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Speech related to National Security: Terrorism Laws

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Freedom of Speech in International Law outlines the minimum protections for speech enshrined in international law, focusing on four types of laws that are being weaponized to silence the press and independent voices: laws regulating defamatory or insulting speech, laws regulating false speech, laws regulating hate speech and laws regulating national security. The book provides examples of where states are falling short and makes recommendations about how international standards should be interpreted, updated and enforced.

Recommendations are based on international legal standards that apply to states and that many social media companies have expressed adherence to. The recommendations have been endorsed by the High Level Panel of Legal Experts on Media Freedom, as well as judges and experts from across the world including the Committee to Protect Journalists, Reporters without Borders, the UN Special Rapporteur on Freedom of Expression and the International Bar Association's Human Rights Institute.

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Speech Related to National Security: Terrorism Laws

Alice Gardoll

I. Introduction

Speech, particularly online speech, can play a role in inciting terror.[1] In the wake of the 2005 London bombings, the United Nations Security Council called on states to '[p]rohibit by law incitement to commit a terrorist act'.[2] And in the years since then, states enthusiastically embraced this request: at least 112 have criminalized incitement to commit a terrorist act in their national legislation.[3]

[1] The author and editors of this book would like to thank the Sciences Po Law School Clinic and in particular students who carried out extensive research of legislation and jurisprudence into media freedom and counter-terrorism.

[2] UNSC Res. 1624 (2005), 14 September 2005, §1(a). This provision requires 'prohibition', rather than criminalization, and was passed under Chapter VI (as opposed to Chapter VII, which permits coercive enforcement action).

[3] UN Security Council Counter-Terrorism Committee Executive Directorate (CTED), *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2021) UN Doc. S/2021/973 (Annex), §2. This number is, in practice, even higher, as in 2016, the CTED stated that 'at least 135 states have effectively prohibited by law incitement to commit terrorist acts', on the basis of general laws which 'prohibit incitement to commit any crime': CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2016) UN Doc. S/2016/50 (Annex), §15. The Counter-Terrorism Committee and the CTED assess states' implementation of UNSC Res. 1624: see UNSC Res. 1373 (2001), 28 September 2001, §6; UNSC Res. 1535 (2004) 16 March 2004, §2; UNSC Res. 1624 (2005), 14 September 2005, §6.

Legal regulation of terrorist-related speech pits democratic values against each other. Terrorist attacks can of course lead to huge loss of life, and limiting their occurrence is a key priority of governments and social media companies the world over. But fundamental disagreements exist about the definition of terrorism, the type of speech that may cause or contribute to it, and where the line should be drawn between protecting speech versus protecting communities against potential violence.[4] This is complicated by the fact that, as the UN Security Council's Counter-Terrorism Committee Executive Directorate has put it, some speech aimed at promoting radicalization may 'not rise to the level of criminal incitement under national laws and may be protected by the right to freedom of expression', but may still 'play a role in helping to convince susceptible persons to cross the line into territorist activity'.[5]

Today, many states criminalize a broad range of speech such as 'glorification', 'promotion', 'apology for' and 'justification of' terrorism, as well as 'extremist' speech.[6] This trend is apparent in democracies and autocracies alike, for instance in Australia, France, Spain, Russia and Egypt.[7] And the reach of these offences can be sweeping, since 'liability is based on the content of the speech, rather than the speaker's intention or the actual impact'.[8]

International human rights bodies such as the Human Rights Committee have criticized many such laws and set out requirements related to the speaker's intent and resulting harm if restrictions to speech are to pass muster under international law.[9] The European Court has taken a broader approach, considering whether speech 'could' be 'seen as a call for violence, hatred or intolerance' as one factor to consider in determining such laws' incompatibility with the European Convention on Human Rights.[10] And it has in certain cases permitted criminal penalties—including imprisonment—for glorification of or apology for terror.[11]

Such laws are also open to abuse: indeed, many states have a strategy of branding journalists as 'terrorists' or 'spies', limiting their ability to do work even before they are

[4] This chapter recommends that states adopt a clear and precise definition of terrorism, which has been the topic of decades of debate, without positing one specific definition. There is some consensus about the two fundamental elements of a legal definition of an act of terrorism: the perpetration of a serious criminal *act*, committed with the *intent* to 'provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act': see UNSC Res. 1566 (2004), 8 October 2004, §3. However, some argue that there should be exceptions to this definition, such as where an act is committed for a 'just cause', by state-sponsored violence, or is not transnational: see, e.g., B. Saul, 'Defining Terrorism: A Conceptual Minefield', in E. Chenoweth & others (eds), *The Oxford Handbook of Terrorism* (OUP 2019) 34.

[5] CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2016) UN Doc. S/2016/50 (Annex), §6.

[6] See s. II.1.1.2. (Glorification or justification of terrorism); s. II.2.1.3. (Russia).

[7] Australian Commonwealth Criminal Code s. 80.2C(3); Spanish Criminal Code Art. 578; French Penal Code Art. 421-2-5; Russian Criminal Code Arts 205.2, 280.1, 290; Egyptian Anti-Terrorism Law 2015 Art. 29.

[8] UN Special Rapporteur B. Emmerson, *Report on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (2016) UN Doc. A/HRC/31/65, §39.

[9] See HRC, General Comment No. 34 (2011), §46; HRC, *Concluding Observations, Ethiopia* (2011) UN Doc. CCPR/C/ETH/CO/1, §15; s. III.3. (Necessity).

[10] See s. III.3.1. (Harm); see, e.g., ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §206.

[11] See s. III.5. (Penalties).

convicted.[12] Russia's arrest of Wall Street Journal reporter Evan Gershkovich for 'espionage' has accelerated 'an exodus' of foreign correspondents, resulting in fears that the country 'may become a black hole of information'.[13] Iran has adopted a similar strategy of accusing journalists of being spies after they report on the state's political affairs and repression of women.[14]

States around the world use these laws to chill political speech, a category of speech that should be given the highest protection, under the pretext of 'terrorism' or 'subversion'. Glaring examples include Al Jazeera's staff in Egypt being branded terrorists and paraded in a cage with members of the Muslim Brotherhood who they had never met after they reported the news in Cairo.[15] Or Belarusian authorities forcibly grounding a commercial airliner to arrest a journalist who was placed on a list of terrorists six months earlier after running a Telegram channel central to organizing protests against the Belarusian President.[16] And in 2020 in Turkey, more than 85 journalists and media workers were in pre-trial detention or serving sentences for terrorism offences as a result of charges targeting ordinary journalistic activity,[17] leading The Economist to observe that although 'few countries have suffered as many terrorist attacks as Turkey in the past five years', 'few governments have invented as many terrorists as Mr. Erdogan's'.[18] And in Spain, musicians and rappers have been sentenced to terms of imprisonment for lyrics supportive of terrorist groups that are no longer actively operating.[19]

This chapter explores terrorism laws that impact speech, as well as the broad array of 'public order' offences prohibiting speech that threatens national security.[20] It sets out

[12] See, e.g., UN Human Rights Special Rapporteur on the situation of human rights defenders, *Global Study on the Impact of Counter-Terrorism on Civil Society and Civil Space* (2023) 27.

[13] T. Law, 'Russia's Arrest of a Wall Street Journal Reporter Has More to Do with Geopolitics Than Espionage' (Time, 30 March 2023); J. Parkinson & D. Hinshaw, Evan Gershkovich Loved Russia, the Country That Turned on Him (The Wall Street Journal, 31 March 2023). See also US Department of State, 2021 Country Reports on Human Rights Practices: Turkey (2021), 30 ('The government frequently responded to expression critical of it by filing criminal charges alleging affiliation with terrorist groups, terrorism, or otherwise endangering the state').

[14] See ch. 5 (Speech Related to National Security: Espionage and Official Secrets Laws), s. II.2.3.1. (Iran). See, e.g., WGAD, *Rezaian v. Iran* (Opinion no. 44/2015), 3 December 2015, §35; J. Rezaian, 'Jailing journalists in Iran is a threat against all civil society' (The Washington Post, 1 November 2022) (describing 'ridiculous' allegations levelled against journalists Niloofar Hamedi and Elahe Mohammadi of being 'agents of the CIA, MI6 and Mossad'. Hamedi and Mohammadi reported on the story of Mahsa Amini, whose death in police custody led to an uprising in Iran).

[15] See A. Clooney, 'The Anatomy of an Unfair Trial' (HuffPost, 18 August 2014).

[16] A. Troianovski & I. Nechepurenko, 'Belarus Forces Down Plane to Seize Dissident; Europe Sees "State Hijacking" ' (The New York Times, 23 May 2021). The journalist Roman Pratasevich was convicted to eight years' imprisonment for a number of offences including inciting social hatred, inciting '"terrorism", organising mass disturbances and slandering Belarusian President Alexander Lukashenko' but was subsequently pardoned: 'Belarusian Activist Roman Protasevich "pardoned by Minsk" ' (Al Jazeera, 22 May 2023).

[17] Human Rights Watch, 'Turkey: Events of 2020' (2020).

[18] 'One man's terrorist: Covid-19 and repression in Turkey' (The Economist, 16 January 2021).

[19] See s. II.2.1.1. (Spain).

[20] Laws and jurisprudence on 'violent extremism' are also referenced to the extent they are illustrative of key principles applicable to terrorism and speech. By 'violent extremism' we refer to a 'wider category of manifestations' including 'forms of conduct that should not qualify as terrorist acts' and against which 'security-based counter-terrorism measures' have proved insufficient: UN Secretary-General, *Plan of Action to Prevent Violent Extremism* (2015) UN Doc. A/70/674, §4. Minor nuisance offences such as obscene language or drunkenness, even when defined as public order offences, fall outside the ambit of this chapter, as does the lawfulness of bans on wearing hijabs, niqabs and burqas in public places on the ostensible basis of protecting the public order: see, e.g., HRC, *Yaker v. France* (Comm. no. 2747/2016), 17 July 2018; ECtHR (GC), *S.A.S. v. France* (App. no. 43835/11), 1 July 2014. The use of certain civil penalties or measures such as injunctions and press restrictions and the issue of due process and fair trial guarantees are also beyond the scope of this chapter.

the international standards governing the permissibility of restricting speech on the basis of terrorism or public order.[21] And it offers recommendations—to both governments and social media companies—as to how such laws should be drafted, interpreted and applied to comply with international law and best practices.

II. State Practice

1. Terrorism Laws and Associated Offences

Numerous states employ vague or broad definitions of terrorism in their criminal codes, and this threatens freedom of speech.[22] Examples include Egypt, which defines terrorism as 'any use of force, violence' or 'threat or intimidation' for purposes including 'disturbing public order', harming 'national unity', 'social peace' or impeding public authorities from 'carrying out their work or exercising some or all of their activities'.[23]

Other countries link criminality to undermining the state's systems, reputation or stability. For example in Saudi Arabia, terrorism includes 'any act committed … with the intention to disturb public order, destabilize the security of society and the stability of the state', 'endanger its national unity' or 'harm the reputation of the state or its standing'.[24] And Bangladesh's law criminalizes 'publish[ing] or circulat[ing] any statement, rumour or report, which is, or which is likely to be prejudicial to the interests of the security of Bangladesh or public order'.[25] To somewhat similar effect, India punishes whoever 'commits', 'advocates, advises or incites the commission of, any unlawful activity', being any 'action, whether by act or by speech' that 'disclaims, questions, disrupts or is intended to disrupt, the sovereignty and territorial integrity of India' or that 'is intended, or supports any claim, to bring about' the cession of any part of India.[26]

In Switzerland, recently passed legislation proposed a definition of terrorist activity as 'efforts intended to influence or modify state order, likely to be achieved or favoured

[21] International standards relating to terrorism intersect with more general standards applicable to national security restrictions to speech, as well as hate speech standards: see ch. 3 (Hate Speech), s. III (International Standards on Hate Speech) and ch. 5 (Speech Related to National Security: Espionage and Official Secrets Laws), s. III.1. (International Standards Related To Speech Affecting National Security).

[22] The review of state terrorism laws and practice contained in this chapter does not aim to be comprehensive but rather to identify significant examples and trends. In addition, references to the language of a statute are not necessarily accompanied by an analysis of all case law interpreting that language in the jurisdiction under review.

[23] Egyptian Anti-Terrorism Law Art. 2(2). See also Myanmar Counter Terrorism Law s. 3 (criminalizing acts causing 'fear among the public' or which 'severely damage the security or the life and property of the public or infrastructure which is fundamental to the public or an individual').

[24] Saudi Arabian Law of Combatting Terrorist Crimes and Its Financing Art. 1(3).

[25] Bangladeshi Penal Code s. 505A. Bangladesh also has a Special Powers Act 1974 which provides sweeping detention and deportation orders to prevent someone from committing a 'prejudicial act', which includes endangering the 'maintenance of public order': Bangladeshi Special Powers Act 1974 ss 2, 3. See also Cambodian Press Laws Arts 11, 12 (making it an offence, punishable by fine only, for the press to 'publish anything that may affect public order by directly inciting one or more persons to commit violence' or any information 'that may affect national security and political stability').

[26] Indian Unlawful Activities (Prevention) Act, ss 2(o), 3. Section 15 of the Act also includes an expansive definition of terrorism. See also s. II.2.2.3. (India).

by committing or threatening to commit serious criminal offenses, or by spreading fear and terror'.[27] In May 2020, five UN Special Rapporteurs sent a letter expressing alarm that the definition of 'terrorist activity' was wider than that set by international standards and included 'acts which seek to influence or modify the state order' that may encompass a 'range of behaviours which are not terrorist in nature'.[28] These experts also considered the offence of 'spreading fear' as 'ill-defined and open to a wide range of interpretations'.[29] As a result, 'journalistic reporting or the legitimate activities of civil society, including humanitarian and human rights organizations, may fall within its scope'.[30] The Swiss parliament passed the legislation in September 2020, and although opponents of the law triggered a referendum, almost 57 per cent of those voters approved the law, which came into force in June 2022.[31]

Similarly, many laws criminalize those who 'disturb' the 'public order' or 'public peace', without defining these terms.[32] For example, Singapore lists disturbing or damaging public order as an act falling within the definition of criminal terrorist conduct.[33]

1.1. Type of speech

Most states prohibit not just the actual commission of violent terrorist acts, or material or financial support for them, but also speech that is linked to terrorism. At one end of the spectrum, incitement offences prohibit speech that is intended to have, and has, a direct, causal connection to the commission of a violent terrorist act. At the other end of the spectrum are offences that criminalize 'apologizing for' terrorism without any intent that a violent terrorist act will result. Often states have multiple laws across this spectrum on their books.

A small number of states only criminalize violent terrorist acts, rather than speech, although speech may still be captured by inchoate criminal provisions such as conspiracy and attempt. For example, Sweden has indicated that incitement to terrorism can be punishable but only if it falls within Swedish aiding and abetting, complicity or conspiracy offences.[34] The same applies in Germany, which does not have any specific provisions for incitement to commit a terrorist act, but the German Criminal Code does

[27] Swiss Federal Law on Measures to Safeguard International Security Art. 23(3)I(2).

[28] See OHCHR, 'Switzerland's new 'terrorism' definition sets a dangerous precedent worldwide, UN human rights experts warn' (11 September 2020).

[29] Ibid.

[30] The letter requested changes to the draft law, which the Swiss government refused to implement. See OHCHR, 'Switzerland's new "terrorism" definition sets a dangerous precedent worldwide, UN human rights experts warn' (11 September 2020).

[31] S. Koltrowitz, 'Swiss government defends anti-terrorism law against criticism over child rights' (Reuters, 13 April 2021); U. Geiser, 'Controversial anti-terrorism law wins voter approval' (Swissinfo.ch, 13 June 2021).

[32] See, e.g., Romanian Criminal Code Art. 371 ('Any person who, in public, by violence committed against persons or property or by threats or serious threats to the dignity of persons, disturbs public order'); Mexican Federal Penal Code Art. 131 ('those who gather tumultuously and disturb the public order with violence against people or things').

[33] Singaporean Internal Security Act s. 2 (defining a terrorist as, among other things, a person who 'by use of any firearm, explosive or ammunition acts in a manner prejudicial to the public safety or to the maintenance of public order or incites to violence or counsels disobedience to the law or to any lawful order').

[34] Swedish Criminal Code chapter 23 s. 4; UNSC, *National Report of Sweden on Implementation of UNSCR 1624* (2006) UN Doc. S/2006/551 (Annex). Swedish law does, however, criminalize inciting rebellion and unlawful threats: Swedish Criminal Code chapter 16 s. 5.

include general criminal offences for abetting and attempted participation.[35] Consistent with its history as a speech-protective nation, US federal law does not provide for an incitement of terrorism offence. Related offences such as seditious conspiracy, advocating the overthrow or destruction of the United States and material support for terrorism as well as general 'inchoate crimes' provisions such as aiding, abetting or conspiring offences generally require acts other than speech to be triggered.[36]

1.1.1. Inciting or encouraging terrorism

Incitement of terrorism is widely criminalized under national laws, consistent with UN Security Council Resolution 1624 (2005) which called on states to adopt measures to '[p]rohibit by law incitement to commit a terrorist act or acts'.[37] In 2021, the Security Council's Counter-Terrorism Committee Executive Directorate reported that at least 112 states 'had expressly criminalized incitement to commit a terrorist act or acts in their national legislation', and in 2016 the Directorate noted that a higher figure—135 countries—had effectively criminalized the same offence by way of general provisions that prohibit 'incitement to commit any crime'.[38]

Many of these laws are imprecise, criminalizing incitement without (a) defining the term, (b) requiring intent by the speaker to bring about any harm or (c) a link to an act of terrorist violence.[39] An example is the recently enacted Anti-Terrorism Act in the Philippines, which exposes any person who 'without taking any direct part in the commission of terrorism, shall incite others to the execution' of terrorism 'by means of speeches, proclamations, writings, emblems, banners or other representations tending to the same end' to up to 12 years' imprisonment.[40] Some nations prohibit the incitement of a wider range of offences on a national security basis, such as China's Criminal Code, which criminalizes 'whoever incites others by spreading rumors or slander or any other means to subvert the State power or overthrow the socialist system' as well as incitement to 'split the State or undermine unity of the country'.[41]

[35] See UNSC, *Report of Germany pursuant to resolution 1624 (2005)* (2006) UN Doc. S/2006/527; German Criminal Code ss 26, 30.

[36] However, certain provisions may capture terrorist-related speech, such as the offence of seditious conspiracy, advocating the overthrow or destruction of the United States and material support for terrorism (see s. II.2.4.1. (United States)) as well as general 'inchoate crimes' provisions such as aiding, abetting or conspiring offences. And the United States considers incitement to commit a terrorist act as a basis of designating a group a 'foreign terrorist organisation'. See UNSC, *Report of the United States of America pursuant to resolution 1624 (2005)* (2006) UN Doc. S/2006/397.

[37] UNSC Res. 1624 (2005), 14 September 2005, §1(a).

[38] CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2021) UN Doc. S/2021/973 (Annex), §2; CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2016) UN Doc. S/2016/50 (Annex), §15.

[39] See, e.g., Norwegian Penal Code (2005) s. 136 ('A penalty of imprisonment for a term not exceeding 6 years shall be applied to any person who: a) publicly incites another person to commit a criminal act specified in sections 131, 134 or 135, or sections 137 to 144'); Estonian Penal Code Art. 237(2) ('preparation of and (public) incitement to acts of terrorism'); Saudi Arabia Penal Law for Crimes of Terrorism and its Financing Art. 35 ('Whoever incites another to join any terrorist entity, or participate in its activities, or recruits it, or contributes to financing').

[40] Philippine Anti-Terrorism Act s. 9; Amnesty International, 'Philippines: Dangerous anti-terror law yet another setback for human rights' (3 July 2020).

[41] Chinese Criminal Law Arts 103, 105.

In contrast, 42 states have ratified the Council of Europe Convention on the Prevention of Terrorism, which requires states to criminalize incitement in domestic law in a narrower form by way of an offence of 'public provocation': 'the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed'.[42] But only a small number of states, including Ireland, Luxembourg and Austria have since reformed their criminal laws on this basis.[43]

Canadian law makes it an offence to 'counsel another person to commit a terrorism offence', with 'counsel' defined as including speech to 'procure, solicit or incite' an act of terror.[44] This offence was adopted in 2019 after an earlier bill that criminalized advocating or promoting terrorism received heavy criticism for impinging on Canadian rights and freedoms.[45]

Other offences prohibit 'encouragement' of terrorism and define it by reference to how speech may be understood by others, rather than the speaker's intent. For example, Ethiopia criminalizes speech 'likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism'.[46]

The United Kingdom's encouragement offence is an example of a more narrowly worded provision, criminalizing the publication of a statement where a person intends that or is reckless as to whether members of the public will be 'directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate' a terrorist offence.[47] This offence also has an objective element, as it only applies to statements 'likely to be understood by a reasonable person as a direct or indirect encouragement or other inducement' to acts of terrorism, however this requirement is fulfilled where a statement 'glorifies the commission or preparation' of a terrorist offence.[48] But the provision's key terms, including 'encouragement', 'inducement' and 'glorifi[cation]' are broad and vague.[49]

[42] COE Convention on the Prevention of Terrorism Art. 5. This includes Russia, who ratified the Convention but as of 2022 is no longer a member of the Council of Europe.

