannie, H. & Voorhoof, D. (20 April 2017). The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?. In *Netherlands Quarterly of Human Rights*. 29(1). p. 64.
[221] European Court of Human Rights. (7 December 1976). *Handyside v. The United Kingdom*. Application no. 5493/72. para. 49.
[222] Article 17 reads: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.', ECHR.
[223] From the *Kühnen vs Germany* case, quoted in Cannie & Voorhoof, *op. cit.,* p. 59.
[224] Cannie & Voorhoof, *op. cit.,* p. 62.
[225] '*La Cour est d'avis que l'expression litigieuse ne rentre pas dans le champ d'application des publications qui se verraient soustraites par l'article 17 de la Convention à la protection de l'article 10. […]controversée d'une caricature, le message de fond visé par le requérant - la destruction de l'impérialisme américain - ne vise pas la négation de droits fondamentaux et n'a pas d'égal avec des propos dirigés contre les valeurs qui sous-tendent la Convention tels que le racisme, l'antisémitisme […] ou l'islamophobie*'. European Court of Human Rights. (06 April 2009). *Leroy v. France*. Application no. 36109/03, para. 27.
[226] Cannie & Voorhoof, *op. cit.,* p. 63.
[227] De Coensel, *op. cit.,* p. 288.
[228] ODIHR, *op. cit.,* p. 14.
[229] De Coensel, *op. cit.,* p. 288.
[230] *Ibid*.

[231] 'a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct'. European Court of Human Rights. (28 September 1993). *Öztürk v. Turkey*. Application no. 22479/93, para. 54.
[232] *Ibid*.
[233] Cannie & Voorhoof, *op. cit.,* p. 65.
[234] Galli, (2013), *op cit*. p 125.
[235] De Coensel, *op. cit.,* p. 289.
[236] European Court of Human Rights. (10 December 2007). *Stoll v. Switzerland*. Application no. 69698/01, para. 101.
[237] European Court of Human Rights (ECtHR). (31 August 2020b) *Guide on Article 10 of the European Convention on Human Rights – Freedom of Expression*, para. 72.
[238] European Court of Human Rights. (8 July 1986). *Lingens v. Austria*. Application no. 9815/82, para. 39.
[239] The ECtHR has described its role in ascertaining whether infringements are necessary as follows: 'the Court's supervision would generally prove illusory if it did no more than examine these decisions in isolation; it must view them in the light of the case as a whole, including the publication in question and the arguments and evidence adduced by the applicant in the domestic legal system and then at the international level. The Court must decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient under Article 10 para. 2'. *Handyside v. The United Kingdom*, para. 50.
[240] De Coensel, *op. cit.,* p. 289.
[241] Rediker, *op. cit.,* p. 345. The factors taken into consideration include: 'the content of the message, the probability and seriousness of the consequences, the intention of the speaker, the medium (including the impact and nature of the publication), the authority of the speaker, the nature of the audience and the security situation in time and space, etc.' De Coensel. *op. cit.,* p. 289.
[242] Rediker, *op. cit*.; p. 343, Galli, (2013), *op cit*., p 118; *Leroy v. France*.
[243] On 13 September 2001 Ekaiza, a weekly magazine distributed in the Basque area, published an illustration by cartoonist Denis Leroy depicting the attacks on the Twin Towers with the slogan '*Nous en avions tous rêvé…le Hamas l'a fait*!'. The text was the parody of a famous commercial by Sony. Subsequently, legal proceeding against both Leroy and Ekaiza were initiated for '*complicité d'apologie du terrorisme*' and '*apologie du terrorisme*'. Leroy explained in a later number of Ekaiza that when drawing the cartoon he had not considered the human suffering deriving from the attack, nor the repercussions, but he was expressing his political views of anti-americanism. In 2002, Leroy was convicted by the tribunal of Bayonne, which evaluated that the slogan was 'unmistakeably praising' of a tragic act of violence. The conviction was upheld by the Court of Appeal in Pau. *Ibid*.
[244] Schlanger, S. (2018). French Law and EU Rules in the Fight Against Incitement to Terrorism or Violent Extremism. In Bayefsky & Blank. *op. cit.,* p. 55.
[245] The first two elements were rapidly assessed as follows: *'Il n'est pas davantage contesté que l'ingérence était prévue par la loi […] et poursuivait plusieurs buts légitimes.'* Among the legitimate aims, the Court stressed in particular the sensitive nature of the fight against terrorism. *Leroy v. France*, para. 36.
[246] *Leroy v. France*, paras. 37-48.