[43] Irish Criminal Justice (Terrorist Offences) 2005 ss 4, 4A (as amended by the Irish Criminal Justice (Terrorist Offences) (Amendment) Act 2015 ss 3, 4); Luxembourg Criminal Code Art. 135(11); Austrian Criminal Code s. 282a.

[44] Canadian Criminal Code c. C-46 ss 22(3), 83.221. For intent requirements of this offence, see s. II.1.2(Intent).

[45] See, e.g., Government of Canada, 'Our Security, Our Rights'. Amnesty International, 'Insecurity and Human Rights: Concerns and Recommendations with Respect to Bill C-51, the *Anti-Terrorism Act, 2015*' (19 March 2015). Australian law also prohibits 'counsel[ing]' another to commit a terrorist offence: Australian Commonwealth Criminal Code s. 80.2C(3).

[46] Ethiopian Anti-Terrorism Proclamation (2009) Art. 6.

[47] UK Terrorism Act 2006 s. 1(2). Conviction for encouragement of terrorism can carry a sentence of up to 15 years' imprisonment. See UK Terrorism Act 2006 s. 1(7). It is also a defence if it was clear, in all the circumstances, that the impugned statement did not express the speaker's views and did not have his or her endorsement: UK Terrorism Act s. 1(6).

[48] UK Terrorism Act 2006 ss 1(1), 1(3). Section 1(3)(b) also provides that statements will be 'indirectly encouraging' terrorism if 'members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated'.

[49] See, e.g., Article 19, 'The Impact of UK Anti-Terror Laws on Freedom of Expression, Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights' (April 2006).

1.1.2. Glorification or justification of terrorism

A number of nations, including Russia, the United Kingdom, Slovenia and Pakistan, criminalize 'glorification', 'justification' or 'apology' of terrorism.[50] Certain European countries broadened these provisions around the time of the 2015 'Charlie Hebdo' attack in France.[51] For example, in 2015 Spain broadened its existing glorification offence to make the commission of the offence online an aggravating factor and increased the maximum penalty from two to three years' imprisonment.[52] The provision also makes it an offence to engage in 'glorification' or 'justification' of terror crimes or 'the performance of acts that entail discredit, contempt or humiliation' of victims of terrorism or their relatives.[53] Prosecutions have rapidly increased since the amendment, but five UN Special Rapporteurs have expressed their concern that the provision is 'too broad and vague'.[54]

While the offence of 'public apology for acts of terrorism' has existed as a provision of French press law since 1881, its enforcement was 'limited to symbolic and/or very serious cases' until 2014, when amendments were introduced into the French Penal Code as a result of increased terrorist threats in Europe and the proclamation of the Islamic State.[55] This offence is now punishable by up to seven years' imprisonment or 100,000 Euro fines when committed online.[56]

Similarly, Australia prohibits advocating acts of terrorism, encompassing anyone who 'counsels, promotes, encourages or urges the doing of a terrorist act or the commission of a terrorism offence'.[57] Australian legal experts have expressed concern

[50] UK Terrorism Act 2006 ss 1(3). 2(4), 3(8); Slovenian Criminal Code Art. 110(2); Pakistani Prevention of Electronic Crimes Act 2016 s. 9; Punjab Maintenance of Public Order (Amendment) Ordinance 2015 s. 6-A; Russian Criminal Code Art. 205.2. See s. II.2.1.3. (Russia). A recent example is Ukraine's 2022 amendments to its Criminal Code, which criminalize 'justification, recognition as legitimate' or 'denial' of the 'armed aggression of the Russian Federation against Ukraine that started in 2014', or 'glorification' of persons who carried out this aggression: Ukrainian Criminal Code Art. 436. The offence is punishable by correctional labour for up to two years, arrest for a term of up to six months, or restriction of liberty for up to three years. However, increased penalties apply for the 'production' or 'dissemination' of 'materials' justifying or denying Russia's aggression (up to five years' imprisonment) or if the offence is committed through 'abuse of office', 'repeatedly' or 'through the media' (up to eight years' imprisonment).

[51] Over the course of three days in January 2015, multiple attacks took place in Paris and surrounds killing 17 people, including an attack on satirical magazine Charlie Hebdo. Police identified three attackers (all of whom died in shootouts), who were linked to both ISIS and Al Qaeda: 'Five years on, France to try suspects in Charlie Hebdo killings' (Reuters, 28 August 2020). Cf. the Netherlands, where the Christian Democratic Party proposed a bill in 2016 to prohibit 'glorification of terrorism', which was the subject of public criticism and was not supported by the Dutch Cabinet.

[52] Spanish Criminal Code Art. 578. See Amnesty International, 'Spain: Tweet … if you dare: How counter-terrorism laws restrict freedom of expression in Spain' (13 March 2018), 2. The Spanish Criminal Code also includes the offence of provocation, conspiracy and solicitation of terrorist offences under Art. 579 and 'indoctrination or training' others to commit terrorist acts under Art. 575, which includes a presumption that such acts take place whenever an individual 'regularly accesses one or more online communication services … whose content is directed or suitable for inciting incorporation into a terrorist organization or group'.

[53] Spanish Criminal Code Art. 578. See Amnesty International, 'Dangerously Disproportionate: The ever-expanding security state in Europe' (17 January 2017), 41–42. Art. 578 criminalizes 'enaltecimiento', which can be translated to either 'glorification' or 'exaltation'.

[54] OHCHR, '"Two legal reform projects undermine the rights of assembly and expression in Spain"—UN experts' (23 February 2015). See s. II.2.1.1. (Spain).

[55] A. Callamard, 'Religion, Terrorism and Speech in a Post Charlie Hebdo World' (2015) 10 *Religion & Human Rights* 207, 218; French Penal Code Art. 421-2-5: in its decision no.2020-845 QPC (19 June 2020), the French Constitutional Council held that the provision complied with the French Constitution. See also N. Houry, 'France's Creeping Terrorism Laws Restricting Free Speech' (Human Rights Watch, 30 May 2018).

[56] French Penal Code Art. 421-2-5 (2).

[57] Australian Commonwealth Criminal Code s. 80.2C(3).

that 'the idea of "promotion" could even plausibly extend to a "retweet" or Facebook "like" of another person's words, meaning that an individual could be prosecuted for words they did not say, but simply repeated or agreed with'.[58] In 2019, following the Christchurch terrorist attack in New Zealand, Australian lawmakers went further by passing an act to criminalize failures by technology companies to remove or report to police material showing 'abhorrent violent conduct' such as a person engaging in a 'terrorist act'.[59] Although in its first two years no one was fined or prosecuted under the law, tech companies such as Google Australia and Twitter Australia expressed concern that the law's heavy penalties (including imprisonment and/or fines of up to 10 per cent of global revenue) could result in 'providers erring on the side of caution' and removing lawful content.[60]

Countries including Kazakhstan,[61] Turkey[62] and Russia also criminalize spreading terrorist 'propaganda', often an undefined or broadly defined term which focuses on the content of speech rather than its impact. For example, Russia prohibits 'public calls for terrorist activity [and] public justification or propaganda of terrorism', with propaganda defined as 'information aimed at developing the ideology of terrorism, convincing a person of its attractiveness or creating the sense of permissibility with respect to terrorist activities'.[63]

1.1.3. Publishing terrorism-related information

A number of states include explicit reference to publishing or distributing terrorist materials as a central element of criminal liability. These provisions range in breadth, for example narrowly worded iterations such as the offence of disseminating terrorist publications in the United Kingdom, which includes a subjective intent requirement; an

[58] K. Hardy & G. Williams, 'Free Speech and Counter-Terrorism in Australia', in I. Cram (ed), *Extremism, Free Speech and Counter-Terrorism Law and Policy: International and Comparative Perspectives* (Routledge 2019) 172.

[59] Australian Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019.

[60] J. Taylor, 'Australian law preventing sharing video of terror attacks results in zero convictions or fines' (The Guardian, 18 November 2021); Communications Alliance, Digital Industry Group Inc., Digital Rights Watch, Tik Tok Australia and New Zealand, Google Australia and New Zealand, IBM Australia, Twitter Australia and New Zealand: 'Group Submission to the Parliamentary Joint Committee on Law Enforcement in relation to the AVM Act' (2021). See s. III.6. (Approach of Private Private Companies to Online Incitement to Terrorism).

[61] Kazakhstani Penal Code Art. 256 (the offence of 'propaganda of terrorism or public calls for commission of an act of terrorism', punishable for up to 12 years' imprisonment when committed 'with the use of mass media or information and communication networks') (unofficial translation).

[62] Turkish Law on the Fight Against Terrorism Art. 7(2) (2013) which criminalizes 'propaganda that legitimizes the methods of a terrorist organization which involves forces, violence or threats' or 'praises' or 'encourages resorting' to such methods. In response to criticism about the law's overbreadth, the Turkish legislature in 2019 inserted an amendment to the effect that 'statements made within the limits of providing information or made with the purpose of criticism cannot be criminalized': Joint International Press Freedom Mission to Turkey, 'Mission Report: Turkey's Journalists in the Dock: Judicial Silencing of the Fourth Estate' (September 2019), 15. See Turkish Prevention of Terrorism Act. However, Turkey continues to use these provisions to silence legitimate journalistic activity: see s. II.2.1.2. (Turkey).

[63] See CFJ, 'TrialWatch Fairness Report—Russian Federation v. Svetlana Prokopyeva' (January 2021), 7, n. 36 (citing the Note to the Russian Criminal Code Art. 205.2). Russia is an example of a state that employs a wide range of terrorism and anti-extremist offences. The Russian Criminal Code prohibits public calls for terrorist activity and public justification or propaganda of terrorism under article 205.2, public calls for the broadly defined notion of 'extremist activity' pursuant to article 290 as well as public calls for violating the territorial integrity of Russia, under article 280.1. The Code of Administrative Offences also contains the related provisions of distribution of extremist materials (Art. 20.29) and abuse of freedom of mass information (Art. 13.15). See Article 19, 'Rights in extremis: Russia's anti-extremism practices from an International perspective' (23 September 2019).

objective causation element where the publication must be 'understood by a reasonable person as a direct or indirect encouragement or other inducement' to acts of terrorism, or may be useful for such acts; and a defence if in all the circumstances the speaker did not endorse the publication.[64]

In contrast, Egypt criminalizes whoever 'establishes or uses a communications site, website, or other media for the purpose of promoting ideas or beliefs calling for the perpetration of terrorist acts'.[65] Russian law prohibits 'bloggers'—defined as owners of a website that has more than 3,000 visitors a day—from 'disseminating the materials containing public appeals for carrying out terrorist activities or publicly justifying terrorism'.[66]

There are also a number of states that fall in between these two extremes, for example Algeria, which criminalizes 'anyone who knowingly reproduces or distributes documents, printed material or information condoning' terrorist acts, and Austria, where the 'prompting' of terrorism in 'a printed work, on the radio or in another medium or in any other public way that makes it accessible to many people' is punishable by two years' imprisonment.[67] Finally, countries such as Ghana and Cambodia have enacted offences for publishing information that can impact—with varying degrees of causal link required—the public order.[68]

1.2. Intent

Incitement to terrorism offences in some states such as Tunisia and Saudi Arabia do not encompass any explicit intent requirement.[69] In contrast, the Council of Europe recommends that a state's 'public provocation' of terrorism offences should include two forms of criminal intent: the intent to communicate the impugned speech and the intent to encourage the commission of a terrorist act.[70] Ireland's public provocation offence, for example, criminalizes 'the intentional distribution, or otherwise making available, by whatever means of communication by a person of a message to the public, with the intent of encouraging, directly or indirectly, the commission by a person of a terrorist

[64] UK Terrorism Act 2006 ss 2(1), 2(3), 2(9).

[65] Egyptian Anti-Terrorism Act Art. 29.

[66] Russian Federal Law No. 149-FZ Art. 10.2.

[67] Algerian Penal Code Art. 87(5); Austrian Criminal Code s. 282a.

[68] Cambodian Press Law Arts 11 ('The press shall not publish anything that may affect public order by directly inciting one or more persons to commit violence'), 12 ('the press shall not publish or reproduce any information that may affect national security and political stability'); Ghanian Criminal Code s. 208 ('publishing information with the intention to cause fear or harm to the public or to disturb the public peace'); see also Ghanaian Anti-Terrorism Act s. 2(1). Some states also criminalize the collection and possession of 'terrorist materials', although such laws are beyond the scope of this chapter: see, e.g., UK Terrorism Act 2000 s. 58(1)(a) (criminalizing the collection of information 'likely to be useful to a person committing or preparing an act of terrorism'); UK Terrorism Act 2006 ss 2(2)(f), 2(3)(b) (criminalizing the 'possession with a view to' dissemination of documents 'likely … to be useful in the commission or preparation of' terrorist acts).

[69] Saudi Arabia Penal Law for Crimes of Terrorism and its Financing Art. 35 ('Whoever incites another to join any terrorist entity, or participate in its activities, or recruits it, or contributes to financing'); Tunisian Law on Fight Against Terrorism and Money Laundering Art. 5 ('whoever incites by whatever means, others to commit terrorist acts').

[70] 42 European states have ratified the 'public provocation' formulation articulated by the COE, although this does not mean that this has resulted in amendments to their domestic laws: see s. II.1.1.1. (Inciting or encouraging terrorism).

activity'.[71] US jurisprudence provides for a high intent threshold for any speech-related offence, namely the intent to incite unlawful action, and a requirement that the speech is objectively likely to incite imminent unlawful action.[72] And nations such as Algeria criminalize anyone who 'promotes, encourages or finances' terrorist acts, without requiring a showing of intent, but with an increased penalty of life imprisonment where acts 'are intended to harm the interests of Algeria'.[73]

Other countries include an explicit recklessness standard, such as Australia's advocacy of terrorism provision, which criminalizes a person who 'advocates' the doing of a terrorist act and is 'reckless as to whether another person will' engage in such an act.[74] The United Kingdom makes it an offence to speak with 'inten[t]' or 'reckless[ness] as to whether' others will be 'directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate' terrorist acts.[75] Similarly, Canadian jurisprudence has interpreted the *mens rea* standard for Canada's offence of 'counselling' another person to commit a terrorist offence as either intent or recklessness. This offence will be made out if a speaker has 'intent or conscious disregard of the substantial and unjustified risk inherent' in counselling a person to commit terrorism.[76]

1.3. Harm

Some terrorism laws do not require a showing of likely harm, or that an act of terrorism has, in fact, resulted from the impugned speech. Indeed, offences such as the 'apology', 'glorification' or 'justification' of terrorism typically criminalize speech irrespective of its link to the commission of a terrorist offence.[77] And certain countries, such as Australia and Canada, explicitly state that criminal liability can apply to incitement offences whether or not a terrorist act was actually committed.[78]

But some states do include a harm requirement in their laws. European states that have adopted the Council of Europe's recommended legislation, such as Slovenia, require that speech 'causes a danger' that a terrorist offence may be committed.[79] And the test of 'likely to incite unlawful action' articulated in the US Supreme Court case of *Brandenburg v. Ohio* also applies to terrorism offences.[80]

In 2016, the Belgian parliament rushed through a bill which removed the requirement that incitement entail a risk of a terrorist offence actually being committed,

[71] Irish Criminal Justice (Terrorist Offences) Act 2005 ss 4, 4A (as amended by the Irish Criminal Justice (Terrorist Offences) (Amendment) Act 2015 ss 3, 4).

[72] US Supreme Court, *Brandenburg v. Ohio* 395 U.S. 444, 9 June 1969, 447. See ch. 3 (Hate Speech), s. II.2.3.2. (United States). See E. J. Skyes, 'In Defense of Brandenburg: The ACLU and Incitement Doctrine in 1919, 1969 and 2019' (2019) 85 (1) *Brooklyn Law Review* 15, 24, n. 66, 25.

[73] Algerian Penal Code Art. 87(6).

[74] Australian Commonwealth Criminal Code s. 80.2C.

[75] UK Terrorism Act 2006 s. 1(2)(b).

[76] See Canada Supreme Court, *R v. Hamilton* [2005] 2 S.C.R. 432, 444, cited in A. Bayesfky & L. Blank, 'Canadian Legal Perspectives on Incitement to Terrorism' in A. Bayefsky & L. Blank (eds), *Incitement to Terrorism* (Nijhoff Law Specials 2018), 58. See also K. Roach, *Criminal Law* (8th edn, Irwin Law 2022), +.

[77] See s. II.1.1.2. (Glorification or justification of terrorism).

[78] Australian Commonwealth Criminal Code s. 80.2C (4); Canadian Criminal Code s. 83.221(2).

[79] See s. II.1.1.1. (Inciting or encouraging terrorism). See, e.g., Slovenian Criminal Code Art. 110(2) (which requires speech to 'cause a risk' that a terrorist offence may be committed).

[80] See s. II.2.4.1. (United States).

instead adding that a defendant had to have 'an intention to incite, directly or indirectly' the commission of an offence.[81] But in 2018, a Belgian human rights group successfully challenged the amendments before the Belgian Constitutional Court on the basis that they violated the Belgian Constitution and were contrary to European Parliament directives.[82]

A number of public order offences incorporate a causal link to possible harm, since these offences are generally focused on the impact of speech rather than its content. However, the harm is often very vaguely or broadly defined. For example, India's unlawful activity law criminalizes 'unlawful activity', being 'any action … whether by committing an act or by words' which among other things 'causes or is intended to cause disaffection against India'.[83] Chinese law includes the offences of 'disrupting social order', 'endangering national security', 'violating the unity and integrity of the State' and 'subverting public order'.[84] A recent addition to Myanmar's Penal Code is similarly broad, criminalizing whoever 'causes or intends to cause fear to a group of citizens or to the public' or 'causes or intends to commit or to agitate directly or indirectly [a] criminal offence against a Government employee'.[85] The UN Special Rapporteur on the situation of human rights in Myanmar has described these as 'illegitimately imposed new laws' which 'are now being used at an alarming rate to justify' the arbitrary 'detentions of individuals'.[86]

1.4. Exclusions, exceptions and defences

Some states' laws, including those of the United Kingdom and Australia, provide for 'good faith' or 'reasonable excuse' defences in their speech-related terrorism offences. In Australia, it is a defence to the charge of advocating the commission of a terrorist act if a defendant: 'publishes in good faith a report or commentary about a matter of public interest'; 'points out in good faith' matters that are producing feelings of ill-will between different groups 'in order to bring about the removal of those matters'; or 'urges in good faith another person to attempt to lawfully procure a change' to laws, policies or practices of Australia or any other country.[87] The evidential burden is on the defendant to prove this defence.[88] This provision also provides that, in considering this defence, a court may have regard to the fact that speech was part of an artistic work, said for a

[81] Amnesty International, 'Europe: Dangerously disproportionate: The ever expanding national security state in Europe' (17 January 2017). EDRi 'Belgium Constitutional Court decision on the concept of incitement to terrorism' (30 May 2018).

[82] EDRi, 'Belgium Constitutional Court decision on the concept of incitement to terrorism' (30 May 2018). The Court annulled the new article so that the previous offence was reinstated.

[83] Indian Unlawful Activities (Prevention) Act 1967 ss 2, 13.

[84] See WGAD, *Gulmira Imin v. China* (Opinion no. 29/2012), 29 August 2012, §30.

[85] Myanmar Penal Code 1861 s. 505A.

[86] UN Special Rapporteur T.H. Andrews, *Report on the situation of human rights in Myanmar* (2021) UN Doc. A/HRC/46/56, §63.

[87] Australian Commonwealth Criminal Code ss 80.3(c), 80.3(d), 80.3(f).

[88] Under Australian law, the evidential burden means 'the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist', rather than the higher legal burden of proving its existence: see Australian Commonwealth Criminal Code s. 13.3(6).

'genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest' or spoken 'in the dissemination of news or current affairs'.[89]

Similarly, in the United Kingdom, a person who collects or possesses information 'likely to be useful to a person committing or preparing an act of terrorism' has a defence if he or she has a 'reasonable excuse' for doing so, and this includes acting for the purposes of 'carrying out work as a journalist' or 'academic research'.[90] However, no such defence is provided for other terrorism-related offending, such as expressing an opinion supportive of a proscribed organization, encouraging terrorism and disseminating terrorist publications.[91] The US material support of terrorism provisions, which have previously been applied to speech,[92] state that they shall not 'be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment',[93] but do not incorporate any specific media-related defence or defence of reasonable excuse.[94] Nor does the Canadian offence of counselling another person to commit a terror offence,[95] or the Council of Europe's 'public provocation to commit a terrorist offence' contained in the Convention on the Prevention of Terrorism.[96]

1.5. Penalties

At least 112 states sanction incitement to terrorism by way of *criminal* provisions.[97] Many states have severe penalties for terror-related speech offences because these offences are incorporated in the same provisions that criminalize violent terrorist or anti-state conduct. Capital punishment is prescribed by states including Mali, Egypt, Algeria, Ethiopia and Thailand for a range of terrorist or public order offending that could capture speech.[98]

Sentences of up to life imprisonment can be meted out in India for advocating or inciting the commission of a terrorist act.[99] Life imprisonment is the penalty for Iraq's offence of committing 'an act with intent to violate the independence of the country or the security of its territory and that act, by its nature, leads to such violation', and any person who 'incites the commission' of this offence—or a range of other anti-state offences—'even though such incitement produces no effect' is punishable by up

[89] Australian Commonwealth Criminal Code s. 80.3(3).
[90] UK Terrorism Act 2000 s. 2, as amended by the UK Counter-Terrorism and Border Security Act 2019.
[91] Contrary to UK Terrorism Act 2000 s. 12 and UK Terrorism Act 2006 ss 1, 2.
[92] See s. I.2.4.1. (United States).
[93] 18 U.S. Code §2339B(i).
[94] 18 U.S. Code §2339B. However, this provision does include an exception 'if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General': 18 U.S. Code §2339B(j).
[95] Canadian Criminal Code c. C-46 ss 22(3), 83.221; see s. II.1.1.1. (Inciting or encouraging terrorism).
[96] COE Convention on the Prevention of Terrorism Art. 5. However, article 12 of the Convention provides certain 'conditions and safeguards' including that states shall ensure that the 'establishment, implementation and application of the criminalization' of article 5 is 'carried out while respecting human rights obligations, in particular the right to freedom of expression'. See s. II.1.1.1. (Inciting or encouraging terrorism).
[97] CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2021) UN Doc. S/2021/973 (Annex), §2.
[98] See Cornell Law School Death Penalty Worldwide Database, 'Republic of Mali'; Algerian Penal Code Art. 87; Ethiopian Anti-Terrorism Proclamation 2009 Art. 3; Thai Criminal Code ss 135/1, 135.3; Egyptian Anti-Terrorism Law Arts 6, 12.
[99] Indian Unlawful Activities (Prevention) Act 1967 s. 18.

to 10 years' imprisonment.[100] Reports indicate that Iraqi authorities recently accused an Iraqi Kurdish photojournalist, Qaraman Shukri, of violating this provision through speech alone, sentencing Shukri to seven years' imprisonment in a closed door trial in June 2021.[101]

Lengthy maximum terms of imprisonment are also common across the world: up to 20 years' imprisonment pursuant to the United States' material support provision (although this offence can apply to both speech and conduct);[102] 12 years' imprisonment under the Philippines' incitement to terrorism provision;[103] 10 years' imprisonment under Norway's Penal Code for threatening terrorist acts;[104] and up to 30 years' imprisonment for threats of terrorism in Brazil.[105] Spain's glorification of terrorism offence has a maximum of three years' imprisonment and a comparable law in France exposes speakers to up to 7 years' imprisonment when committed online.[106] In addition, certain countries increase criminal penalties where offences are committed online or by way of mass media.[107]

2. Application of Terrorism Laws Around the World

Across the world, states employ legitimate laws to combat the scourge of violent terrorist activity which has had devastating effects across the globe. The Global Terrorism Index, which tracks terrorist attacks, recorded that deaths from terror attacks across the world have significantly increased since 2000, when more than 3,300 individuals died as a result of such attacks, to a peak in 2015 of over 10,000 deaths in a single year while ISIS controlled large swathes of Syria and Iraq.[108] ISIS and other transnational terrorist groups continue to engage in deadly attacks, including ISIS-affiliated attacks in 21 different countries in 2022.[109]

But a range of counterterrorism and public order laws have also been used to chill speech by journalists or critics. The UN identified as a 'major concern' states acting against alleged terrorist incitement in circumstances where 'the targeted behaviour may not be incitement at all, but rather another form of expression that a State may find objectionable, such as political dissent or advocacy of controversial beliefs or views that does not, in itself, create a danger of terrorist violence'.[110] Terrorism laws

[100] Iraqi Penal Code Arts 156, 170.
[101] CPJ, 'Iraqi Kurdish court sentences photojournalist Qaraman Shukri to 7 years in prison in secret trial' (28 June 2021).
[102] 18 U.S.C. §2339B; see s. I.2.4.1. (United States). See also, e.g., US Department of Justice, 'Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations' (18 October 2022).
[103] Philippine Anti-Terrorism Law s. 9.
[104] Norwegian Penal Code s. 134.
[105] Brazilian Anti-Terrorism Act Art. 2.
[106] French Penal Code Art. 421-2-5; OHCHR, "'Two legal reform projects undermine the rights of assembly and expression in Spain"—UN experts' (23 February 2015). Spanish Criminal Code Art. 578(1). See s. II.2.1.1. (Spain).
[107] See, e.g., French Penal Code Art. 421-2-5; Kazakhstani Penal Code (2014) Art. 256.
[108] Institute for Economics & Peace, 'Global Terrorism Index 2015' (November 2015).
[109] Vision of Humanity, 'Global Terrorism Index 2023: Key findings in 5 Charts' (2023).
[110] CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2016) UN Doc. S/2016/50 (Annex), §11.

which criminalize speech without imposing clear definitions of terrorism or stringent requirements related to the intent of the speaker and foreseeable harm caused by the speech are particularly effective tools to stifle legitimate dissent.[111] Similarly, association and membership provisions which allow states to deem certain groups or actors as 'terrorists', and then to criminalize the speech of anyone remotely linked to those groups, can be sweeping in their effect.[112]

The examples provided below are illustrative of these practices and demonstrate how overbroad terrorism laws, like many other broad national security provisions,[113] can be abused to suppress legitimate speech, often by journalists or political actors.

2.1. Europe

2.1.1. Spain

Spain's counterterrorism laws have frequently been used against a surprising category of defendants: rappers. The most prominent case relates to Spanish rapper José Miguel Arenas Beltrán, known as Valtonyc.[114] In 2012 and 2013, Valtonyc released music online which praised the actions of the Basque separatist group Euskadi Ta Askatasuna (ETA) and the First of October Anti-Fascist Resistance Group (GRAPO), both dissolved but classified as terrorist organizations in Europe.[115] His lyrics included: 'let them be as frightened as a police officer in the Basque country', 'the king has a rendezvous at the village square, with a noose around his neck', and a comment that a certain politician 'deserves a nuclear destruction bomb'.[116]

Valtonyc was convicted of 'exalting terrorism and humiliating its victims' and sentenced to two years' imprisonment.[117] In finding Valtonyc guilty, the Spanish first instance court distinguished between an expression of political opinion intended to stimulate debate and expression of personal hatred and intolerance, the latter being liable to restriction. This decision was affirmed in February 2018 by the Spanish Supreme Court, which held that hateful speech 'encouraging or promoting, even indirectly, a situation of risk for people or rights of third parties or of the system of freedoms itself' can be lawfully restricted.[118] The Court found that Valtonyc's lyrics met this threshold, as his songs 'praising terrorist organizations … and their violent actions … are an incitement to imitations of such acts'.[119]

[111] Ibid., §20.

[112] See, e.g., International Commission of Jurists, 'Danger in Dissent: Counterterrorism and Human Rights in the Philippines' (January 2022), 3–6 (on the 'red-tagging' of civil society organizations, human rights defenders and others as 'terrorists').

[113] See ch. 5 (Speech Related to National Security: Espionage and Official Secrets Laws), s. I.2. (Application of Espionage and Official Secrets Laws Around the World).

[114] See Spanish Supreme Court, Sentencia num. 79/2018 (15 February 2018). See also Columbia Global Freedom of Expression, Case of Jose Miguel Arenas (Valtonyc) (2018).

[115] Columbia Global Freedom of Expression, Case of Jose Miguel Arenas (Valtonyc) (2018).

[116] S. Jones, 'Spanish rapper due to begin jail term vows to 'disobey fascist state' (The Guardian, 24 May 2018).

[117] Spanish Criminal Code Arts 578, 579. Art. 578 criminalizes 'enaltecimiento', which can be translated to either 'glorification' or 'exaltation'. See s. II.1.1.2. (Glorification or justification of terrorism). Valtonyc was also sentenced to six months for slander against the Crown (Art. 490.3); and six months for threats of harm to a politician (Art. 169.2).

[118] Spanish Supreme Court, Sentencia num. 79/2018 (15 February 2018).

[119] Ibid.

Valtonyc, who was on bail during the proceedings, has since absconded to Belgium and a legal battle has ensued regarding his extradition. In September 2018, a Ghent court rejected Spain's extradition request, holding that incitement to terrorism under Belgian law 'mainly refers to international terrorism and not—as in the current case—to historical national terrorism' involving organizations that are no longer active.[120] This decision was upheld on appeal in 2022.[121]

Valtonyc's case is one of a number of similar cases in Spain against musicians.[122] In June 2020, the Spanish Supreme Court affirmed six-month terms of imprisonment for 12 members of the rap group 'La Insurgencia'.[123] The group members were charged with 'glorifying terrorism' on the basis of their songs praising the far-left terrorist organization GRAPO, such as the lyric 'more dead Nazis are needed'.[124] Despite the musicians arguing that their art is provocative and should not be taken literally, the Court held that the expression did not 'imply a criticism, nor an opinion, nor a democratic use of social networks. It is about exalting violent behaviour and seeking to reinforce the ideology of those who carried out terrorist acts by praising them'.[125] The Court therefore found that a six-month sentence for each rapper was legitimate.

Spain's Supreme Court also confirmed a nine-month sentence against rapper 'Pablo Hasél' for 'glorifying' or 'exalting' terrorism.[126] Hasél was convicted in 2018 of insulting the monarchy and glorifying terrorism for tweets which praised armed groups ETA and GRAPO, stating among other things that 'demonstrations are necessary but not enough, we must support those who go further' and that he was 'proud of those who reacted to police aggression'.[127] He was initially sentenced to two years' imprisonment for this speech, reduced to nine months in part because GRAPO and ETA are not currently active.[128] Protests in support of Hasél took place in a number of Spanish cities in early 2021, and in February 2021 he was arrested and taken into custody after failing to

[120] S. Vazquez Maymir & P. de Hert, 'First Periodic Country Report: Belgium' (Stream, 2022). The Court also held that glorification of terrorism does not have an equivalent under Belgian law. A Belgian appellate court referred the matter to the European Court of Justice to advice on a technical point regarding an amendment to the offence in the intervening period and its retroactive application: CJEU (GC), *Proceedings relating to the execution of a European arrest warrant against X C-717/18*, 3 March 2020.

[121] 'Valtònyc: Belgian appeals court rules out extradition for Spanish rapper' (Euronews, 17 May 2022).

[122] The provision has also been applied against speakers other than musicians: see, e.g., Columbia Global Freedom of Expression, 'The State v. Cassandra Vera' (2018). And in a recent case the Spanish Constitutional Court overturned a one-year term of imprisonment handed down by the Spanish Supreme Court against another singer, César Strawberry, for a series of tweets supporting ETA and GRAPO. The Constitutional Court held that imprisonment was a disproportionate interference with the singer's free speech: Columbia Global Freedom of Expression, 'The Case of César Strawberry' (2020).

[123] Human Rights Watch, 'Spain: Events of 2020' (2020).

[124] Spanish Penal Code Art. 578.

[125] 'The Supreme Court confirms six-month prison sentence for rappers of La Insurgencia for lorifying terrorism' (El País, 24 June 2020).

[126] Spanish Penal Code Art. 578.

[127] See 'Explainer: The tweets that landed Spanish rapper Pablo Hasel in jail' (The Local, 20 February 2021). Hasél had also previously been sentenced to two years' imprisonment for glorifying terrorism in his YouTube songs: A. Taylor, 'A Spanish rapper was arrested for tweets praising terrorists and mocking royals. Then the protests began' (The Washington Post, 23 February 2021).

[128] Taylor (n 127). He was also fined 25,000 EUR for insulting the monarchy, libel and slander: 'Explainer: The Tweets that Landed Spanish Rapper Pablo Hasel in Jail' (The Local, 20 February 2021).

turn himself in to begin his prison term.[129] Amnesty International Spain's Director has argued that if 'these articles of the Criminal Code are not amended, freedom of expression will continue to be silenced and artistic expression will continue to be restricted'.[130]

2.1.2. Turkey

Since the 2016 coup attempt in Turkey,[131] President Erdogan's government has arrested or imprisoned more than 95,000 citizens, and closed over 1,500 NGOs on terrorism-related grounds, typically for alleged links to Fethullah Gülen, who Erdogan blamed for the coup, or links to the Kurdish Worker's Party (PKK).[132] As noted by Human Rights Watch in 2016, although 'Turkey has a long tradition of misusing terrorism laws against journalists', the political situation in 2016 saw 'journalists from mainstream media organs targeted'.[133] And this trend has continued: reports indicate that terrorism-related charges accounted for more than 42 per cent of charges brought against journalists in Turkey in 2022.[134]

For instance, in 2018 Alaaddin Akkaşoğlu, owner of a left-leaning local newspaper, was convicted of membership in a terrorist organization and sentenced to nearly nine years in prison.[135] Reports indicate that the only allegation against him was the use of an encrypted communication app which authorities alleged was proof of membership of what the Turkish government has categorized as Gülen's terrorist organization.[136]

Such prosecutions are possible due to Turkey's 'arsenal of counter-terrorism laws', which it routinely uses against journalists and human rights defenders,[137] including the offence of 'disseminating propaganda that legitimizes the methods of a terrorist organisation'.[138] And these laws were bolstered in 2020 by a new law on Preventing Financing of Proliferation of Weapons of Mass Destruction. Ostensibly introduced to ensure that Turkey was compliant with its international counter-terrorism financing obligations, UN experts have expressed concern that some provisions 'greatly exceed' this aim, and fear that this law 'may lead to targeting and suspending activities of associations which are critical of the Government, under the cover of investigation for

[129] C. King, 'Riots In Barcelona In Support Of Rapper Hasél' (Euroweekly News, 31 January 2021); A. Congostrina, 'Spanish rapper convicted over tweets arrested after ignoring prison deadline' (El País, 16 February 2021).

[130] Amnesty International, 'Spain: Jailing of rapper for song lyrics and tweets "unjust and disproportionate" ' (21 February 2021).

[131] Turkey has been characterized in this chapter as a European nation because it is a member of the Council of Europe, a state party to the European Convention on Human Rights and is subject to the jurisdiction of the European Court of Human Rights.

[132] US Department of State, 2021 Country Report on Human Rights Practices: Turkey (2021).

[133] Human Rights Watch, 'Silencing Turkey's Media: The Government's Deepening Assault on Critical Journalism' (15 December 2016).

[134] International Press Institute, 'IPI monitoring: At least 227 journalists faced trial in Turkey in 2022' (31 January 2023).

[135] CPJ, 'People: Alaaddin Akkaşoğlu' (August 2018).

[136] It is called Fethullahist Terrorist Organization/Parallel State Structure, or FETÖ/PDY: ibid.

[137] Amnesty International, 'Turkey: Measures to prevent terrorism financing abusively target civil society and set dangerous international precedent' (18 June 2021).

[138] Turkish Law on the Fight Against Terrorism Art. 7(2) (2006). See s. II.1.1.2. (Glorification or justification of terrorism).

terrorism related offences'.[139] This new law establishes a permanent ban against holding executive office in civil organizations for those convicted of terrorist financing, and grants the Minister of the Interior power to suspend individuals, or the activities of an organization, where an individual is being prosecuted for terrorist-related offences.[140] UN experts have argued that 'under the guise of addressing terrorism', such measures send 'a clear signal . . . that civil society actors are legitimate targets for attacks and then legitimizes the adoption of further restrictive measures' against them for what they say.[141]

2.1.3. Russia

Since Russia's invasion in Ukraine, terrorism charges have been one of the myriad ways in which Russian authorities have sought to stifle any criticism of the war, with reports indicating that over 100 defendants have been charged with extremism or for terrorism-related speech since the war began.[142]

Examples include Olesya Krivtsova, a 19-year-old student who was charged with offences including 'justifying terrorism' for an Instagram post to her private account which stated that she understood why Ukrainians were rejoicing after Ukrainian forces had successfully bombed a bridge connecting Russia with Crimea.[143] Her classmates, who provided the post to the authorities, were key witnesses in the prosecution's case against her.[144] She faced up to 10 years' imprisonment for the post but fled Russia.[145] Other cases include that of Andrey Boyarshinov, a former university employee and a civil society activist who was put under house arrest for 'public justification of terrorism' on the basis of an alleged anti-war speech made on a Telegram channel.[146] Boyarshinov was taken into pre-trial detention[147] and faces up to seven years in prison.[148]

[139] Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, *Letter to the Government of Turkey* (2021)OL TUR 3/2021.

[140] Turkish Law on Preventing the Financing of Proliferation of Weapons of Mass Destruction (amending the Turkish Law of Associations, Arts 3a and 30/A) Arts 12, 15.

[141] Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, *Letter to the Government of Turkey* (2021) OL TUR 3/2021.

[142] 'The Anti-War Case' (OVD-Info, 25 November 2022). Russia has been characterized in this chapter as a European nation because it is a former member of the Council of Europe, was a state party to the European Convention of Human Rights and is subject to the jurisdiction of the European Court of Human Rights prior to 16 September 2022.

[143] 'Inside Russia's Crackdown on Dissent' (The New York Times, 11 April 2023).

[144] Ibid.

[145] Ibid.

[146] Pursuant to Art. 205.2(2) of the Russian Criminal Code: Amnesty International, 'Russia: Authorities launch witch-hunt to catch anyone sharing anti-war views' (30 March 2022); M. Kuznetsova, 'How Russian anti-war protesters face persecution' (DW, 20 April 2022).

[147] 'Pretrial Detention Extended for Anti-War Activist in Russia's Tatarstan' (Radio Free Europe/Radio Liberty, 11 November 2022).

[148] 'The Anti-War Case' (OVD-Info, 25 November 2022). See also 'Detention of Russian director and playwright extended for two months' (AP, 30 June 2023).

Terrorism and extremism charges have also been part of the multi-pronged campaign against prominent opposition figure Aleksei Navalny and his supporters.[149] In June 2021, President Putin signed into law new legislation barring anyone who founded, led, worked for or otherwise participated in 'extremist' organizations from running for elected office for a period of three to five years.[150] Days later, three organizations founded by Navalny were banned as 'extremist'.[151] And in June 2023, Navalny appeared in court after Russian authorities filed new charges against him for allegedly promoting terrorism, calling for and financing extremism and rehabilitating Nazism.[152] Navalny was convicted of those charges and sentenced to 19 years imprisonment, added to the 11 and a half years he was already serving.[153] Several of Navalny's colleagues are detained or wanted on a range of similar charges such as 'participation in an extremist community', 'dissemination of purposely false information about the Russian Armed Forces' and 'justification of terrorism'.[154]

2.2. Asia Pacific region

2.2.1. Myanmar

Authorities in Myanmar have consistently used counterterrorism and public order laws to suppress free speech and critical reporting of the government's actions. In March 2020, the government declared the Arakan Army, the ethnic armed group in Rakhine State, a terrorist organization under Myanmar's Counter-Terrorism Law and an unlawful association pursuant to the Unlawful Associations Act.[155] This declaration spurred a series of arrests of journalists who had reported on the conflict in Rakhine.

For example on 30 March 2020, Nay Myo Lin, the editor-in-chief of the Voice of Myanmar, was charged under sections 50(a) and 52(a) of Myanmar's Counter-Terrorism Law for interviewing a spokesperson of the Arakan Army.[156] Nay Myo Lin's

[149] Navalny has been subjected to an assassination attempt, multiple criminal proceedings, and in 2022 was sentenced to nine years in a penal colony for fraud and contempt of court: Amnesty International, 'Russia: Opposition leader Aleksei Navalny sentenced to 9 years in prison in cynical deprivation of his human rights' (22 March 2022).

[150] Amnesty International, 'Russia: Aleksei Navalny's NGOs banned as "extremist", depriving thousands of their rights' (10 June 2021). According to Russian law on combating extremist activity, an organization may be banned as 'extremist', which can entail also administrative or criminal sanctions for participants of such organizations: see SOVA Center, 'The Structure of Russian Anti-Extremist Legislation' (November 2010).

[151] Amnesty International, 'Russia: Aleksei Navalny's NGOs banned as "extremist", depriving thousands of their rights' (10 June 2021).

[152] 'Russia's Navalny defends himself over "extremism charges"' (Al Jazeera, 19 June 2023).

[153] In September 2023, Navalny's appeal was rejected: 'Russia's Navalny loses appeal against 19-year jail term' (Al Jazeera, 26 September 2023).

[154] Amnesty International, 'Russia: Two years after Aleksei Navalny's arrest, Russian opposition figures suppressed, jailed or exiled' (23 January 2023). See s. II.1.1.2. (Glorification or justification of terrorism).

[155] A declaration of an 'unlawful association'—being one which 'encourages or aids persons to commit acts of violence or intimidation'—has serious criminal implications. For example, being a member of any unlawful organization or assisting the association 'in any way' is punishable by up to two years' imprisonment: Myanmar Unlawful Association Act 1908 ss 15–17. See also N. Nyein, 'Myanmar Govt Declares Arakan Army a Terrorist Group' (The Irrawaddy, 24 March 2020).