[247] *Ibid*.

[248] *Ibid*.
[249] De Coensel, *op. cit.,* p. 290.
[250] ECtHR, (2020b) *op. cit.,* para. 535.
[251] *Leroy v. France*, para. 48.
[252] *Leroy v. France*, para. 47.
[253] *Stoll v. Switzerland*, para. 101.
[254] ODIHR, *op. cit.,* p. 15; De Coensel, *op. cit.,* p. 288.
[255] De Coensel, *op. cit.,* p. 288.
[256] *Ibid*.
[257] 'For each of the counter-terrorism measures, States must determine, in relation to restrictions or limitations on the enjoyment of a given right or freedom, whether the impact of the measure on the exercise of that right or freedom is proportional to the objective being pursued by the measure and its potential effectiveness in achieving that objective.' A/63/337, para. 56.
[258] De Coensel, *op. cit.,* p. 289. 'The Court must determine whether the interference at issue was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the [domestic] courts to justify it are 'relevant and sufficient'', *Lingens v. Austria*, para. 40.
[259] ODIHR, *op. cit.,* p. 15.
[260] *Ibid*.
[261] *Ibid*.
[262] UN Human Rights Council (HRC). (21 February 2020). *Human rights impact of policies and practices aimed at preventing and countering violent extremism. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*. A/HRC/43/46, para. 12.
[263] As quoted in De Coensel, *op. cit.,* p. 293.
[264] Barak-Erez & Scharia, *op. cit.,* p. 14.
[265] Timmermann, W. K. (2015). *Incitement in International Law*. Routledge. New York. p. 57.
[266] Gordon, (2017) *op. cit.,* p. 10.
[267] Barak-Erez & Scharia, *op. cit.,* p. 14.
[268] Barak-Erez & Scharia, *op. cit.,* p. 16.
[269] *Ibid*.
[270] *Ibid*.
[271] Clarence Brandenburg was convicted in 1964 under the Ohio Criminal Syndicalism Act for 'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism''. United States Supreme Court. (9 June 1969). *Brandenburg v. Ohio*. 395 U.S. 444.
[272] Perry, F. V. & Gelman, W. A Multilateral Convention on Outlawing Incitement to Acts of Terrorism Under International Law. In *Syracuse Journal of International Law and Commerce.* 43(1). P. 144.
[273] *Brandenburg v. Ohio*, 446.
[274] Perry&Gelman, *op. cit.,* p. 144.
[275] Rediker, *op. cit.,* p. 331.
[276] Saul. *op. cit*., p. 16.
[277] Barak-Erez & Scharia. *op. cit.,* p. 15.

[278] Rediker. *op. cit.,* p. 331.
[279] Renieris*, op. cit*., p. 680.
[280] Saul, *op. cit*., p. 16.
[281] Barak-Erez & Scharia, *op. cit.,* p. 16.
[282] *Ibid*.
[283] van Ginkel, *op. cit*., p. 23.
[284] Barak-Erez & Scharia, *op. cit.,* p. 19.
[285] *Ibid*.
[286] Morrison, S. R. (2011). Terrorism Online: is speech the same as it ever was?, in *Creighton Law Review*. 963. p. 2.
[287] Saul, *op. cit*., p. 15.
[288] ODIHR, *op. cit*., p. 3.
[289] van Ginkel, *op. cit*., p. 8.
[290] ODIHR, *op. cit*., p. 3.
[291] *Ibid*.
[292] Nossel, S., quoted in Noor P. (17 January 2021). Should we celebrate Trump's Twitter ban? Five free speech experts weigh in. In *The Guardian*.
[293] Saul, *op. cit*., p. 15.
[294] A/HRC/31/65, para. 8.
[295] CTIFT, *op. cit*., 2014, para. 37.
[296] A//67/357, para. 3.
[297] De Coensel. *op. cit*., p. 270.
[298] Zedner, L. (2007). Pre-crime and post-criminology? In *Theoretical Criminology*. 11(2), p. 261.
[299] Beck, U. (1992). *Risk Society: Towards a New Modernity*. Sage.
[300] Beck, *op. cit*., p. 34.
[301] McCulloch & Pickering, *op. cit.,* p. 630.
[302] Human Rights Watch. (9 December 2020). *China: Big Data Program Targets Xinjiang's Muslims*.
[303] Xingjiang is a vast autonomous region located in north-western China, which has recently received attention by the international media for repressive actions enacted by Chinese authorities towards the Uyghur and other ethnic minorities; for more information see for example Sciorati, G. (15 October 2020). Cina: la questione uigura nello Xinjiang. In *ISPI*.