[156] International Federation for Human Rights, 'Myanmar: Arbitrary detention of Mr. Nay Myo Lin and judicial harassment of four other journalists' (3 April 2020); Human Rights Watch, 'Myanmar: Editor Wrongfully Charged Counter-Terrorism Law Threatens Press Freedom, Freedom of Information' (2 April 2020). These provisions criminalize 'acts of terrorism', broadly defined to include 'to cause fear among the public … with the aim of forcing the government or a local or foreign organization to do an unlawful act or making them avoid acting lawfully, and other actions'; 'actions to form a terrorist group' or that 'knowingly involve in a terrorist group' or 'actions to allow a terrorist or a member of a terrorist group' to use, gather or hold a meeting: Pyidaungsu Hluttaw Law No. 23 (2014).

interview, titled 'Peace Process has Stopped', focused on the Arakan Army's reaction to their designation as a terrorist organization and the impact of this decision on the ongoing peace process.[157] The UN Special Rapporteur on the situation of human rights in Myanmar condemned these charges, and similar charges levelled against other journalists, arguing that '[t]hese journalists were reporting on the escalating armed conflict in Rakhine State, where the Government has imposed a mobile internet shutdown' and that 'their reporting was of the highest public interest value and should be protected'.[158] The Committee to Protect Journalists also called for Nay Myo Lin's immediate release, stating that 'reporting on armed conflict is not the same as being a terrorist'.[159] The charges against Nay Myo Lin were ultimately dropped, and although police and government spokespeople declined to comment on the case, Nay Myo Lin reported that police told him 'it was their mistake'.[160]

The use of public order and terrorism offences against journalists has intensified since Myanmar's coup d'état in February 2021 and the accompanying expansion of Myanmar's public order offences. In 2021 existing public order provisions in Myanmar's Penal Code were broadened including by criminalizing any attempt to 'hinder, disturb, damage the motivation, discipline, health and conduct' of military personnel or cause their hatred, disobedience or 'disloyalty'.[161] A new provision, section 505A, criminalizes anyone who 'causes or intends to cause fear to a group of citizens or to the public' or 'causes or intends to commit or to agitate directly or indirectly [a] criminal offence against a Government employee'.[162] Over 176 journalists have been detained since the coup began, many accused of violating section 505A.[163] The UN Special Rapporteur on the situation of human rights in Myanmar has described these as 'illegitimately imposed new laws' which 'are now being used at an alarming rate to justify detentions of individuals'.[164]

2.2.2. India

In India, widely drawn terrorism and public order laws give police and prosecutors extensive powers that can chill speech and send journalists and human rights defenders to prison for years even before a conviction. One example is the use of the Unlawful Activities (Prevention) Act as a mechanism to silence journalists reporting on the politically volatile region of Kashmir. Under the Act, 'unlawful activity' includes 'words … which [are] intended, or suppor[t] any claim, to bring about … the cession

[157] International Federation for Human Rights, 'Myanmar: Arbitrary detention of Mr. Nay Myo Lin and judicial harassment of four other journalists' (3 April 2020).

[158] OHCHR, 'Myanmar must allow free flow of information and aid to protect right to health in COVID-19 crisis—UN Special Rapporteur Yanghee Lee' (4 April 2020).

[159] 'Myanmar Journalist Arrested For Interview With Blacklisted Arakan Army' (Radio Free Asia, 31 March 2020).

[160] 'Myanmar frees journalist who was charged under terrorism law' (Reuters, 10 April 2020); K. Y. Lynn, 'Myanmar report released after charged over interview' (Anadolu Agency, 10 April 2020).

[161] Human Rights Watch, 'Myanmar: Post-Coup Legal Changes Erode Human Rights' (2 March 2021).

[162] Myanmar Penal Code 1861 s. 505A.

[163] A. Nachemson, 'In 2021, Myanmar journalists risked lives to tell world of coup' (Al Jazeera, 29 December 2021); 'More than 130 journalists arrested in Myanmar, media group says' (Radio Free Asia, 4 April 2022). IFJ, 'Myanmar: Five journalists freed as human rights abuses escalate' (8 May 2023).

[164] UN Special Rapporteur T.H. Andrews, *Report on the situation of human rights in Myanmar* (2021) UN Doc. A/HRC/46/56, §63.

of a part of a territory of India', 'which disclaims, questions, disrupts or is intended to disrupt the sovereignty or territorial integrity of India', or 'which causes or is intended to cause disaffection against India'.[165] The Act also allows the government to declare an association unlawful, and any individual who assists the operation of an unlawful association can be liable to up to five years' imprisonment.[166]

In 2019 this Act was amended to allow an individual to be deemed a 'terrorist' if that individual 'promotes or encourages terrorism' or is 'otherwise involved in terrorism'.[167] This provision has been criticized on the basis that Indian authorities can now designate individuals as 'terrorists' without charge or trial.[168] The same year as these amendments were passed saw Indian authorities arrest 1,948 people under the Act, an almost 37 per cent increase from the previous year.[169]

Journalists charged under the Act include Aasif Sultan, assistant editor of a Kashmir-based English magazine, who was accused of 'harbouring terrorists' and conspiracy against the state by giving assistance to rebels, after publishing an article about a Kashmiri rebel commander killed by Indian authorities.[170] Sultan has been in pre-trial detention and has spent more than five years in jail.[171] UN experts have also condemned the arrests of human rights defenders in the region, including cases involving the death penalty,[172] and noted India's 'misuse' of its 'anti-terrorism framework … to smear and silence human rights defenders'.[173] Repeated calls have been made against the use of the Act 'as a means of coercion against civil society, the media, and human rights defenders in Indian-administered Jammu and Kashmir'.[174]

2.3. Middle East and Africa

2.3.1. Egypt

A high-profile example of Egypt's use of terrorism charges against journalists is the case of Mohamed Fahmy, head of the Al Jazeera bureau in Cairo, and his colleagues Peter Greste and Baher Mohamed.[175] In 2014 the men were convicted of a string of

[165] Indian Unlawful Activities (Prevention) Act 1967 s. 2.
[166] Ibid., ss 3, 10, 13.
[167] Ibid., 7 s. 35(3)(c).
[168] A. Vishwanath & K. Sheriff M., 'Amendments to anti-terror law: Onus will be on individual to prove he is not terrorist' (The Indian Express, 26 July 2019) ('The law does not require any other offences to be filed against the individual to declare him/her a terrorist. The law also does not specify any process for the designation').
[169] '"Misused, abused": India's harsh terror law under rare scrutiny' (Al Jazeera, 16 August 2021): 'only 2.2 percent of cases registered under the Act from 2016 to 2019 ended in a court conviction'.
[170] B. Kichay, 'Kashmiri journalist Aasif Sultan kept in jail for more than 1,000 days' (Al Jazeera, 31 May 2021). According to Al Jazeera, the police added Sultan's name 'to a first information report' about a gunfight with the rebels in 2018. The charges against Sultan included non-speech offences such as 'murder, attempt to murder and other crimes', even though Sultan's lawyer has denied his client being present at the fight and reported that this fact is 'admitted by the prosecution'. See also CPJ, 'Kashmiri journalist Aasif Sultan granted bail, then re-arrested under preventative detention law' (11 April 2022).
[171] 'India arrest Kashmir journalist Irfan Mehraj on "terror" charges' (Al Jazeera, 21 March 2023).
[172] OHCHR, 'One year in detention: UN experts demand immediate release of Kashmiri activist Khurram Parvez' (22 November 2022).
[173] OHCHR, 'India: UN expert demands immediate end to crackdown on Kashmiri human rights defenders' (24 March 2023). See also WGAD, *Parvez v. India* (Opinion no. 8/2023), 28 March 2023, §70.
[174] OHCHR, 'One year in detention: UN experts demand immediate release of Kashmiri activist Khurram Parvez' (22 November 2022).
[175] See ch. 4 (False Speech), s. II.2.3.1. (Egypt).

offences, including possession of publications and records promoting the aims of a terrorist group and spreading false news. The judgment convicted the three journalists on the basis that 'through their actions, [they] had compiled audiovisual film material and falsified untrue events to be broadcast by a satellite channel in order to stir conflict within the Egyptian State'. More specifically, the court condemned them for betraying 'the noble profession of journalism' by 'portraying the Country—untruthfully—to be in a state of chaos … internal strife and disarray'. This sinister plot was apparently orchestrated 'upon the instructions of the … terrorist Muslim Brotherhood Group' and the court even concluded that 'Satan joined [the journalists] in the exploitation of this media activity to direct it against this country. Fahmy and Greste were sentenced to 7 years' imprisonment and Mohamed to 10 years.[176]

This conviction was entered despite the fact that no substantive evidence was placed before the court to justify these charges.[177] The court's reasoning listed seized equipment, which comprised computers, cameras and other standard journalistic equipment, and none of the video footage shown in court established that the journalists were members of or even supportive of the Muslim Brotherhood. Indeed, the defendants stated that they had never seen the 14 alleged Brotherhood members who were co-defendants at their trial until they were placed alongside them in a cage in court on the first day of the trial.[178] International condemnation followed the decision,[179] but at a retrial they were re-convicted of the same offences, which resulted in three-year sentences for each journalist on the basis that 'it has been proven beyond reasonable doubt that the al-Jazeera media channel has dedicated its broadcasting to the service and support of the Muslim Brotherhood faction and that they have permanently sided with them at the expense of their media ethics'.[180] Although they were eventually released following a presidential pardon,[181] the journalists each spent more than a year in prison.[182]

2.3.2. Iran

In 2019, Iranian activist and human rights lawyer Nasrin Sotoudeh was convicted of a range of offences and sentenced to 33 years in prison and 148 lashes for her peaceful

[176] They were also sentenced for possessing communications and broadcasting equipment without a press permit. See A. Clooney, 'The Anatomy of an Unfair Trial' (HuffPost, 18 August 2014). See also Egypt Justice, 'Al Jazeera English Journalists Case—Unofficial English Translation of Court of Cassation Judgment' (1 January 2015), 6–9.

[177] See A. Clooney, 'The Anatomy of an Unfair Trial' (HuffPost, 18 August 2014).

[178] Ibid.

[179] 'Timeline: The two trials of Mohamed Fahmy' (CTV, 13 October 2015).

[180] Mohamed received an additional six months' imprisonment for possessing a single bullet. The court relied on the same evidence as that relied on in the first trial. Columbia Global Freedom of Expression, 'The Case of Al Jazeera Journalists' (2015).

[181] In February 2015, Greste was freed from prison and deported to Australia following presidential 'approval', and Fahmy and Mohamed were released on bail. See Egypt Justice, 'Al Jazeera English Journalists Case—Unofficial English Translation of Court of Cassation Judgment' (1 January 2015); 'Egypt Pardons Al Jazeera Journalists Mohamed Fahmy and Baher Mohamed' (The New York Times, 23 September 2015).

[182] Baher Mohamed and Mohamed Fahmy spent over 14 months in prison: see 'Baher Mohamed: My 1,124 hours of Solitary Confinement in Prison' (Al Jazeera, 17 August 2017).

advocacy for women's rights and against Iran's compulsory hijab requirements.[183] Following a trial which Sotoudeh refused to attend after being denied the right to choose her own lawyer, Sotoudeh was found guilty of seven different offences, including 'assembly and collusion with an intention to commit a crime against national security', 'propaganda against the state', membership of an illegal group, 'publishing falsehoods with the intention to disturb public opinion' and 'disturbing public order'.[184] Sotoudeh is required to serve at least 12 years in prison.

According to the court's verdict, Sotoudeh's illegal conduct was publishing a statement demanding a referendum; conducting 'interviews with foreign media outlets opposed to the Islamic Republic'; 'publish[ing] a video message without a hijab' on social media platforms to show her solidarity with women campaigning against the compulsory hijab; distributing button badges with the slogan 'I am against forced hijab' and participating in 'illegal' anti-death penalty demonstrations.[185] A number of UN human rights experts decried the sentence as 'deeply concerning' and urged her immediate release.[186] Sotoudeh was temporarily released in September 2020, after her health deteriorated due to a six-week hunger strike. But Iranian authorities ordered her return to prison in December 2020.[187]

2.4. North and South America

2.4.1. United States

Although the United States Supreme Court's first amendment jurisprudence makes the United States perhaps the world's most speech-protective nation, US law includes a crime of material support of terrorism that has been applied to speech.[188] In 1996, shortly after the infamous bombing in Oklahoma City, the US Government enacted

[183] Sotoudeh was arrested in June 2018 on the basis that she was yet to serve a five-year sentence handed down in 2016 *in absentia*, the existence of which Sotoudeh had been unaware. As a result, her total sentence is 38 years. See Amnesty International, 'Iran: Shocking 33-year prison term and 148 lashes for women's rights defender Nasrin Sotoudeh' (11 March 2019).

[184] Pursuant to Arts 610, 500, 499, 639, 638, 698 and 618 of the Iranian Penal Code. Center for Human Rights Iran, 'Defying Unjust Court Process, Nasrin Sotoudeh Refuses to Appeal Prison Sentence' (19 March 2019). Amnesty International, 'Iran: Shocking 33-year prison term and 148 lashes for women's rights defender Nasrin Sotoudeh' (11 March 2019). Sotoudeh was only permitted to take a note of the charges of which she was convicted, which her husband later published. Following her conviction, the Islamic Republic News Agency reported that Sotoudeh had been sentenced to seven years' imprisonment: five for 'gathering and concluding to commit crimes against national security' and two for 'insulting the Supreme Leader': see also 'Human rights lawyer Nasrin Sotoudeh jailed 'for 38 years' in Iran' (The Guardian, 11 March 2019).

[185] Center for Human Rights Iran, 'Defying Unjust Court Process, Nasrin Sotoudeh Refuses to Appeal Prison Sentence' (19 March 2019); T.S. Far, 'Why Nasrin Sotoudeh is on Hunger Strike to Protest Iran's Dire Prison Conditions' (Human Rights Watch, 10 September 2020).

[186] Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers; Chair-Rapporteur of WGAD; Chair of the Working Group on the issue of discrimination against women in law and in practice; Special Rapporteur on the situation of human rights in the Islamic Republic of Iran: see OHCHR, 'Iran: UN experts "shocked" at lengthy prison sentence for human rights lawyer Nasrin Sotoudeh' (14 March 2019).

[187] See OHCHR, 'Iran: Nasrin Sotoudeh must be released, say UN experts' (9 December 2020); J. Hincks, '"It's Like We're Hanging in the Air". Iranian Activist Nasrin Sotoudeh's Husband on Her Temporary Release from Prison' (TIME, 20 November 2022). Sotoudeh was again released from prison on medical leave in July 2021 and remains on medical leave: IBAHRI, 'Iran: IBAHRI condemns prison sentence against Reza Khandan and calls for charges to be dropped' (21 February 2023).

[188] See, e.g., D. Barak-Erez & D. Scharia, 'Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law' (2011) 2 *Harvard National Security Journal* 1, 3.

federal statute 18 U.S.C §2993B, making it a crime, punishable by up to 20 years' imprisonment, to 'knowingly provid[e] material support or resources to a foreign terrorist organization', with 'material support' defined to include 'expert advice or assistance', 'training' and 'personnel'.[189] This law has since emerged as 'the chief statute for charging terrorism suspects in federal courts'.[190]

In 2010, the Supreme Court decided a case, *Holder v. Humanitarian Law Project,* that was brought by US citizens and domestic human rights organizations who wished to provide support such as advocacy training, requesting aid and relief, and using humanitarian and international law to peacefully resolve disputes to two classified terrorist organizations: the Kurdistan Workers' Party (the PKK) and the Liberation Tigers of Tamil Eelam (LTTE).[191]

The US Government argued that the statute limited only *conduct* rather than speech, and that, in any event, its interest in 'combating terrorism is an urgent objective of the highest order'. The plaintiffs agreed that the Government had a strong interest in combating terrorism, but argued that 'the objective of combating terrorism does not justify prohibiting their speech … because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism'.[192]

Chief Justice Roberts, delivering the 6:3 majority judgment for the Court, held that the statute was 'constitutional as applied to the particular activities plaintiffs have told us they wish to pursue', including 'train[ing]' members of the designated terrorist group 'to use humanitarian and international law to peacefully resolve disputes'; 'teaching' members of the designated terrorist group 'how to petition various representative bodies such as the United Nations for relief'; and 'engag[ing] in political advocacy' on behalf of specific Kurdish communities.[193] This meant that it was permissible to impose up to 20 years' imprisonment—or life imprisonment if 'the death of any person results'—under US law if these activities were conducted by the plaintiffs.[194] According to the Chief Justice, section 2993B demonstrated Congress and the Executive's position that 'providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization'.[195] The Chief Justice accepted that support of non-violent activities would free up other resources that may be put to violent ends, and that such support lends 'legitimacy' to terrorist groups.[196]

[189] 18 U.S.C. §§2339A, 2339B.

[190] See, e.g., W.E. Said, 'The Material Support Prosecution and Foreign Policy' (2011) 86 *Indiana Law Journal* 543, 544.

[191] US Supreme Court, *Holder v. Humanitarian Law Project* 561 U.S. 1, 21 June 2010.

[192] Ibid., 29.

[193] Ibid., 14. The Court also held that the statute was not unconstitutionally vague and did not violate the plaintiffs' freedom of association, the latter on the basis that the statute criminalized specific types of conduct instead of membership, and therefore was sufficiently protective of the right to association. See also FBI, 'Staten Island Man Sentenced to 69 Months in Prison for Providing Material Support and Resources to Hizballah' (23 April 2009) (sentencing the defendant to over five years in prison following a guilty plea under the same statute for helping to broadcast Hezbollah's TV station Al-Manar).

[194] 18 U.S.C. §2339B; US Supreme Court, *Holder v. Humanitarian Law Project* 561 U.S. 1, 21 June 2010, 39.

[195] US Supreme Court, *Holder v. Humanitarian Law Project* 561 U.S. 1, 21 June 2010, 36.

[196] Ibid., 30.

The majority judgment also drew a careful distinction between independent advocacy and coordinated speech. In response to the dissenting Justices' argument that 'there is "no natural stopping place" for the proposition that aiding a foreign terrorist organization's lawful activities promotes the organization as a whole', the Chief Justice considered the statute to delineate such a place, as 'the statute reaches only material support coordinated *with or under the direction* of a designated foreign terrorist organization'.[197] As a result, the Court held that it 'in no way suggest[ed] that a regulation of *independent speech* would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations'.[198]

In his dissenting judgment, Justice Breyer (with Justices Ginsburg and Sotomayor joining) argued that the Government had not made the 'strong showing necessary to justify under the First Amendment the criminal prosecution of those who engage in these activities', which all concern political speech.[199] The dissenters returned to the principles related to hate speech articulated in *Brandenburg v. Ohio,* arguing that the plaintiffs 'seek to advocate peaceful, *lawful* action to secure political ends' and therefore do not fall within the incitement test in *Brandenburg*.[200] The dissent described the government's arguments in support of combatting terrorism as 'general and speculative', and applicable to 'virtually all speech-related support for a dual-purpose group's peaceful activities'.[201] The dissent also expressed concern as to the distinction between coordinated and independent speech, describing the distinction as an 'arbitrary' one incapable of clear definition.[202] In light of this 'serious doubt' as to the statute's constitutionality, Justice Breyer proposed a construction consistent with the First Amendment, namely that the statute criminalizes speech 'only when the defendant knows or intends those activities will assist the organization's unlawful terrorist actions'.[203]

The decision has been strongly condemned, including by The New York Times Editorial Board, which called it a 'bruise on the First Amendment'.[204] An amicus brief filed by a diverse coalition of academic and advocacy groups expressed concern with section 2339B, arguing that effective peace-making, conflict resolution and human rights advocacy 'sometimes requires direct engagement with groups and individuals that resort to or support violence', and that such a broadly worded material-support provision punishes association with a group even where intended to *dissuade* that group from engaging in unlawful activities.[205]

Similarly, First Amendment academics have suggested that this precedent 'has the potential to limit freedom of speech far beyond content-based prohibitions of the sort

[197] Ibid. (emphasis added).
[198] Ibid., 39 (emphasis added).
[199] Ibid., Dissenting Opinion of Breyer J, 42.
[200] Ibid., Dissenting Opinion of Breyer J, 44. See ch. 3 (Hate Speech), s. II.2.3.2. (United States).
[201] Ibid., Dissenting Opinion of Breyer J, 55 .
[202] Ibid., Dissenting Opinion of Breyer J, 51–52.
[203] Ibid., Dissenting Opinion of Breyer J, 55–56. Justice Breyer recommended the case be remanded to lower courts to consider more specifically the precise activities in which the plaintiffs still wish to engage and determine whether and to what extent a grant of declaratory or injunctive relief was warranted: 60.
[204] 'A Bruise on the First Amendment' (The New York Times, 21 June 2010).
[205] Amicus Brief of the Carter Center and other humanitarian groups in support of Humanitarian Law Project, et al. in US Supreme Court, *Holder v. Humanitarian Law Project* 561 U.S. 1, 21 June 2010, 2, 6.

prevalent in Europe', such as glorification and propaganda offences.[206] This is because *Holder v. Humanitarian Law Project* 'opens the door for prohibiting any speech related to a terrorist organization, no matter how peaceful it is, as long as it is expressed *in coordination with or under the direction* of a terrorist organization'.[207] Further difficulties arise as the decision 'did not explicitly define what coordination entails', leaving 'considerable uncertainty as to what sort of relationship an individual must have with an organization to be convicted under §2339B'.[208] Others have recognized the challenge this presents for social media companies, as the Court's construction of the statute does not capture speech glorifying terrorism if unconnected to a terrorist group, but may prohibit the exact same speech when uttered 'in coordination with or at the behest of [a] terrorist group'.[209] In these circumstances, '[h]ow would a social media provider know whether such coordination has occurred?'[210]

In its 2006 report to the UN Counter-Terrorism Committee,[211] the US Government noted that the First Amendment 'limits the ability of the U.S. to prosecute incitement to commit acts of terrorism to the strict set of circumstances set forth in Brandenburg'.[212] However, the United States argued that it already had 'in place a number of legal measures that comport with these provisions',[213] including the material support provisions in section 2339B, the federal offences of solicitation to violence and advocacy of the overthrow of the government, as well as 'inchoate crimes' that prohibit preparatory acts to substantive criminal offences. And 'given the overlap between supporters of terrorism and those who incite terrorism', the United States noted that material support and inchoate provisions 'further the goals set forth in [UN Security Council resolution] 1624 of preventing and prohibiting incitement to terrorism'.[214] Nonetheless, the United States recognized that 'the majority of the terrorist propaganda found on the Internet today could not be prosecuted under U.S. criminal law', in light of First Amendment principles that place high limits on restrictions to speech.[215]

A case which demonstrates the use of US solicitation and 'inchoate crimes' provisions against speech inciting terrorist acts is the *al-Timimi* case. Al-Timimi, an Islamic scholar and American citizen, attended a dinner five days after the September 11 attacks with a small group of Muslim men to discuss the possibility of backlash against American Muslims, and suggested that the men should leave the United States, join the mujahideen and fight enemies of Islam.[216] He also read a fatwa issued by a Saudi scholar

[206] Barak-Erez & Scharia (n 188).
[207] Ibid.
[208] N. Abel, '*United States vs. Mehanna,* the First Amendment and Material Support in the War on Terror' (2013) 54 *Boston College Law Review* 2, 711, 730.
[209] R. VanLindingham, 'Jailing the Twitter Bird: Social Media, Material Support to Terrorism and Muzzling the Modern Press' (2017) 39 *Cardozo Law Review* 1, 35.
[210] Ibid. See s. III.6 (Approach of Private Companies to Online Incitement to Terrorism).
[211] This is the entity tasked with monitoring the implementation of the UN call for states to prohibit incitement to terrorism. See UNSC Res. 1624 (2005). See also s. III.5. (Penalties).
[212] UNSC, *Report of the United States of America pursuant to resolution 1624 (2005)* (2006) UN Doc. S/2006/397.
[213] Ibid.
[214] Ibid.
[215] Ibid. See, e.g., s. III.6. (Approach of Private Companies to Online Incitement to Terrorism).
[216] See, e.g., T. Healy, '*Brandenburg* in a Time of Terror' (2009) 84 *Notre Dame Law Review* 2.

declaring that Muslims were obliged to defend Afghanistan against the United States. Four of the men later flew to Pakistan to attend a training camp but ultimately returned to the United States after Pakistan had closed its border to Afghanistan. In 2005, al-Timimi was convicted of 10 separate offences including '[s]oliciting others to levy war against the United States', inducing others to 'attempt to aid the Taliban' and 'use firearms during and in relation to crimes of violence' and was sentenced to life in prison.[217] Scholars have argued that al-Timimi's speech was 'clearly protected' on a literal reading of *Brandenburg v. Ohio,* as there was no evidence of inciting imminent action since the dinner took place in the United States before hostilities had begun and the men arrived at the camp weeks after al-Timimi's speech.[218] The conviction in this case has therefore been held to sidestep the '*Brandenburg* framework', which requires a likelihood of imminent physical harm.[219] Al-Timimi's appeal continues, and after 15 years in prison in 2020, a US federal court judge ruled that al-Timimi could remain on home confinement until his appeal was finalized, holding that if his convictions under some counts were reversed he 'would have already served more time in prison than warranted'.[220]

III. International Legal Standards

Freedom of expression is enshrined in article 19 of the Universal Declaration of Human Rights, article 19 of the ICCPR and regional human rights instruments.[221] Under article 19(3) of the ICCPR, a state is permitted to restrict speech if the state can prove that the restriction is (1) 'provided by law' (legality requirement); (2) pursues one of the following legitimate objectives: (i) 'respect of the rights or reputations of others' or (ii) 'the protection of national security or of public order … or of public health or morals' (legitimacy requirement); and (3) is 'necessary' to achieve that objective (necessity requirement).[222] An analysis of necessity includes an assessment of proportionality, namely that restrictions are 'appropriate to achieve their protective function', 'the least intrusive instrument amongst those which might achieve their protective function', and 'proportionate to the interest to be protected'.[223] Like the ICCPR, regional human rights treaties recognize the protection of 'national security' as a legitimate reason to punish speech.[224]

Although many national laws criminalize terrorism and public order offences, there are few cases litigated before international and regional human rights bodies that test

[217] US District Court, E.D., Virginia, Alexandria, *United States v. Al-Timimi* 1:04-cr-385 (LMB), 1-2 18 August 2020, affirmed by US Court of Appeals, Fourth Circuit, *United States v. Al-Timimi* No. 20-4442, 31 August 2020.
[218] T. Healy (n 216) 659.
[219] Ibid., 2.
[220] US District Court, E.D., Virginia, Alexandria, *United States v. Al-Timimi* 1:04-cr-385 (LMB), 1-2 18 August 2020, affirmed by US Court of Appeals, Fourth Circuit, *United States v. Al-Timimi* No. 20-4442, 31 August 2020.
[221] ECHR Art. 10; ACHR Art. 13; ACHPR Art. 9; Arab Charter Art. 32; ASEAN Human Rights Declaration Art. 23; Cairo Declaration on Human Rights in Islam Art. 22. See ch. 1 (Introduction), s. II.1.1. (Treaty language).
[222] See also HRC, General Comment No. 34 (2011), §22.
[223] Ibid., §34.
[224] See ch. 5 (Speech Related to National Security: Espionage and Official Secrets Laws), s. III.1. (International Standards Related to Speech Affecting National Security).

whether and to what extent they may extend to *speech* in support of terrorism.[225] An exception is the European Court of Human Rights, which has considered a number of cases involving terrorist-related speech. But there is a wider body of international standards governing the interplay between speech and national security—for instance in the context of espionage laws—that is relevant to terrorism and public order laws.[226] And standards relating to insulting speech and hate speech are also relevant to terrorism restrictions, as both require an assessment of whether speech extends beyond merely insulting or abhorrent expression to inciting violence or other criminal actions or prohibited outcomes.[227]

A key question is the degree to which speech supporting terrorism must be causally linked to the commission of a terrorist act. The Human Rights Committee, UN Special Rapporteur on terrorism, Council of Europe and UN Secretary-General have all criticized terror offences with a less stringent causal link than 'incitement', such as 'glorifying', 'apologizing' or 'justifying' terrorism, on the basis that they do not incorporate 'intent to incite the commission of a terrorist offence' or 'increas[e] the actual likelihood of a terrorist act occurring'.[228] But the European Court of Human Rights has become an outlier, applying a looser causal standard than its counterparts, with the result that it has found offences such as 'apology' for terrorist acts and engaging in separatist 'propaganda' compatible with article 10.[229]

Although the international human rights framework was developed to apply to states, a number of technology and social media companies have committed to ensuring they regulate speech—including terrorist and violent extremist content—in a manner consistent with international human rights standards.[230] These international standards represent a floor, not a ceiling, for free speech protection.[231]

1. Legality

1.1. Definition of terrorism

Since there is no agreed definition of 'terrorism' under international law, international and regional human rights bodies do not specify a particular definition for states to adopt. But the requirement that a restriction on human rights be 'provided by law'—also known as the 'principle of legality'—requires that a law must be public

[225] See ch. 1 (Introduction), s. II.1.1. (Treaty Language).
[226] See ch. 5 (Speech Related to National Security: Espionage and Official Secrets Laws), s. III.1. (International Standards Related to Speech Affecting National Security).
[227] See ch. 2 (Insulting Speech) and ch. 3 (Hate Speech).
[228] See UN Secretary-General, *Report on the protection of human rights and fundamental freedoms while countering terrorism* (2008) UN Doc. A/63/337, §61. See s. III.3.2. (Causal link between speech and harm).
[229] See s. III.3.2. (Causal link between speech and harm); s. III.3.2.1. ('Glorification', 'justification' and 'apology' offences).
[230] See ch. 3 (Hate Speech), s. V (Approach of Private Companies to Online Hate Speech); The Christchurch Call to Action to Eliminate Terrorist and Violent Extremist Content Online (2019).
[231] See ch. 3 (Hate Speech), s. VI.5. (Recommendations).

and 'formulated with sufficient precision to enable an individual to regulate his or her conduct'.[232] It means that a speaker should be able 'to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action could entail'.[233] As the UN Security Council's Counter-Terrorism Committee has put it: if an 'underlying definition [of terrorism] includes overly broad terms, then the incitement to commit terrorist acts offence will likely also be problematic' under international law.[234]

The Human Rights Committee has criticized certain laws for being overly vague since this 'can lend itself to arbitrary and abusive implementation'.[235] For instance, it expressed concern about Vietnam's offence of 'terrorism to oppose the people's Government' on this basis.[236] And it found that Niger's definition, by referring to an 'act' committed 'with the intention of disrupting the normal functioning of public services' could 'by its vague and ambiguous nature, result in the penalization of peaceful activities linked to the right to freedom of expression'.[237] It also critiqued Jordan's definition of terrorism, which includes 'such acts as disturbing the public order, acts that sow discord and online activity that supports or spreads ideas of terrorist groups', on the basis that it allows authorities to prosecute 'individuals who exercise their right to freedom of expression'.[238]

Like the Human Rights Committee, the Working Group on Arbitrary Detention and the UN Special Rapporteur on terrorism[239] have criticized Saudi Arabia's definition of terrorism—which criminalizes acts or omissions endangering 'national unity' or undermining 'the reputation or position of the State'—on the basis it enables the 'criminalisation of a wide spectrum of acts of peaceful expression'.[240] Although the Working Group accepted that 'any definition of terrorism' could cover 'threats' as well as 'acts' of 'violence', it found that the offence 'should be confined to [those] that are committed for religious, political or ideological motives, and that are aimed at putting the public or

[232] HRC, General Comment No. 34 (2011), §25. See ch. 2 (Insulting Speech), s. III.1. (Legality); ch. 4 (False Speech), s. III.2.1. (Legality); ch. 3 (Hate Speech), s. III.2.1. (Legality); ch. 5 (Speech Related to National Security: Espionage and Official Secrets Laws), s. III.2. (Legality).

[233] ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §131 (citing ECtHR, *The Sunday Times v. United Kingdom (No. 1)* (App. no. 6538/74), 26 April 1979, §§48–49). But 'consequences need not be foreseeable with absolute certainty': ECtHR (GC), *Satakunnan Markkinapörssi Oy v. Finland* (App. no. 931/13), 27 June 2017, §143.

[234] CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2021) UN Doc. S/2021/973 (Annex), §10.

[235] HRC, *Concluding Observations, Vietnam* (2019) UN Doc. CCPR/C/VNM/CO/3, §§11– 12. Article. 113(1) of Vietnam's Criminal Code criminalizes any person 'who, for the purpose of opposing the people's government, infringes upon life or officials or other people'. Article 113(2) also includes the offence of 'forcing, persuading other people to participate in terrorism', punishable by 10–15 years' imprisonment: Vietnamese Criminal Code Art. 113.

[236] HRC, *Concluding Observations, Vietnam* (2019) UN Doc. CCPR/C/VNM/CO/3, §§11– 12.

[237] HRC, *Concluding Observations, Niger* (2019) UN Doc. CCPR/C/NER/CO/2, §14.

[238] HRC, *Concluding Observations, Jordan* (2017) UN Doc. CCPR/C/JOR/CO/5, §12. See also HRC, *Concluding Observations, Bahrain* (2018) UN Doc. CCPR/C/BHR/CO/1, §§29–30; HRC, *Concluding Observations, Pakistan* (2017) UN Doc. CCPR/C/PAK/CO/1, §§21–22; HRC, *Concluding Observations, Bangladesh* (2017) UN Doc. CCPR/C/BGD/CO/1, §§9–10; HRC, *Concluding Observations, Morocco* (2016) UN Doc. CCPR/C/MAR/CO/6, §§17–18.

[239] The full title is: the 'UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' but the abbreviated title will be used throughout the chapter.

[240] WGAD, *Waleed Abulkhair v. Saudi Arabia* (Opinion no. 10/2018), 19 April 2018, §§26, 67 (citing OHCHR, 'UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Saudi Arabia' (4 May 2017)).

section of the public in fear or to coerce a Government or international organization to take or refrain from taking a particular action'.[241]

The European Court also requires that restrictions on speech should be 'provided by law', which means that laws penalizing speech should be 'formulated with sufficient precision to enable people to regulate their conduct' and to 'foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[242] The European Court is 'mindful of the difficulties linked to preventing terrorism and formulating anti-terrorism criminal laws', and therefore has recognized that states 'inevitably have recourse to somewhat general wording' for these laws, 'the application of which depends on the practical interpretation by the judicial authorities'.[243] The Court has noted that 'it is not for it to rule on the constituent elements of the offences under domestic law of terrorism and threat of terrorism' and found instead that the 'Court's task is merely to review under Article 10' decisions by domestic courts 'delivered pursuant to their power of appreciation. In so doing, it must satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts'.[244]

In practice, in the 'majority of cases' the European Court's analysis will turn on whether a restriction is 'necessary' and proportionate,[245] and the Court is often reluctant to find a violation of article 10 on the basis of the threshold question of legality.[246] For example, when the feminist punk band Pussy Riot's music videos were banned under Russia's Suppression of Extremism Act, members of the band argued that the Act 'was vague to the point of making the legal rule in question unforeseeable'.[247] The Court decided to 'leave the question open' as to whether the provisions were prescribed by law, on the basis the applicants' grievances fell to be examined 'from the point of view of the proportionality of the interference'.[248]

The Inter-American Court of Human Rights has imposed similar standards for terrorism offences. According to the Court, 'offenses of a terrorist nature' must be formulated precisely, as 'the principle of legality requires that a necessary distinction be made between such offenses and ordinary offenses, so that every individual and also the criminal judge have sufficient legal elements to know whether an action is penalized under one or the other offense'.[249] The Inter-American Court considers this distinction

[241] WGAD, *Waleed Abulkhair v. Saudi Arabia* (Opinion no. 10/2018), 19 April 2018, §67.
[242] EctHR, *Alekhina v. Russia* (App. no. 38004/12), 17 July 2018, §254.
[243] ECtHR (GC), *Demirtaş v. Turkey (No. 2)* (App. no. 14305/17), 22 December 2020, §275.
[244] ECtHR, *Fatullayev v. Azerbaijan* (App. no. 40984/07), 22 April 2010, §112.
[245] See s. III.5. (Penalties).
[246] ECtHR, Guide on Article 10 of the Convention, 31 August 2022, §61 ('The Court … analyses whether the interference was "prescribed by law" and whether it "pursued one of the legitimate aims" within the meaning of Article 10 § 2, and lastly whether the interference was "necessary in a democratic society"; in the majority of cases, this is the question which determines the Court's conclusion in a given case'). See ch. 1 (Introduction), s. III.3.1.1. (Justifications for penalizing speech).
[247] ECtHR, *Alekhina v. Russia* (App. no. 38004/12), 17 July 2018, §256. Criminal proceedings for hooliganism were also instituted against the band members for the performance and considered by the ECtHR.
[248] Ibid., §§209, 258. See also ECtHR, *Şahin Alpay v. Turkey* (App. no. 16538/17), 20 March 2018, §175 (although conceding that 'serious doubts may arise' as to whether the applicant's pre-trial detention was foreseeable, 'in view of its findings … concerning the necessity of the interference, the Court considers that it does not have to settle this question').
[249] IACtHR, *Norín Catrimán v. Chile* (Series C, no. 279), 29 May 2014, §§162–163.

warranted because of the harsh prison sentences and the restrictions on fundamental rights that flow from terrorist offences.[250] The Court has also stated that the 'special intent or purpose of instilling "fear in the general population"' should be a 'fundamental element to distinguish conduct of a terrorist nature from conduct that is not, and without which the conduct would not meet the definition'.[251]

Certain soft law instruments have also sought to articulate contours of the definition of the physical conduct amounting to a terrorist act which in turn impacts speech-related offences. For example, the UN Special Rapporteur on terrorism has developed a model definition of terrorism as 'an action or attempted action' where the action constitutes 'intentional taking of hostages', is 'intended to cause death or serious bodily injury' or involves 'lethal or serious physical violence' and is done with the 'intention of (a) [p]rovoking a state or terror in the general public' or (b) '[c]ompelling a Government or international organization to do or abstain from doing something'.[252] While this offence does not incorporate speech, the Special Rapporteur on terrorism has also created a model incitement to terrorism offence, which 'must be limited to the incitement to conduct that is truly terrorist in nature' as defined in the model definition of terrorism.[253] Similarly, a number of UN and regional Special Rapporteurs on free speech adopted a 2008 joint declaration which held that the definition of terrorism 'at least as it applies in the context of restrictions of freedom of expression, should be restricted to violent crimes that are designed to advance an ideological, religious, political or organised criminal cause and to influence public authorities by inflicting terror on the public'.[254]

An overboard definition of terrorism is not the only manner in which terror laws may fail legality requirements: international bodies have also criticized laws that include only a vague causal link to terrorism on these grounds.[255] The UN High Commission for Human Rights has observed that 'it is important that vague terms of an uncertain scope such as *glorifying* or *promoting* terrorism are not used when restricting expression'.[256] The Human Rights Committee has stated that the offences of 'praising', 'glorifying' or 'justifying' terrorism' should be 'clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression'.[257] And the 2008 joint declaration of UN and regional Special Rapporteurs also criticized 'the criminalisation of speech' based on 'vague notions such as providing

[250] Ibid., §163.
[251] Ibid., §171.
[252] The action must also correspond to the 'definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism' or '[a]ll elements of a serious crime defined by national law': UN Special Rapporteur Martin Scheinin, *Report on ten areas of best practices in countering terrorism* (2010) UN Doc. A/HRC/16/51, §28.
[253] Ibid., §§31–32. See s. III.3. (Necessity).
[254] UN Special Rapporteur, OSCE Representative on Freedom of the Media, OAS Special Rapporteur, ACmHPR Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation* (10 December 2008). See s. III.3. (Necessity) for how the Declaration addresses the requirements of causality and harm.
[255] See s. III.3.2.1. ('Glorification', 'justification' and 'apology' offences).
[256] OHCHR, *Human Rights, Terrorism and Counter-terrorism: Fact Sheet No. 32* (1 July 2008).
[257] HRC, General Comment No. 34 (2011), §46.

communications support to terrorism or extremism, the "glorification" or "promotion" of terrorism or extremism, and the mere repetition of statements by terrorists, which does not itself constitute incitement'.[258]

1.2. Definition of extremism

International bodies have expressed concern regarding vague laws that criminalize 'extremism' without a definition or clear link to violence or hate speech. For example, the Human Rights Committee has critiqued Russian law's definition of 'extremist activity' on the basis that it 'is too vague to protect individuals … against arbitrariness in its application' and 'to give notice to persons concerned' of 'actions for which they will be held criminally liable'.[259] The Committee has expressed a similar concern about the use of Uzbekistan's Counter-Extremism Act 'to unduly restrict' freedom of expression, on the basis of terms such as 'extremism', 'extremist activity' and 'extremist materials'.[260]

Similarly, the UN Special Rapporteur on terrorism has stated that criminalizing 'extremist' acts, '[a]bsent the qualifier' of 'violent extremism conducive to terrorism', may impermissibly 'encroach on human rights'.[261] According to the UN Special Rapporteur, the 'term "extremism" has no purchase in binding international legal standards and, when operative as a criminal legal category, is irreconcilable with the principle of legal certainty'.[262]

At the European level, the Venice Commission has noted that the term ' "extremist" activities' is 'too broad, lack[s] clarity and may open the way to different interpretations'.[263] Similarly, the European Court has decried the breadth of these laws in a case concerning the forced dissolution of local Jehovah's Witness organizations in Russia, the banning of their publications and the prosecution of their members.[264] The Court observed that the banning of Jehovah's Witnesses' publications solely on the basis of non-violent attempts to persuade others of the virtues of their religion 'in the absence of any statements advocating violence, hatred or intimidation, was only possible because the definition of "extremism" in Russian law was overly broad and could be, and has been, applied to entirely peaceful forms of expression'.[265] It thus fell short of the 'prescribed by law' requirement.[266]

[258] UN Special Rapporteur; OSCE Representative on Freedom of the Media; OAS Special Rapporteur; ACmHPR Special Rapporteur on Freedom of Expression and Access to Information, *2008 Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation* (9 December 2008).

[259] HRC, *Concluding Observations, Russian Federation* (2003) UN Doc. CCPR/CO/79/RUS, §20; HRC, General Comment No. 34 (2011), §46.

[260] HRC, *Concluding Observations, Uzbekistan* (2020) UN Doc. CCPR/C/UZB/CO/5, §20.

[261] See UN Special Rapporteur M. Scheinin, *Report on human rights impacts of policies and practices aimed at preventing and countering violent extremism* (2020) UN Doc. A/HRC/43/46, §14.

[262] Ibid.

[263] Venice Commission, *Opinion on the Federal Law on Combating Extremist Activity* (Opinion no. 660/2011), 15–16 June 2012, §31. See also ECtHR, *Ibragimov v. Russia* (App. nos. 1413/08 & 28621/11), 28 August 2018, §85.

[264] ECtHR, *Taganrog LRO and Others v. Russia* (App. nos. 32401/10 & 19 others), 7 June 2022.