[304] Davidson, H. and Graham-Harrison, E. (9 December 2020). 'Being young' leads to detention in China's Xinjiang region. In *The Guardian*. Significantly these behaviours include activities such as 'having 'extremist thoughts' or downloading 'extremist' audiovisual content', which hardly seem sufficient for indicating culpability. Instead, not only are these individuals arrested, but they are also held in 'political education' camps. See Human Rights Watch, *op. cit.*
[305] Grosso, L. (9 December 2020). Come funziona la Polizia Predittiva Cinese, che arresta le persone in base a un database. Altro che Minority Report… In *Business Insider*.
[306] Zedner, *op. cit*., p. 264.
[307] McCulloch & Pickering, *op. cit.,* p. 633.
[308] McCulloch & Pickering, *op. cit*., p. 630,
[309] Garner, B. A. (ed.). (2019). *Black's Law Dictionary*. 11th ed. Thomson Reuters. St. Paul.
[310] *Ibid*.
[311] Cassese (2008), *op. cit.,* p. 219.

[312] Timmerman, (2006), *op. cit*., p. 825; Galli, (2013), *op. cit.,* p. 121.
[313] Cahill M. T. (2012). Defining Inchoate Crime: An Incomplete Attempt. In *Ohio State Journal of Criminal Law*. 9(2). p. 755.
[314] Cassese, (2008), op. cit., p. 219. Renieris, E. M. (2009). Combating Incitement to Terrorism on the Internet: Comparative Approaches in the United States and the United Kingdom and the Need for an International Solution. In *Vanderbilt Journal of Entertainment and Technology Law*.11(3). p. 682.Cahill, *op. cit*., p. 754.
[315] Timmerman. (2006), *op. cit*., p. 825.
[316] Cassese (2008), *op. cit*., p. 220.
[317] *Ibid*.
[318] *Ibid*.
[319] *Ibid*.
[320] The option of extending incitement to all crimes against humanity was discussed during the drafting of the Rome Statute of the International Criminal Court, but these were explicitly rejected; see Timmerman (2006), *op. cit*., p. 843.
[321] Child, J. & Hunt, A. (2011). Risk, Pre-emption, and the Limits of the Criminal Law. In *Whose Criminal Justice? Regulatory State or Empowered Communities*. Waterside Press. p. 59-60.
[322] Cahill, *op. cit*., p. 754.
[323] *Ibid*.
[324] Child & Hunt, *op. cit*.
[325] Alexander, L. & Kessler Ferzan, K. (2009). *Crime and Culpability. A Theory of Criminal Law*. Cambridge University Press. Cambridge.
[326] *Ibid*.
[327] Rediker, *op. cit.*, p. 347.
[328] Child & Hunt, *op. cit*., p. 59.
[329] Ventura, J. M. (2019). Aiding and Abetting. In de Hemptinne, J., Roth, R. & van Sliedregt, E. (ed.s). *Modes of Liability in International Criminal Law*. Cambridge University Press. p. 173.
[330] Ventura, op. cit., p. 181. The author also points out that aiding and abetting has a wider scope than incitement, as the latter 'can only be linked in International Criminal Law with genocide'.
[331] *Prosecutor v. Akayesu*, para. 562.
[332] Galli, F. (2019). Case Studies of National Counter-Terrorism Policies: Case Study of France. In Shor E., & Hoadley S. (ed.s). *International Human Rights and Counter-Terrorism*. Springer. p. 375.
[333] Child & Hunt, *op. cit*., p. 53.
[334] Galli, (2013), *op. cit*., p. 121; Rediker*, op. cit*., p. 327.
[335] Galli, (2013), *op. cit*., p. 121.
[336] Cahill, *op. cit*., p. 754.
[337] Galli, (2019), *op. cit*., p. 375.
[338] *Ibid*.
[339] Child & Hunt, *op. cit*., p. 56.
[340] Peršak, N. (2007). *Criminalising Harmful Conduct*. Springer. p. 22.
[341] De Coensel, *op. cit.,* p. 286.
[342] *Ibid*.
[343] Peršak, *op. cit*., p. 22.
[344] Dr. De Coensel has come to this conclusion after analysing standards of prohibition of incitement to terrorism in the European Union, the UK and Belgium; De Coensel, *op. cit*., p. 286.