[265] Ibid., §201.

[266] Ibid.

1.3. Definition of public order

International human rights bodies have consistently found that vaguely worded offences related to the 'social order' or 'public order' fail the test that they must be 'provided by law'. For example the Working Group on Arbitrary Detention has expressed concern at the 'vague, imprecise or sweeping elements' in Chinese criminal laws such as 'disrupting social order', 'endangering national security', 'violating the unity and integrity of the State' and 'subverting public order'.[267] And the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has noted that 'States often treat national security or public order as a label to legitimate any restriction'.[268]

Similarly, the Inter-American Commission has made clear that 'any definition of crimes related to national security' must be 'carefully drafted, in precise, express, and exhaustive terms, to ensure that it cannot be invoked to limit the exercise of the right to freedom of expression or punish criticism of the government and its authorities'.[269] For example, the Commission found Cuba's offence of 'collaborating with foreign media' with the objective of 'disrupting public order' or 'destabilizing the country' to be incompatible with the right to freedom of expression enshrined in the American Declaration.[270] The Commission noted that these criminal laws are a 'means to silence ideas and opinions because they discourage any type of criticism' and that they 'affect not only the individuals punished with their application by the Cuban courts, but also the entire Cuban society'.[271]

2. Legitimacy

The second requirement to validly penalize speech under article 19(3) of the ICCPR and regional free speech treaties is that the penalty pursues one of the 'legitimate aims' set out in international treaties.[272] To justify speech restrictions arising from terrorism and public order laws, states have relied on the aims of 'national security' and the protection of 'public order'.[273] For example, the European Court has noted that the legitimate aims of national security, territorial integrity or public safety, and the prevention

[267] WGAD, *Gulmira Imin v. China* (Opinion no. 29/2012), 29 August 2012, §30. See also WGAD, *Sokhet v. Cambodia* (Opinion no. 75/2021) 18 November 2021, §55 (involving a conviction for 'incitement to disrupt social order').

[268] UN Special Rapporteur D. Kaye, *Report on Promotion and protection of the right to freedom of opinion and expression* (2016) UN Doc. A/71/373, §19.

[269] IACmHR, *Roca Antúnez v. Cuba* (Case 12.127) 24 February 2018, §98.

[270] IACmHR. *Biscet v. Cuba* (Case 12.476), 21 October 2006, §210.

[271] Ibid., §209.

[272] See s. III. (International Legal Standards).

[273] See s. III. (International Legal Standards). See, e.g., ECtHR (GC), *Sürek v. Turkey (No. 1)* (App. no. 26682/95), 8 July 1999, §§51–52 (the Court finding Turkey's Prevention of Terrorism Act 1991 as having the legitimate aims of 'the protection of national security and territorial integrity and the prevention of disorder and crime'). States sometimes also refer to 'the rights of others': ECtHR (GC), *Sürek v. Turkey (No. 2)* (App. no. 24122/94), 8 July 1999, §29 (considering a Turkish law which criminalized revealing the identity of officials mandated to fight terrorism and thus protected them 'from being targeted for terrorist attack' as 'taken in the interest of national security and territorial integrity and for the protection of the rights of others').

of disorder or crime are 'frequently invoked in combination'.[274] And the European Court has recognized the connection between these aims and terror offences, noting that 'measures taken by national authorities to maintain national security and public safety [are] part of the fight against terrorism', and that it must 'ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations'.[275]

A state's assertion that national security interests are at stake will be given considerable, but not unlimited, deference by international bodies.[276] The Human Rights Committee requires states to point to the 'precise nature of [a] threat' rather than a 'general situation' of uncertainty.[277] Similarly, 'even where national security is at stake', the European Court has held that 'measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision'.[278]

The legitimate aim of 'public order' as a basis for penalizing speech differs slightly to both the aims of protecting national security and 'the rights of others' in that there are textual nuances between the ICCPR and its regional equivalents. Article 19 of the ICCPR allows for restrictions for the protection of 'public order (*ordre public*)', whereas article 10(2) of the European Convention instead provides for 'the prevention of disorder or crime' as well as 'national security or public safety'.[279] However, the drafting history of the European Convention does not suggest that the drafters intended to cast a broader net over the type of speech that can be penalized.[280] And the Human Rights Committee has considered 'public order' to encompass a wide range of limits to speech, including the additional aims expressly listed in article 10 of the European Convention.[281]

[274] ECtHR, Guide on Article 10 of the Convention, 31 August 2022, §539. See, e.g., ECtHR, *Stomakhin v. Russia* (App. no. 52273/07), 9 May 2018, §§84–87; ECtHR (GC), *Sürek v. Turkey (No. 1)* (App. no. 26682/95), 8 July 1999, §52; ECtHR (GC), *Sürek v. Turkey (No. 3)* (App. no. 24735/94), 8 July 1999, §31.

[275] ECtHR (GC), *Zana v. Turkey* (App. no. 18954/91), 25 November 1997, §55.

[276] See, e.g., ECtHR (GC), *Janowiec v. Russia* (App. nos. 55508/07 & 29520/09), 21 October 2013, §213; ECtHR, *Liu v. Russia (No. 2)* (App. no. 29157/09), 26 July 2011, §85. See also ch. 5 (Speech Related to National Security: Espionage and Official Secrets Laws), s. III.1. (International Standards Related to Speech Affecting National Security).

[277] HRC, *Park v. Republic of Korea* (Comm. no. 628/1995), 20 October 1998, §10.3 (finding that a reference 'to the general situation in the country and the threat posed by "North Korean communists" was insufficiently precise'). See also, e.g., HRC, *Shin v. Republic of Korea* (Comm. no. 926/2000), 16 March 2004, §7.3 (holding that while the national courts 'identified a national security basis as justification' for the confiscation of the artist's painting and his conviction under the National Security Law, 'the State party must demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes caused by the author's conduct'); WGAD, *Xiyue Wang v. Iran* (Opinion no. 52/2018), 23 August 2018, §75 (holding that the Government 'did not establish a clear connection between this activity and contemporary national security interests provided under article 19(3)' of the ICCPR).

[278] ECtHR (GC), *Janowiec v. Russia* (App. nos. 55508/07 & 29520/09), 21 October 2013, §213.

[279] ICCPR Art. 19(3), ECHR Art. 10(2). Article 13 of the American Convention references 'public order' but this is not followed by the French term '*ordre publique*' in brackets: ACHR Art. 13(2)(b).

[280] See ch. 1 (Introduction), s. II.1.1.1. (Abuses by the state). Cf. ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §§146–147 (where the ECtHR compared the meaning of 'prevention of disorder' in articles 8(2),10(2) and 11(2) of the ECHR to the 'maintenance of *ordre public*' as provided by articles 2(3) of Protocol No. 4 to the ECHR).

[281] See HRC, *Lovell v. Australia* (Comm. no. 920/2000), 24 March 2003, §9.4; HRC, General Comment No. 34 (2011), §31 ('Contempt of court proceedings relating to forms of expression may be tested against the public

The Human Rights Committee has so far avoided providing an explicit definition of 'public order', with Committee members 'understandably reluctant to erect strict definitions that might hamper legitimate future application of Article 19, paragraph 3' of the ICCPR.[282] But both the Human Rights Committee and the European Court have considered protecting 'public order' or the 'prevention of disorder and crime' as legitimate aims that extend beyond the realm of protecting national security, encompassing for example the guaranteeing of fair elections,[283] speech-making in public places[284] and contempt of court proceedings.[285]

Unlike its European counterpart, the Inter-American Court of Human Rights has provided an explicit definition of 'public order' and its basic parameters. In its advisory opinion on whether Costa Rica's compulsory licensing of media associations violated the American Convention on Human Rights, the Court held that the term 'public order' should be understood as constituting 'the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles'.[286] Two foundational principles were articulated: first, that 'public order' may 'under no circumstances be involved as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content', and secondly, that public order restrictions 'must be subjected to an interpretation that is strictly limited to' the 'just demands' of 'a democratic society', which 'takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention'.[287]

Similarly, the Inter-American Commission has noted that:

order (*ordre public*) ground'); HRC, *Agazade and Jafarov v. Azerbaijan* (Comm. no. 2205/2012) 27 October 2016, §§7.4–7.5; HRC, *Aleksandrov v. Belarus* (Comm. no. 1933/2010) 24 July 2014, §7.4 (holding that Belarus had not explained how the actions of a protestor 'would have violated the rights and freedoms of others or would have posed a threat to public safety or public order (*ordre public*)').

[282] See M. O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34' (2012) 12(4) *Human Rights Law Review* 627, 652.

[283] HRC, *Kim v. Republic of Korea* (Comm. no. 968/2001), 27 July 2005, §§4.1, 8.3 (where the Human Rights Committee considered that a conviction and fine against a journalist for publishing opinion polls too close to an election did not violate article 19 of the ICCPR, noting Korea's argument that 'the guarantee of fair elections is an integral part of public order in a democratic society').

[284] See ch. 3(Hate Speech), s. III.2.2. (Legitimacy). Cf. ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §§13, 153–154 (finding that calling the Armenian genocide a 'lie' could not be restricted on the basis of preventing disorder).

[285] See, e.g., HRC, General Comment No. 34 (2011), §31. See also ECtHR, *Karapetyan v. Armenia* (App. no. 59001/08), 17 November 2016, §49 (where restricting civil servants' freedom to engage in political activities was considered necessary 'to ensure the consolidation and maintenance of democracy'); ECtHR, *Nix v. Germany* (App. no. 35285/16), 13 March 2018, §§39, 44 (public order laws which require that persons using Nazi symbols clearly distance themselves from Nazi ideology were found to be legitimate on the basis that they 'prevent the revival of prohibited organisations' and to 'maintain political peace').

[286] IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85 (Series A, no. 5), 13 November 1985, §64. The Court also recognized the 'difficulty inherent in the attempt of defining with precision the concepts of 'public order' and 'general welfare'' (§67), with the result that it may consider its own definition to be an imprecise one.

[287] Ibid., §67. Applying these principles, the Inter-American Court held that the public order may justify licensing of other professions but 'cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of the rights that Article 13 of the Convention grants to each individual', hence violating 'the basic principles of a democratic public order on which the Convention itself is based': §76.

> for any penalty to be imposed in the name of defending public order (understood as public safety, health and morals), it is necessary to demonstrate that the concept of 'order' being defended is not authoritarian; rather, it must be a democratic order, understood as the existence of structural conditions for all persons, without discrimination, to be able to exercise their rights freely, vigorously, and without fear of being punished for doing so.[288]

Finally, the Siracusa Principles, developed by experts and adopted by the UN Economic and Social Council, provide soft law guidance on the interpretation of 'public order' under article 19(3), holding that this term 'may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order'.[289]

3. Necessity

The third arm of the tripartite test under article 19(3) of the ICCPR and regional free speech treaties is whether a penalty for speech is 'necessary', and most cases that come before international and regional bodies turn on this issue.[290] Central elements to assess the necessity of a restriction to speech are: (a) the type of harm arising from speech;[291] (b) the causal link between speech and harm;[292] and (c) the intent of the speaker.[293] The requirement of 'necessity' also encompasses the proportionality of penalties, as any restrictive measure 'must be the least intrusive instrument amongst those which might achieve their protective function' and penalties must be 'proportionate to the interest to be protected'.[294] In addition, international human rights law recognizes a number of defences or exceptions to liability for speech that are of particular importance for terrorism and public order laws. These include whether speech relates to the public interest,[295] and the defences of truth and opinion.[296]

3.1. Harm

Under international standards, speech cannot be restricted unless a state can demonstrate a specific type of harm that may arise from it.[297] As articulated by the Human Rights Committee '[w]hen a State … invokes a legitimate ground for [a] restriction of

[288] IACmHR, *Roca Antúnez v. Cuba* (Case 12.127), 24 February 2018, §103.
[289] Siracusa Principles. The Siracusa Principles were formally included in the work of the UN Commission on Human Rights at its 4lst session. See also ch. 5 (Speech Related to National Security: Espionage and Official Secrets), s. III.1. (International Standards Related to Speech Affecting National Security).
[290] See, e.g., ECtHR, Guide on Article 10 of the Convention, 31 August 2022, §61; s. III.1.1. (Definition of terrorism) (discussing how few cases turn on the issue of legality).
[291] See s. III.3.1. (Harm).
[292] See s. III.3.2. (Causal link between speech and harm).
[293] See s. III.3.3. (Intent).
[294] HRC, General Comment No. 34 (2011), §34.
[295] See s. III.4.1. (Public interest).
[296] See s. III.4.3. (Truth and opinion).
[297] The causal link that is required is discussed at s. III.3.2. (Causal link between speech and harm).

freedom of expression, it must demonstrate in a specific and individualized fashion the precise nature of the threat' posed by the speech.[298]

But international and regional bodies differ slightly in the type of harm that will meet this threshold, particularly what harms beyond violence may qualify. Speech that incites violence can clearly be penalized, even through criminal sanctions (which terrorism laws typically apply).[299] For instance, the Working Group on Arbitrary Detention has held that 'expression … cannot be punished as such, if there are no violent acts committed … and there is no factual proof of resort to or *advocacy of violence*'.[300] And incitement to violence is one of the 'serious and very exceptional circumstances' in which the African Court will consider custodial sentences for speech to be compatible with freedom of expression.[301] The Inter-American Commission has also declared penalties for speech can be justifiable if a speaker had intent to promote 'lawless violence'.[302]

The European Court has also found that 'incitement to violence' is a prohibited harm and interprets this broadly to encompass implied rather than just express calls for such harm.[303] As the Court has found, states 'cannot rely on protecting territorial integrity and national security, maintaining public order and safety, or preventing crime' as a basis for restricting speech unless the speech constitutes 'incitement to violence'.[304] But according to the European Court, such incitement need not necessarily mean expressly 'advocat[ing] recourse to violent action or bloody revenge'; it can also mean words that can 'be interpreted as likely to encourage violence by expressing deep-seated and irrational hatred towards identified persons'.[305] Indeed, in the case of terrorist offences, the Court 'accepts that disseminating messages in praise of the perpetrator of an attack, denigrating the victims, calling for the financing of terrorist organizations or other similar conduct may constitute acts of incitement to terrorist violence' and 'Article 10 does not prohibit any restrictions as such' to this speech.[306] And the Court considers

[298] HRC, General Comment No. 34 (2011), §35, citing HRC, *Shin v. Republic of Korea* (Comm. no. 926/2000), 16 March 2004. See also HRC, *Ross v. Canada* (Comm. no. 736/1997), 18 October 2000, §11.5. See s. III.3.2. (Causal link between speech and harm).

[299] However, international and regional bodies will still holistically consider whether a restriction was necessary and proportionate to advance a legitimate aim.

[300] WGAD, *Dolma Kyab v. China* (Opinion no. 36/2007), 30 November 2007, §15 (writer and teacher sentenced to 10 years' imprisonment for allegedly seeking to publish separatist content regarding Tibet, including the number and location of Chinese military installations). On a number of occasions the Working Group has found a violation of article 19 if 'no evidence' is provided that a speaker 'incited acts of violence' or was 'involved in any violence or force': see, e.g., WGAD, *Al-Hawali v. Saudi Arabia* (Opinion no. 29/2023), 3 April 2023, §32; WGAD, *Van Kham v. Viet Nam* (Opinion no. 13/2022), 31 March 2022, §74; WGAD, *Hammouri v. Israel* (Opinion no. 13/2023), 29 March 2023, §61.

[301] ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §165.

[302] IACmHR, *Report on the Violence Against LGBTI Persons* (2015) OEA/Ser.L/V/II. Doc.36/15 Rev.2, §235. See s. III.3.3 (Intent).

[303] See, e.g., ECtHR, *Rouillan v. France* (App. no. 28000/19), 23 June 2022, §71; see s. III.3.2.1. ('Glorification', 'justification' and 'apology' offences).

[304] ECtHR, *Dmitriyevskiy v. Russia* (App. no. 42168/06), 3 October 2017, §100. See also ECtHR, *Mehmet Hasan Altan v. Turkey* (App. no. 13237/17), 20 March 2018, §209.

[305] ECtHR, *Dmitriyevskiy v. Russia* (App. no. 42168/06), 3 October 2017, §100. See also ECtHR, *Mehmet Hasan Altan v. Turkey* (App. no. 13237/17), 20 March 2018, §209.

[306] ECtHR, *Yavuz and Yaylalı v. Turkey* (App. no. 12606/11), 17 December 2013, §51.

incitement to violence to be only one of 'several factors' that the Court will assess when determining whether penalties imposed on speech are 'necessary'.[307]

Conversely, the Court has also found, in applying its incitement to violence test, that even when speech '[t]aken literally' 'might be construed as inciting readers to hatred, revolt or the use of violence', penalties can be disproportionate in certain contexts, including if the speech is 'artistic in nature'.[308] For instance, the Court considered a case in which a poet was convicted and sentenced to over a year in prison for engaging in 'propaganda' by disseminating poems that called for self-sacrifice for 'Kurdistan' and included some 'aggressive passages directed at Turkish authorities'.[309] Even though the Court accepted that the poems might amount to literal incitement to 'hatred, revolt and the use of violence', it considered that poetry, as a medium, is 'addressed to a very small audience', which 'limited' the poems' 'potential impact' on national security and public order. The Court concluded that 'even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation'.[310]

Beyond incitement to 'violence', international and regional bodies have found that incitement to 'armed resistance', 'commission of criminal offences',[311] 'serious disturbances' of public order[312] and 'lawless violence or any similar action' are harms that can also justify criminal penalties.[313] For example, in a case when a politician received a one-year suspended sentence for a keynote speech paying tribute to a former member of the terrorist organization ETA, the European Court found a violation of article 10 because the speech 'read as a whole did not incite the use of violence or *armed resistance*'.[314] The Inter-American Commission found a violation of freedom of expression when Cuban citizens disseminated documents critical of the state but these were not

[307] These include 'whether the statements were made against a tense political or social background' and 'the manner in which the statements were made, and their capacity—direct or indirect—to lead to harmful consequences'. ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §§204–208. However, in some cases the Court has described this as an 'essential element': see, e.g., ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021, §39.

[308] ECtHR (GC), *Karataş v. Turkey* (App. no. 23168/94), 8 July 1999, §§49–52.

[309] Ibid., §49.

[310] Ibid., §52. *Compare* ECtHR (GC), *Zana v. Turkey* (App. no. 18954/91), 25 November 1997, §§26, 58–61 (reaching the opposite conclusion in a case where a mayor was sentenced to 12 months' imprisonment based on the type of speech and its timing, given the 'extreme tension' in the region).

[311] HRC, *Rabbae v. Netherlands* (Comm. no. 2124/2011) (Individual Opinion (Concurring) of Committee members Sarah Cleveland and Mauro Politi), §7. This decision relates to hate speech. See ch. 3 (Hate Speech), s. III.2.3.1. (Harm).

[312] See, e.g., ECtHR, *Leroy v. France* (App. no. 36109/03), 2 October 2008, §45 (finding no violation of article 10 on the basis that speech 'elicited reactions which *could have* stirred up violence' and 'could have affected public order in the region' (emphasis supplied); HRC, *Marchant Reyes v. Chile* (Comm. no. 2627/2015), 7 November 2017, §§2.7, 7.5 (finding a violation of article 19 where Chile could not demonstrate 'a reasonable clarification of the existence of a real and specific threat to public order'): see s. III.3.2. (Causal link between speech and harm).

[313] IACmHR, *Report on the Violence Against LGBTI Persons* (2015) OEA/Ser.L/V/II. Doc.36/15 Rev.2, §235. The question of harm is also closely linked to the legitimate aim that a state is pursuing, such as protection of national security, territorial integrity and public order: see s. III.2. (Legitimacy).

[314] ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021, §§46. The politican was a leading member of the Basque independence movement, and also received a seven-year ban from office for the crime of 'praise or justification' of terrorism. See also ECtHR, *Üçdağ v. Turkey* (App. no. 23314/19), 31 August 2021, §85.

found to 'pose a certain and credible threat of a potentially *serious disturbance of the basic conditions for the operation of democratic institutions*'.[315] The Commission considered that it would be insufficient to invoke 'mere conjecture about potential disturbances of order … that do not clearly pose a reasonable risk of serious disturbances' and then defined such disturbances as 'lawless violence'.[316] This is consistent with article 13(5) of the American Convention, which requires states to penalize speech that constitutes 'incitement to lawless violence *or to any other similar action*'.[317] Though 'similar action' is not defined, the drafting history of the treaty suggests that the harm should be comparable in severity to violence.[318]

A further type of harm that can make a penalty 'necessary' under international human rights law is incitement to a serious criminal offence. The harm standard proposed by members of the Human Rights Committee in the context of hate speech incorporates both incitement to violence and '*the commission of criminal offences*'.[319] The UN and the Council of Europe have suggested that the appropriate test is that speech 'causes a danger' that 'terrorist offences … may be committed'.[320] The UN Secretary-General also defined the appropriate parameters of incitement as 'a direct call to engage in terrorism'.[321] And the UN Special Rapporteur has observed that the threshold for inchoate terror crimes should be a 'reasonable probability that the expression in question would succeed in inciting a *terrorist act*'.[322]

However, international and regional bodies have not consistently required the high bar of incitement to violence or criminal offences. Incitement to 'hatred' has also been sufficient to curtail speech in some cases assessing the application of laws on terrorism.[323] For example, despite decisions by the Working Group on Arbitrary Detention that have suggested a requirement of 'proof of resort to or advocacy of violence', the

[315] IACmHR, *Roca Antúnez v. Cuba* (Case 12.127), 2 February 2018, §107 (emphasis added). See s. III.3.2. (Causal link between speech and harm).

[316] IACmHR, *Roca Antúnez v. Cuba* (Case 12.127), 24 February 2018, §107. See also IACmHR, *Biscet v. Cuba* (Case 12.476), 21 October 2006. Cf. ECtHR (GC), *Sürek v. Turkey (No. 4)* (App. no. 24762/94), 8 July 1999, Concurring Judgment of Judge Bonello (freedom of expression 'does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing *imminent lawlessness* and is likely to incite or produce such action' (emphasis added)): see s. III.3.2. (Causal link between speech and harm).

[317] ACHR Art. 13(5) (emphasis added), see ch. 3 (Hate Speech).

[318] Inter-American specialized conference on human rights, San José, Costa Rica, Minutes of the second plenary session (22 November 1969) Doc. 86, US Statement, 444. The original provision provided for violence as well as 'discrimination' and 'hostility', but the US delegate recommended that this wording be replaced with 'similar action' to ensure consistency with First Amendment jurisprudence. In addition the Spanish version of article 13(5) provides for 'similar *illegal action*' ('acción ilegal similar').

[319] HRC, *Rabbae v. Netherlands* (Comm. no. 2124/2011) Individual Opinion (concurring) of Committee members Sarah Cleveland and Mauro Politi, §7 (emphasis added).

[320] See s. III.3.2. (Causal link between speech and harm). COE Convention on the Prevention of Terrorism (2005) Art. 5; UN Special Rapporteur on terrorism Martin Scheinin, *Report on Ten areas of best practices in countering terrorism* (2010) UN Doc. A/HRC/16/51.

[321] UN Secretary-General, *Report on The Protection of human rights and fundamental freedoms while countering terrorism* (2008) UN Doc. A/63/337, §61. This test also requires that the speech occur 'in the context in which the call is directly causally responsible for increasing the actual likelihood of a *terrorist act* occurring (see s. III.3.2. (Causal link between speech and harm) and that it occur 'with the intention that this will promote terrorism' s. III.3.3. (Intent).

[322] UN Special Rapporteur on terrorism, *Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders* (2019) UN Doc. A/HRC/40/52, §37 (emphasis added).

[323] See ch. 3 (Hate Speech), s. III.2.3.1. (Harm).

Working Group has also found that incitement to 'hatred or violence' was sufficient.[324] In one case, an Egyptian blogger who encouraged attendance at a demonstration against civilians being tried in Egyptian military courts was convicted of a public order offence and sentenced to five years' imprisonment.[325] The Working Group held that 'a vague and general reference to public order … is insufficient to convince the Working Group that the restrictions on the freedom of expression by way of deprivation of liberty are necessary'.[326] It emphasized instead that 'the peaceful, non-violent expression or manifestation of one's opinion … *if it does not constitute incitement to national, racial or religious hatred or violence*, remains within the boundaries of the freedom of expression'.[327] The African Court also considers 'public incitement to hatred' to fall within the 'exceptional circumstances' that may warrant custodial sentences for speech.[328]

Like other international bodies, the European Court has in certain circumstances qualified incitement to 'hatred' as being sufficient to make a penalty for speech 'necessary'. But the Court has gone beyond this, and in a number of recent decisions adopted as its 'essential question' or 'salient issue' whether speech 'could … be seen as a call for violence, *hatred or intolerance*'.[329] Although the parameters of the concept of 'intolerance' are more frequently addressed in the context of hateful speech rather than terrorism or public order,[330] it is clear that the Court's conception of hatred and intolerance means that speech does not need to 'involve an explicit call for an act of violence, or other criminal acts' for a penalty to be considered 'necessary'.[331] Instead, as the Court has put it, a broader array of 'expression that promotes or justifies violence, *hatred, xenophobia or another form of intolerance* cannot normally claim protection'.[332] This lower harm threshold—combined with a lack of a strict causation requirement linking the speech to objectively possible or actual harm—has resulted in a disconnect between the European Court's approach to hate speech and speech-based terrorism laws in comparison to other international bodies.[333]

A further factor that sets the Court's jurisprudence apart is that in a small number of cases terrorism-related speech has been found to be unprotected under article 17 of

[324] WGAD, *Dolma Kyab v. China* (Opinion no. 36/2007), 30 November 2007, §15. See also WGAD, *Umbetaliyev v. Kazakhstan* (Opinion no. 33/2021), 8 September 2021, §43.

[325] WGAD, *Alaa Ahmed Seif al Islam Abd El Fattah v. Egypt* (Opinion no. 6/2016), 19 April 2016. The blogger was originally sentenced in absentia to 15 years' penal servitude, which was annulled and he was retried and sentenced to five years' penal servitude: §26.

[326] Ibid., §48.

[327] Ibid., §§48–49 (emphasis added). Cf. ch. 3 (Hate Speech), s. VI.4. (Recommendations) (recommending that hatred on the basis of sexual orientation, gender, political affiliation or other protected characteristics should be penalized in the same manner as discrimination based on race, ethnicity or religion).

[328] ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §165.

[329] ECtHR, Guide on Article 10 of the Convention, 31 August 2022, §§554, 557 (emphasis added); ECtHR, *Ibragimov v. Russia* (App. nos. 1413/08 & 28621/11), 28 August 2018, §98. See also, e.g., ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §206; ECtHR, *Gündüz v. Turkey* (App. no. 35071/97), 4 December 2003, §§ 48, 51; ECtHR, *Féret v. Belgium* (App. no. 15615/07), 16 July 2009, §64.

[330] See ch. 3 (Hate Speech), s. III.2.2. (Case Study: International Standards on Blasphemy Laws), s. III.2.3.1. (Harm), and s. VI.3.3. (Recommendations).

[331] ECtHR, *Ibragimov v. Russia* (App. nos. 1413/08 & 28621/11), 28 August 2018, §94. See also ECtHR, *Vejdeland v. Sweden* (App. no. 1813/07), 9 February 2012, §55.

[332] ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §230 (emphasis added).

[333] See s. III.3.2. (Causal link between speech and harm).

the Convention. Article 17 provides that '[n]othing in th[e] Convention may be interpreted as implying … any right to engage in any activity … aimed at the destruction of any of the rights and freedoms' set out in the treaty. This means that in some cases speech is not analysed using the balancing exercise provided by article 10(2) but held instead to be essentially unprotectable as a threshold matter.[334] Article 17 has therefore effectively operated as a guillotine provision which overrides the Court's usual analysis of necessity and proportionality.[335]

The Court has construed article 17 as preventing 'individuals or groups with totalitarian aims from exploiting … the principles enunciated in the Convention'.[336] And the Court has, on this basis, refused to consider claims involving 'speech [that] is incompatible with the values' of the Convention or 'contrary to' its 'text and spirit'.[337] Although the Court has stated that article 17 sets a 'high threshold'[338] and should only be applied 'on an exceptional basis and in extreme cases',[339] the Court has found a number of hate speech cases inadmissible on this basis.[340] And the Court has found 'terrorism' to be one of the values that is contrary to the Convention's text and spirit.[341]

Although article 17 has sweeping reach—and could potentially apply to all cases involving terrorism-related speech that incites 'hatred' as well as violence—it has been applied by the Court in a relatively small number of cases involving terrorist-related speech. For instance, the Court considered a case in which a Danish television company was convicted, fined and deprived of its licence to broadcast on the basis it promoted the PKK's terror operation over a four-year period.[342] The Court observed that the 'decisive point when assessing whether statements, verbal or non-verbal, are removed from the protection of Article 10 by Article 17' is whether statements are directed 'against the Convention's underlying values, for example by stirring up hatred or violence'.[343] Applying this principle to the company's broadcasting, the Court attached 'significant weight' to the Danish court's finding that the company's 'one-sided coverage

[334] See ECtHR, 'Factsheet—Hate Speech', September 2023, 5.

[335] See ch. 3 (Hate Speech), s. III.2. (Discretionary Restrictions on Hate Speech).

[336] ECtHR, *Hizb Ut-Tahrir v. Germany* (App. no. 31098/08), 12 June 2012, §72, citing ECtHR (GC), *Paksas v. Lithuania* (App. no. 34932/04), 6 January 2011, §§87–88.

[337] ECtHR, *Ivanov v. Russia* (App. no. 35222/04), 20 February 2007, §1; ECtHR, *Roj TV A/S v. Denmark* (App. no. 24683/14), 17 April 2018, §30.

[338] ECtHR, *Lilliendahl v. Iceland* (App. no. 29297/18), 12 May 2020, §§25–26.

[339] Ibid., §25. See also ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §114.

[340] See ch. 3 (Hate Speech); s. III.2.2. (Legitimacy). See, e.g., ECtHR, *Ivanov v. Russia* (App. no. 35222/04), 20 February 2007; ECtHR, *Norwood v. United Kingdom* (App. no. 23131/03), 16 November 2004; ECtHR, *Belkacem v. Belgium* (App. no. 34367/14), 27 June 2017.

[341] See UK Department of Digital, Culture, Media & Sport and Department of Science, Innovation & Technology, 'Policy paper: Online Safety Bill: European Convention on Human Rights Memorandum' (18 January 2023) ('The [European] Court has held that content expressing support for terrorism does not, by virtue of Article 17, attract the protection afforded by Article 10', citing ECtHR, *Roj TV A/S v. Denmark* (App. no. 24683/14), 17 April 2018. See also ECtHR, *Orban v. France* (App. no. 20985/05), 15 January 2009, §35 (providing that 'statements unequivocally aimed at justifying war crimes such as torture or summary executions' violate Art.10). In some cases, the Court has involved a value related to combatting terrorism: the 'peaceful settlement of international conflicts and the sanctity of human life': see ECtHR, *Kasymakhunov and Saybatalov v. Russia* (App nos. 26261/05 & 26377/06), 14 March 2013, §106.

[342] ECtHR, *Roj TV A/S v. Denmark* (App. no. 24683/14), 17 April 2018. The company was convicted under article 114e of the Danish Penal Code which penalized 'any person who promotes … the activities' of a terrorist person or group and fined approximately 670,000 EUR.

[343] ECtHR, *Roj TV A/S v. Denmark* (App. no. 24683/14), 17 April 2018, §31.

with repetitive incitement to participate in fights and actions' amounted 'to propaganda for the PKK'.[344] The Danish court found that the channel 'unilaterally showed the views of the PKK' without any alternative voices or any 'effort on behalf of the applicant company to distance itself' from the inciting language.[345] As the programmes included 'incitement to violence and support for terrorist activity' they were found not to attract the protection of article 10.[346]

Similarly, the Court found that article 17 applied when German authorities confiscated assets and shut down activities of Hizb Ut-Tahrir, a self-described 'global Islamic political party and/or religious society' that advocated for the overthrow of governments and the installation of an Islamic Caliphate.[347] Although the group argued that it 'did not accept violence to achieve its religious and political objectives',[348] the Court observed that German authorities had concluded—based on statements published in magazines, flyers and transcripts of public statements—that Hizb Ut-Tahiri had 'called for the violent destruction' of the State of Israel and for the 'banishment and killing of its inhabitants'.[349] On that basis, the Court considered that article 10 could not protect the group's speech.[350] The Court came to the same conclusion in a different case concerning two members of Hizb Ut-Tahrir who were 'engaged in spreading its ideology by distributing its literature and recruiting new members'.[351] In that case the Court argued that Hizb ut-Tahrir had published 'anti-Semitic and pro-violence statements', in particular 'repeated statements justifying suicide attacks in which civilians are killed'.[352] This was considered 'clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and the sanctity of human life'.[353]

And when a Russian citizen was convicted and sentenced to one year imprisonment for disseminating 1,500 communist newspapers, the European Court also found that article 17 applied.[354] The Court observed that the articles in the newspapers 'went far beyond simply criticising the current President' of Ukraine and instead 'openly called for an armed civil conflict with the country aimed at the seizure of State power by the proletariat'.[355] In the Court's opinion, such speech 'constituted a threat to public order and to democracy which is a fundamental feature of the European public order', thereby running 'counter to the fundamental ideas and values underpinning the Convention'.[356]

[344] Ibid., §46.
[345] Ibid., §9. The channel was also financed in part by the PKK: §46.
[346] Ibid., §47. See also ECtHR, *Belkacem v. Belgium* (App. no. 34367/14), 27 June 2017, §§33–37.
[347] ECtHR, *Hizb Ut-Tahrir v. Germany* (App. no. 31098/08), 12 June 2012.
[348] Ibid., §67.
[349] Ibid., §§73–75.
[350] Ibid., §§73–78. The Court found that Arts 9, 10 and 11 did not apply to protect the group.
[351] ECtHR, *Kasymakhunov and Saybatalov v. Russia* (App. nos. 26261/05 & 26377/06), 14 March 2013, §106.
[352] Ibid., §106.
[353] Ibid., §106.
[354] ECtHR, *Romanov v. Ukraine* (App. no. 63782/11), 16 July 2020. The applicant, who conceded he had manufactured and detonated an explosive device, was sentenced to a total of 10 years' imprisonment for dissemination of printed material calling for an armed revolt against the constitutional order and a range of other offences, including terrorism and unlawful possession of firearms and explosives: §§27–44.
[355] Ibid., §163.
[356] Ibid., §164.

3.2. Causal link between speech and harm

In the terrorism context, numerous national laws criminalize speech based on its content, without any requirement as to its actual or potential impact.[357] Such laws violate international standards, which provide that states must demonstrate a causal link between speech and specific types of harm before speech can be restricted.[358]

The Human Rights Committee requires states to establish a 'direct and immediate connection between the expression and the threat' before speech can be penalized.[359] For example, when Chilean police removed a public work of art depicting human rights abuses in Santiago on the grounds that this was necessary to 'prevent[] potential disruption to public order arising out of the burning' of the work, the Committee observed that such harm was 'merely speculative' and found that Chile had violated article 19 of the ICCPR as it had not provided 'a reasonable clarification of the existence of a real and specific threat to public order'.[360]

The Working Group on Arbitrary Detention also requires a causal link between speech and harm, though its exact parameters are unclear. The Working Group has referenced the Human Rights Committee's causation standard in a number of national security cases.[361] In other decisions, it has required a state to show 'cause and effect' between speech and harm. For instance, the Working Group considered a case involving a Venezuelan politician from an opposition group who was charged with property damage and incitement to public disorder after speaking at a protest where violence broke out.[362] The Working Group found a violation of his freedom of speech on the basis that there was 'no evidence to suggest that there is a cause and effect relationship between the organization of a political demonstration, the speech made in the course of that demonstration and the deaths, injuries and material damage that occurred on the fringes of the demonstration'.[363]

Although Inter-American and African regional bodies have had limited opportunities to consider causation in the context of terrorism, they have adopted high causation requirements for other types of speech.[364] The Inter-American Commission has, for example, found a violation of the right to free speech in the American Convention when Cuban citizens who disseminated documents critical of the state were convicted

[357] See s. II.1.1.3. (Harm).

[358] For an analysis of which harms qualify, see s. III.3.1. (Harm).

[359] HRC, General Comment No. 34 (2011), §35, citing HRC, *Shin v. Republic of Korea* (Comm. no. 926/2000), 16 March 2004. See also HRC, *Ross v. Canada* (Comm. no. 736/1997), 18 October 2000, §11.5.

[360] HRC, *Marchant Reyes v. Chile* (Comm. no. 2627/2015), 7 November 2017, §§7.5, 9. The Committee ordered the police to locate the banners and return them and publicly acknowledge the violation of rights: §9.

[361] See ch. 5 (Espionage and Official Secrets Law), s. III.4.2.2. (Causation). See, e.g., WGAD, *Gulmira Imin v. China* (Opinion no. 29/2012), 29 August 2012, §28; WGAD, *Ziyuan Ren v. China* (Opinion no. 55/2014), 21 November 2014, §28; WGAD, *Zhen Jianghua v. China* (Opinion no. 20/2019), 1 May 2019, §71.

[362] He was also charged with incitement to arson: WGAD, *López Mendoza v. Venezuela* (Opinion no. 26/2014), 26 August 2014, §32.

[363] WGAD, *López Mendoza v. Venezuela* (Opinion no. 26/2014), 26 August 2014, §54 (the WGAD also noted that the demonstration had 'already ended'). Although this reasoning suggests that the Working Group requires actual violence to have occurred before it will find a restriction to speech valid, in other decisions the Group has indicated that 'incitement to hatred' may be sufficient cause to restrict speech: see s. III.3.1. (Harm) (discussing WGAD, *Alaa Ahmed Seif al Islam Abd El Fattah v. Egypt* (Opinion no. 6/2016), 19 April 2016).

[364] See ch. 3 (Hate Speech), s. II.1.2. (Harm) and ch. 5 (Speech Related to National Security: Espionage and Official Secrets Laws), s. III.4.2. (Harm).

of sedition. The Commission noted that any alleged 'violation of public order … must arise' from speech or other causes that 'pose a certain and credible threat of a potentially serious disturbance of the basic conditions for the operation of democratic institutions'.[365] And it considered it insufficient to invoke 'mere conjecture about potential disturbances of order, or hypothetical circumstances derived from the authorities' interpretations of facts that do not clearly pose a reasonable risk of serious disturbances ("lawless violence")'.[366] Similarly, the OAS Rapporteur has declared that, in order to justify restrictions on freedom of expression to protect the rights of others, those rights must 'be clearly harmed or threatened'.[367] A speaker must have had both intent to 'promot[e] lawless violence or … similar action' and 'the *capacity* to achieve this objective and create an *actual risk* of harm'.[368] Likewise, the Declaration of Principles of Freedom of Expression and Access to Information in Africa requires 'a close causal link between the risk of harm and the expression' to justify penalties on speech imposed on public order or national security grounds.[369]

The UN and the Council of Europe have suggested that the appropriate causation test is that speech 'causes a danger' that 'terrorist offences … may be committed'.[370] The Council of Europe's Convention on the Prevention of Terrorism provides for the offence of 'public provocation to commit terrorist offences', prohibiting 'the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence' where such speech '*whether or not directly advocating* terrorist offences, *causes a danger that* one or more such offences may be committed'.[371] The Explanatory Report of the Convention further explains that 'when considering whether such danger is caused, the nature of the author and of the addressee of the message, as well as the context in which the offence is committed shall be taken into account'.[372] The former UN Special Rapporteur on terrorism has tweaked this definition by stating that the caveat 'whether or not *directly* advocating terrorist offences' should be revised to 'whether or not "*expressly*" advocating' such offences.[373] This was intended to 'cover the situation of using coded language', but not to 'reduce the requirement to prove both a subjective intention to incite as well as an objective danger that a terrorist act will be committed'.[374] The current Special Rapporteur has also suggested that the

[365] IACmHR, *Roca Antúnez v. Cuba* (Case 12.127), 24 February 2018, §107.
[366] Ibid. See also IACmHR. *Biscet v. Cuba* (Case 12.476), 21 October 2006.
[367] IACmHR, *Annual Report of the Inter-American Commission on Human Rights: Report of the Special Rapporteur for Freedom of Expression* (2009) OEA/Ser.L/V/II., Doc. 51, 250.
[368] IACmHR, *Report on the Violence Against LGBTI Persons* (2015) OEA/Ser.L/V/II. Doc.36/15 Rev.2, §235 (in the context of mandatory restrictions on speech).
[369] ACmHPR, Declaration of Principles of Freedom of Expression and Access to Information in Africa (2019), Principle 22 (5).
[370] COE Convention on the Prevention of Terrorism (2005) Art. 5; UN Special Rapporteur on terrorism, Martin Scheinin, *Report on Ten areas of best practices in countering terrorism* (2010) UN Doc. A/HRC/16/51.
[371] COE Convention on the Prevention of Terrorism (2005) Art. 5 (emphasis added). The Convention has been signed and ratified by 42 states (including Russia) as well as the European Union. For a discussion of the intent requirements provided by Art. 5: see III.3.3 (Intent).
[372] COE, *Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism* (2005) CETS 196, §100.
[373] UN Special Rapporteur on terrorism, Martin Scheinin, *Report on Ten areas of best practices in countering terrorism* (2010) UN Doc. A/HRC/16/51, §30 (emphasis added).
[374] Ibid. See s. III.1 (Legality).

causation requirement in the context of speech-related terrorism offences should be a '*reasonable probability that the expression in question would succeed in inciting a terrorist act*, thus establishing a degree of causal link or *actual risk* of the proscribed result occurring'.[375]

The European Court has imposed a lower causation threshold than its counterparts. Establishing a link to specific harm that speech may cause is not a requirement but one of many factors 'taken into account' when the Court considers the necessity of restricting speech.[376] And it appears that the Court may not have been consistent in the causation test it has applied. On some occasions, the Court has considered whether speech is 'capable of inciting' violence,[377] 'liable to incite to violence',[378] or that 'could have stirred up violence' and 'could have affected public order in the region'.[379] More recent decisions have coalesced around a single, albeit broad, standard: whether statements 'could, when read as a whole and in their context, be seen as a call for violence, hatred or intolerance'.[380]

Early iterations of the European Court's conception of causation were articulated in a number of Turkish cases in the late 1990s in which journalists, media professionals or politicians were charged under counterterrorism provisions for publishing material deemed to be supportive of the Kurdistan Workers' Party or 'PKK'. For example, the owner of a weekly publication was convicted and fined for the crime of 'propaganda' after publishing news articles referring to Turkish territory as 'Kurdistan', describing the fight for liberation as a 'war directed against the forces of the Republic of Turkey' and stating that 'we want to wage a total liberation struggle'.[381] While the Court held that the references to 'Kurdistan' and a 'national liberation struggle' cannot 'be deemed sufficient to regard the interference [with speech] as [being] necessary', the references to waging war 'must be seen as *capable of* inciting to further violence in the region', and therefore found the interference with speech proportionate.[382]

Some European Court judges have however criticized the Court's application of this 'capable of' or 'liable to' incite violence causation test on the basis this approach pays 'insufficient attention to the general context in which the words were used and their likely impact'.[383] In a leading case, *Surek (No. 4) v. Turkey*, the majority of the Court

[375] UN Special Rapporteur on terrorism, *Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders* (2019) UN Doc. A/HRC/40/52, §37 (emphasis added). See ch. 3 (Hate Speech), s. III.2.3.1. (Harm).