345 Mill, J. S. (1859). *On Liberty*.
346 De Coensel, *op. cit.,* p. 286.
347 Child & Hunt, *op. cit*., p. 53.
348 Child & Hunt, *op. cit*., p. 54.
349 Timmerman. (2006), *op. cit*., p. 826.
350 Fisher, K. J. (2012). *Moral Accountability and International Criminal Law*. Routledge. p. 51.
351 Fisher, *op. cit*., p. 53.
352 Fisher, *op. cit*., p. 56.
353 *Ibid*.
354 de Hemptinne, Roth & van Sliedregt, *op. cit*., p. 392.
355 Timmerman, (2006), *op. cit*., p. 826.
356 *Ibid*.
357 *Prosecutor v. Akayesu*, para. 562.
358 *Handyside v. The United Kingdom*, para. 49.
359 Bhoumik, A. (2005). Democratic Responses to Terrorism: A Comparative Study of the United States, Israel, and India. In *Denver Journal of International Law and Politics*. 33(2). op. cit., p. 289.
360 McCulloch & Pickering, *op. cit*., p. 636.
361 Staffler, *op. cit*., p. 58.
362 Bhoumik, *op. cit*., p. 298.
363 *Ibid*.
364 *Ibid*.
365 Galli. (2013), *op. cit*., p. 121; van Ginkel, *op. cit*., p. 9; Galli. (2019), *op. cit*., p. 374.
366 McCulloch & Pickering, *op. cit.*, p. 629; Galli. (2013). *op. cit.*, p. 121; Galli. (2019), *op. cit.*, p. 374.
367 Ronen, *op. cit*., p. 13.
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369 A/HRC/43/46, para. 24.
370 Child & Hunt, *op. cit*., p. 56.
371 Mariner, J. (January 28 2008). *Terrorism and Speech*. FindLaw.
372 van Ginkel, *op. cit*., p. 9.
373 A/HRC/43/46, para. 24.
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[386] Galli, (2019), *op. cit*., p. 372.
[387] Galli, (2019), *op. cit*., p. 379.
[388] *Ibid*.
[389] *Ibid*.
[390] ODIHR, *op. cit*., p. 3.
[391] Renieris, *op. cit.,* p. 682.
[392] Perry & Gelman, *op. cit*., p. 146.
[393] *Ibid*.
[394] Barak-Erez & Scharia, *op. cit*., p. 19.
[395] Renieris, *op. cit.,* p. 683.
[396] Quoted in Barak-Erez & Scharia, *op. cit.,* p. 17.
[397] Renieris, *op. cit*., p. 683.
[398] Corn, *op. cit*., p. 123.
[399] Kearney, C. (April 2009). NY man sentenced to 5 years for aiding Hezbollah. In *Reuters Inter.*
[400] *Ibid*.
[401] Barak-Erez & Scharia*, op. cit*., p. 3.
[402] Perry & Gelman, *op. cit*., p. 146.
[403] United States Supreme Court. (21 June 2010). *Holder v. Humanitarian Law Project*. No. 08-1498.
[404] Barak-Erez & Scharia, *op. cit*., p. 2; Gordon, (2017), *op. cit*., p. 14.
[405] Barak-Erez & Scharia, *op. cit*., p. 19.
[406] Gordon, (2017) *op. cit*., p. 13.
[407] Barak-Erez & Scharia, *op. cit*., p. 4.
[408] ODIHR, *op. cit*., p. 3.
[409] McCulloch & Pickering, *op. cit*., p. 629.
[410] These include legitimate concerns, such as reassuring populations, but also misplaced believes.
[411] Bhoumik, *op. cit*., p. 320.
[412] Bhoumik, *op. cit*., p. 321.
[413] McCulloch & Pickering, *op. cit*., p. 630.
[414] These, along with the USA Patriot Act (October 2001), include the Aviation and Transportation Security Act (November 2001), the Victims of Terrorism Relief Act (January 2002), the Enhanced Border Security and Visa Entry Reform (April 2002), the Bioterrorism Response Act (June 2002), and the Terrorist Bombings Convention Implementation Act (June 2002). Bhoumik, *op. cit*., p. 315.
[415] *Ibid*.
[416] That is the main purpose of International Humanitarian Law. See Melzer, N. (2019). *International Humanitarian Law: A Comprehensive Introduction*. International Committee of the Red Cross. p. 17.
[417] VanLandingham, R. (2018). Targeting Speech in War. in Bayefsky & Blank, *op. cit*., p. 106.
[418] Melzer, *op. cit*., p. 81.
[419] *Ibid*.
[420] '(1) they were commanded by a person responsible for his subordinates; (2) they had a fixed distinctive emblem recognizable at a distance; (3) they carried arms openly; and (4) they conducted their operations in accordance with the laws and customs of war'; these are listed in Art. 1 of the Hague Regulations; quoted in Melzer, *op. cit*., p. 81.
[421] VanLandingham, *op. cit*., p. 108.

[422] United States Department of Defense. (December 2016). *Law of War Manual*. Para. 4.18.4.1.
[423] VanLandingham, *op. cit*., p. 113.
[424] VanLandingham, *op. cit*., p. 115.
[425] VanLandingham, *op. cit*., p. 116.
[426] Staffler, *op. cit*., p. 58.
[427] Sapiro, M. (July 2003). Iraq: The Shifting Sands of Preemptive Self-Defense. In *The American Journal of International Law*. 97(3).
[428] As Sapiro observes, '[a]lthough the administration has characterized its new approach as 'preemptive,' it is more accurate to describe it as 'preventive' self-defense', Sapiro, *op. cit*., p. 599.
[429] Cassese, A. (2006b), *Diritto Internazionale*. Il Mulino. p. 386.
[430] Sapiro, *op. cit.,* p. 601. Art. 51 of the Charter of the United Nations states that: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations […]'.
[431] *Ibid*.
[432] Battacchi, P. (2003). L'Uso Preventivo della Forza: la Nuova Strategia di Sicurezza Americana e l'Esempio Israeliano del 1956. In *Informazioni della Difesa*. 4. p. 37; Sapiro, op. cit., p. 599.
[433] UN Secretary-General. (14 January 2003). *Press Release at United Nations Headquarters*. SG/SM/8581.
[434] Battacchi, *op. cit.,* p. 37; Sapiro, *op. cit*., p. 599.
[435] SG/SM/8581.
[436] Cassese, (2006b), *op. cit*., p. 386.
[437] Mill, *op. cit*.
[438] *Ibid*.
[439] Cram*, op. cit*., p. 86.
[440] Úbeda de Torres, *op. cit*., p. 8.
[441] European Court of Human Rights. (25 November 1997). *Zana v. Turkey*. No. 69/1996/688/880, paras. 9-11.
[442] 'I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake…'. *Zana v. Turkey*, para. 12.
[443] *Zana v. Turkey*, para. 14.
[444] *Zana v. Turkey*, para. 25.
[445] *Zana v. Turkey*, para. 26.
[446] *Zana v. Turkey*, para. 52.
[447] *Zana v. Turkey*, para. 58.
[448] *Zana v. Turkey*, para. 62.
[449] 'The statement cannot, however, be looked at in isolation', *Zana v. Turkey*, para. 59. See also Gordon, (2017), *op. cit*., p. 9.
[450] ODIHR, *op. cit.,* p. 19.
[451] Barak-Erez & Scharia*, op. cit*., p. 24.
[452] 'the support given to the PKK – described as a 'national liberation movement' – by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region'. *Zana v. Turkey*, para. 60. See also Barak-Erez & Scharia, *op. cit.,* p. 10.

[453] *Prosecutor v. Akayesu,* para. 557.
[454] Rediker, *op. cit.,* p. 327.
[455] Cram, *op. cit.,* p. 96.
[456] Davis, H. (2005). Lessons from Turkey: Anti-Terrorism Legislation and the Protection of Free Speech. In *European Human Rights Law Review*. 1. p. 79.
[457] Cram, *op. cit.,* p. 96.
[458] Cram, *op. cit.,* p. 94.
[459] As quoted in Cram, *op. cit.,* p. 98.
[460] Ronen, *op. cit*., p. 28.
[461] Ronen, *op. cit*., p. 22.
[462] Cram*, op. cit*., p. 86.
[463] International Commission of Jurists. (15 February 2007). *Response to the European Commission Consultation on Inciting, Aiding or Abetting Terrorist Offences*. p. 11.
[464] McCulloch & Pickering, *op. cit*., p. 634.
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[467] A/67/357, para. 56.
[468] A/67/357, para. 57.
[469] Conklin, M. (27 January 2021). Capitol Offense: Is Donald Trump Guilty of Inciting a Riot at the Capitol?. in *SSRN*. p. 1.
[470] 'All of us here today do not want to see our election victory stolen by emboldened radical left Democrats, which is what they're doing and stolen by the fake news media. That's what they've done and what they're doing. We will never give up. We will never concede, it doesn't happen.' Trump, D. (6 January 2021). *Save America Rally Speech*. Transcript available at RAV.com.
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