[376] These factors include 'the context in which the impugned statements were made, their nature and wording, their potential to lead to harmful consequences', whether 'the statements were made against a tense political or social background' and whether they 'could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance'. ECtHR, *Atamanchuk v. Russia* (App. no. 4493/11), 11 February 2020, §50. See also ECtHR, *Ibragimov v. Russia* (App. nos. 1413/08 & 28621/11), 28 August 2018, §99. See ch. 3 (Hate Speech), s. III.2.3.1. (Harm).

[377] ECtHR (GC), *Sürek v. Turkey (No. 3)* (App. no. 24735/94), 8 July 1999, §40.

[378] ECtHR (GC), *Sürek v. Turkey (No. 4)* (App. no. 24762/94), 8 July 1999, §58.

[379] ECtHR, *Leroy v. France* (App. no. 36109/03), 2 October 2008, §45.

[380] See s. III.3.1. (Harm); ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §§206, 240. ECtHR, Guide on Article 10 of the Convention, 31 August 2022, §557. See, e.g., ECtHR, *Gündüz v. Turkey* (App. no. 35071/97), 4 December 2003, §§ 48, 51; ECtHR, *Féret v. Belgium* (App. no. 15615/07), 16 July 2009, § 64.

[381] ECtHR (GC), *Sürek v. Turkey (No. 3)* (App. no. 24735/94), 8 July 1999, §10 (emphasis added).

[382] Ibid., §§40–42. The owner of the publication was sentenced to approximately 2.9 million EUR.

[383] ECtHR (GC), *Sürek v. Turkey (No. 4)* (App. no. 24762/94), 8 July 1999, Joint Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve.

applied this test and found a violation of article 10 after the owner of a publication was convicted of engaging in 'propaganda' for publishing news commentary about the Kurdish cause that stated that 'the real terrorist is the Republic of Turkey', and was fined approximately 2.9 million Euros.[384] The majority considered that 'State authorities enjoy a wider margin of appreciation' where 'remarks incite to violence', but found that on the whole, 'the content of the articles cannot be construed as being capable of inciting to further violence' or as 'liable to incite to violence'.[385] The Court stated that '[a]dmittedly', the commentary stated that 'it is time to settle accounts', but took the view that this reference 'must be seen in the context of the overall literary and metaphorical tone of the article and not as an appeal to violence'. It also described the reference to Turkey as 'the real terrorist' to be 'more of a reflection of the hardened attitude of one side to the conflict, rather than a call to violence' against it.[386]

But in a concurring judgment, five other judges argued that the majority's reasoning was faulty because, although the correct result was reached, the majority 'attaches too much weight to the form of words used in the publication'.[387] The concurring opinion stated that an 'approach which is more in keeping with the wide protection afforded to political speech … is to focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered'.[388] They considered that the Court should ask questions such as: '[w]as the language *intended to* inflame or incite to violence? Was there a *real and genuine risk* that it might actually do so?', as well as examining other contextual factors such as the position of influence of the author, the prominence of the newspaper or whether the words were 'far away from the centre of violence or on its doorstep'.[389]

Another concurring judgment in the same decision went a step further and advocated that the Court adopt the 'clear and present danger' test as articulated by US courts as the required causal link between speech and harm.[390] Judge Bonello held that the Court's existing causation threshold—described as justifying restrictions to speech that '*supported or instigated* the use of violence'—was an 'insufficient' yardstick.[391] He argued instead that freedom of expression 'does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing *imminent* lawlessness and *is likely to incite or produce* such action', which is a 'question of proximity and degree'.[392] And he concluded that the news commentary in that case did not have the 'potential of imminently threatening dire effects on the national

[384] ECtHR (GC), *Sürek v. Turkey (No. 4)* (App. no. 24762/94), 8 July 1999, §58. He was charged under a provision which criminalized 'written and spoken propaganda … aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation' and penalized any person 'who engages in such an activity' and fined 83,333,333 Turkish lira: §24.

[385] Ibid., §§57–58.

[386] Ibid., §58.

[387] Ibid., Joint Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve.

[388] Ibid., Joint Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve.

[389] Ibid. (emphasis added). See s. III.3.3. (Intent).

[390] See ch. 3 (Hate Speech), s. II.2.3.2. (United States).

[391] ECtHR (GC), *Sürek v. Turkey (No. 4)* (App. no. 24762/94), 8 July 1999, Concurring Judgment of Judge Bonello.

[392] Ibid. (emphasis added).

order', meaning that the sanctions imposed on the speaker were inappropriate.[393] These two concurring positions were replicated in similar terrorism cases handed down around this time.[394]

In decisions that postdate these concurring judgments, the European Court has continued to adopt broad causation requirements and attach considerable weight to the inflammatory nature of speech rather than its potential impact.[395] A leading example is the case of *Leroy v. France,* which involved a cartoon published in a Basque weekly newspaper depicting the attacks of September 11, two days after those attacks, with the caption 'We have all dreamt of it … Hamas did it'.[396] Pursuant to France's 'apology for terrorism' offence, the cartoonist and publisher of the newspaper were convicted and each fined 1,500 Euros.[397] The Court took the view that the cartoon expressed 'support and moral solidarity' for the perpetrators of the attacks, and since it was printed two days after the attacks, 'when the whole world was reeling from the news' and 'in a politically sensitive [Basque] region' of France, that the cartoon 'elicited reactions which *could have* stirred up violence' and 'could have affected public order in the region' and therefore that article 10 had not been violated.[398]

Commentators have criticized the Court's decision in *Leroy,* arguing that 'it is hard to maintain that the drawing in question created a "credible" danger that more terrorist offences would be committed', in light of the relatively small circulation of the weekly [newspaper] and the differences between terrorist attacks taking place in the United States and differently-motivated attacks in the Basque region'.[399] According to this view, the case demonstrates that the 'capable of' or 'liable to' incite violence test 'is a vague one that allows judges considerable scope to prohibit speech merely because they consider it to be highly offensive', reflecting the concerns of the concurring judges from *Surek* and other earlier cases.[400]

In applying this contested approach to causation, the European Court considers a number of factors, including the identity of the speaker and the audience, the tone of the speech and the timing and location of the speech, including whether this overlaps with ongoing terrorist violence.[401] In practice, the Court's approach has resulted in a patchwork of jurisprudence from which it is difficult to draw patterns and predict when

[393] Ibid.

[394] See ECtHR, *Sürek v. Turkey (No. 1)* (App. no. 26682/95), 8 July 1999; ECtHR (GC), *Sürek v. Turkey (No. 3)* (App. no. 24735/94), 8 July 1999; ECtHR (GC), *Sürek and Özdemir v. Turkey* (App. nos. 23927/94 & 24277/94), 8 July 1999.

[395] See, e.g., ECtHR, *Z.B. v. France* (App. no. 46883/15), 2 September 2021.

[396] See ch. 3 (Hate Speech), s. III.2.3.1. (Harm).

[397] ECtHR, *Leroy v. France* (App. no. 36109/03), 2 October 2008.

[398] Ibid., §45 (emphasis added).

[399] S. Sottiaux, 'Leroy v. France: apology of terrorism and the malaise of the European Court of Human Rights' free speech jurisprudence' (2009) 3 *European Human Rights Law Review* 415, 424. See also A. Dyer, 'Freedom of Expression and the Advocacy of Violence: Which Test Should the European Court of Rights Adopt?' (2014) 33/1 *Netherlands Quarterly of Human Rights* 78–107.

[400] See Dyer (n 399) 97.

[401] Cf., Rabat Plan of Action, §29 (providing a six-part threshold test to determine if hate speech can be restricted by criminal penalties, including 'context'; 'speaker' and 'content and form'); HRC, General Comment No. 34 (2011), §34 ('The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination').

the Court will or will not allow a restriction to speech on the basis of terrorism or public order laws.

3.2.1. 'Glorification', 'justification' and 'apology' offences

One consequence of the need for a causal link between the speech and proscribed harm is that crimes such as the 'glorification', 'justification' and 'apology' of terrorism have been deemed to violate international law.[402] These have been distinguished from 'incitement' to terrorism, on the basis that incitement provisions generally incorporate higher intent and causation requirements than these crimes: intent to incite a terrorist offence as well as causing a 'danger that a terrorist act will be committed'.[403] The former UN Secretary-General Ban Ki-moon denounced the 'troubling trend' of criminalizing 'glorifying' terrorism, insisting that 'incitement must be separated from glorification' and that 'the first may be legally prohibited, the second may not'.[404] The Secretary-General also defined the appropriate parameters of incitement as 'a direct call to engage in terrorism, with the intention that this will promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring'.[405] The UN has also stated that '[s]uch offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying" or "justifying" terrorism' should be 'clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression'.[406] In the words of the UN High Commission for Human Rights:

> A troubling trend has been the proscription of the glorification (*apologie*) of terrorism, involving statements which may not go so far as to incite or promote the commission of terrorist acts, but might nevertheless applaud past acts. While such statements might offend the sensibilities of individual persons and society, particularly the victims of terrorist acts, it is important that vague terms of an uncertain scope such as *glorifying* or *promoting* terrorism are not used when restricting expression.[407]

The UN Human Rights Committee has also highlighted that such laws, for example Ethiopia's 'criminalization of encouragement and inducement of terrorism through publication', can 'lead to abuse against the media'.[408] And the Working Group on Arbitrary Detention has found violations of freedom of speech in assessing laws that

[402] These have also been criticized or struck down on the ground of vagueness. See s. III.1. (Legality).

[403] UN Special Rapporteur on terrorism, Martin Scheinin, *Report on Ten areas of best practices in countering terrorism* (2010) UN Doc. A/HRC/16/51, §30. Although not all incitement provisions in state practice have high intent and causation bars: see s. II.1.1.1. (Inciting or encouraging terrorism).

[404] UN Secretary-General, *Report on The protection of human rights and fundamental freedoms while countering terrorism* (2008) UN Doc. A/63/337, §61.

[405] Ibid.

[406] HRC, General Comment No. 34 (2011), §46.

[407] OHCHR, *Human Rights, Terrorism and Counter-terrorism: Fact Sheet No. 32* (1 July 2008). See also CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2021) UN Doc S/2021/973 (Annex), §§19, 39 (observing that 'measures criminalizing glorification of acts of terrorism could lead to human rights violations').

[408] HRC, *Concluding Observations, Ethiopia* (2011) UN Doc. CCPR/C/ETH/CO/1, §15.

criminalize 'advocating' terrorism or 'encouragement of terrorism' due to the overbroad nature of such provisions.[409]

Similarly, a Joint Declaration published by a number of UN and regional Special Rapporteurs also criticized 'the criminalisation of speech' based on 'vague notions such as providing communications support to terrorism or extremism, the "glorification" or "promotion" of terrorism or extremism, and the mere repetition of statements by terrorists, which does not itself constitute incitement'.[410] It concluded that, instead, criminal penalties should be restricted to instances of 'intentional incitement to terrorism', which should be 'understood as a direct call to engage in terrorism which is directly responsible for increasing the likelihood of a terrorist act occurring, or to actual participation in terrorist acts'.[411] Recent reports of the UN Special Rapporteur on terrorism have also criticized offences of 'glorification, justification, advocacy, praising or encouragement of terrorism, and acts relating to "propaganda" for terrorism'.[412] The Special Rapporteur has described the problematic 'element common to these offences' as liability arising 'based on the content of the speech, rather than the speaker's intention or the actual impact of the speech'.[413] The Inter-American Commission has similarly taken the view that 'laws that broadly criminalize the public defense (apologia) of terrorism or of persons who might have committed terrorist acts, without considering the element of incitement "to lawless violence or to any other similar action" are incompatible with the right to freedom of expression'.[414]

In contrast, the European Court's expanded conception of harm and causation has seen the Court approve of offences that capture speech on a much broader basis than incitement to terrorism, such as 'engag[ing]' in separatist 'propaganda' or 'apology of terrorism'.[415] This is because the Court has 'accepted that certain forms of identification with a terrorist organization' and 'glorification' may be regarded as 'support for terrorism and incitement to violence and hatred', and deemed this to be sufficient harm to justify criminal penalties.[416] And the Court has considered that 'disseminating messages in praise of the perpetrator of an attack, denigrating the victims, calling for the financing of terrorist organizations or other similar conduct' can itself 'constitute acts of incitement to terrorist violence'.[417]

[409] See, e.g., WGAD, *Saber Saidi v. Algeria* (Opinion no. 49/2012), 16 November 2012, §§17–19 (finding that 'invoking loose definitions of offences that allow for a broad interpretation' of the charge of 'advocating terrorism' meant that 'the law is not in conformity with international law'); WGAD, *Eskinder Nega v. Ethiopia* (Opinion no. 62/2012), 21 November 2012, §§32, 40 (citing the Human Rights Committee's concern as to the scope of Ethiopia's encouragement of and inducement to terrorism offences, and holding that the 'application of the overly broad offences in the current case constitutes an unjustified restriction on the rights to freedom of expression and to a fair trial'). See s. III.1. (Legality).

[410] UN Special Rapporteur; OSCE Representative on Freedom of the Media; OAS Special Rapporteur; ACmHPR Special Rapporteur on Freedom of Expression and Access to Information, Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation (2008).

[411] Ibid.

[412] UN Special Rapporteur on terrorism, *Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders* (2019) UN Doc. A/HRC/40/52, §37.

[413] Ibid. See s. III.3.2. (Causal link between speech and harm).

[414] IACmHR, *Report on Terrorism and Human Rights* (2002) OEA/Ser.L/V/II.116 Doc. 5 rev. 1, §323.

[415] See, e.g., ECtHR, *Leroy v. France* (App. no. 36109/03), 2 October 2008; ECtHR (GC), *Sürek v. Turkey (No. 3)* (App. no. 24735/94), 8 July 1999; ECtHR (GC), *Zana v. Turkey* (App. no. 18954/91), 25 November 1997.

[416] ECtHR, *Yavuz and Yaylalı v. Turkey* (App. no. 12606/11), 17 December 2013, §51.

[417] Ibid. See s. III.3.1. (Harm).

For instance, in a case concerning France's 'apology for terrorism' provision, the European Court considered a radio broadcast of a former member of an extreme left-wing terror group who had spent 25 years in prison for terrorist-related murders.[418] When asked to comment on more recent terrorist attacks committed in France, he said that 'we can't say that these kids are cowards' and that he 'found them very brave'.[419] He was sentenced to 18 months' imprisonment.[420] The Court observed that states have a 'wider margin of appreciation' when 'remarks incite the use of violence', but also when 'statements … glorify violence and thereby *indirectly* incite its use'.[421] Finding that even if the applicant 'did not express support for Islamist ideology', he 'presented the terrorist method of action, for which he himself had twice been sentenced to life imprisonment, in a romantic light by using positive and glorious images of the perpetrators'.[422] In light of this, and the fact his comments were made less than a year after the ISIS attacks, the Court determined they amounted to 'indirect incitement to the use of terrorist violence'.[423]

In another recent case, the European Court approved of a 'glorification' offence even though it accepted that the speaker was intending to be humorous rather than incite violence. In this case, an uncle gave his three-year-old nephew a T-shirt to wear to school which read 'I am the bomb!' and 'Jihad, born on 11 September', and was sentenced to two months' suspended imprisonment and a fine for 'glorify[ing]' serious crimes.[424] The nephew only wore the T-shirt for one afternoon in his kindergarten class and the wording was only viewed by two people—both adults—who were helping to dress the child.[425] In finding that this penalty was compatible with the right to free speech, the European Court took into account 'the importance and weight' of the 'general context', being that the incident took place 'only a few months after other terrorist attacks … which caused the death of three children in a school'.[426] The fact that the uncle 'has no links to any terrorism movement' and 'has not subscribed to a terrorist ideology' but rather was intending to be humorous did not change this conclusion.[427] The Court also held that even appreciating the 'importance of the absence of publicity' in the context of only two individuals having viewed the message, the uncle 'could not have been unaware of the particular resonance' of the message in a school, and the national courts were in a 'privileged position to apprehend the need for a [criminal] sentence' in the case.[428] Media freedom group Article 19, which intervened in the case,

[418] ECtHR, *Rouillan v. France* (App. no. 28000/19), 23 June 2022. See s. III.5. (Penalties).
[419] Ibid., §5.
[420] Including 10 months' probation served at home, and a fine.
[421] ECtHR, *Rouillan v. France* (App. no. 28000/19), 23 June 2022, §66 (emphasis added).
[422] Ibid., §69.
[423] Ibid., §71. However, in light of its 'nature' and 'severity', the Court held his prison sentence was disproportionate to the aim pursued, and found a violation of article 10 'with regard to the severity of the criminal sanction imposed': §§75–77. See s. III.5. (Penalties).
[424] ECtHR, *Z.B. v France* (App. no. 46883/15), 2 September 2021, §11. His sister was also convicted and sentenced to a one-month suspended sentence and a fine, and they both were required to pay damages in a civil action.
[425] Ibid., §§8, 62.
[426] The European Court considered, but ultimately dismissed, an argument by France that Art. 17 of the Convention applied: ibid., §§18–27.
[427] Ibid., §§57–60.
[428] Ibid., §§62–66.

observed that 'it is clear that the inscriptions on the child's T-shirt were unlikely to incite violence', and that the Court 'consistently fails to heed international standards on freedom of expression accordingly to which the mere "praise", "glorification" or "support" of violence or terrorism are overly vague legal standards' bound to criminalize lawful speech.[429]

This view has more recently been advocated by a judge of the European Court, Judge Lemmens, who has suggested that the Court should explicitly hold that making it an offence to 'praise or justify terrorism, without requiring that the opinion expressed can be considered incitement to violence or hate speech' should be considered a violation of article 10 of the European Convention.[430] In that case, a politician spoke at an event honouring the ETA terrorist group and was charged with 'praise or justification' of terrorism.[431] The majority decision did not opine on the validity of the law itself, but concluded that the speech 'did not incite the use of violence or armed resistance, either directly or indirectly' as it advocated 'embarking on a democratic path' to achieve 'political objectives'.[432] As a result, the politician's one-year suspended prison term and seven-year ban on running for office could not qualify as 'necessary'. In a concurring decision finding a violation of article 10, Judge Lemmens held that Spain's provision was 'too broad in scope', because it 'makes it an offence to praise or justify terrorism, without requiring the opinion expressed be considered incitement to violence or hate speech'.[433] As a result, he 'would have preferred the Court to state explicitly that the problem of the disproportionate nature of the interference is rooted in the law itself'.[434]

3.3. Intent

International bodies have outlined a minimum 'intent' requirement for speech-based terrorism laws when assessing offences such as 'glorification', 'justification' or 'apology' of terrorism, now common across Europe and other parts of the world.[435] For example, the Human Rights Committee has critiqued the United Kingdom's 'encouragement of terrorism' offence for being 'broad and vague' and capturing speech even when a person 'did not intend members of the public to be directly or indirectly encouraged by

[429] Article 19, 'European Court of Human Rights: Contradictory rulings in two key free expression and terrorism cases' (2 September 2021).

[430] ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021 (Concurring opinion of Judge Lemmens), §7.

[431] ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021. See s. III.3.1. (Harm).

[432] ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021, §§46–52.

[433] Ibid. Concurring Opinion of Judge Lemmens, §7. Judge Lemmens also considered this to apply generally, not just in the case of Spain: 'the 'mere' fact of praising terrorism or justifying acts of terrorism without such remarks being considered as calls to violence or hate speech, is not sufficient to exempt such opinions from the protection of Article 10'): §9.

[434] Ibid. Concurring opinion of Judge Lemmens, §7.

[435] See s. III.3.2.1. ('Glorification', 'justification' and 'apology' offences); see also s. II.1.1.2. (Glorification or justification of terrorism). See, e.g., UN Special Rapporteur on terrorism, *Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders* (2019) UN Doc. A/HRC/40/52, §37 ('The element common to these offences is that liability is based on the content of the speech, rather than the speaker's intention or the actual impact of the speech').

his or her statement to commit acts of terrorism' but was nonetheless 'understood by some members of the public as encouragement to commit such acts'.[436]

In contrast, some 'incitement' to terrorism offences, which incorporate an intent requirement, have been found to comply with international standards. The UN Secretary-General has defined permissible incitement to terrorism offences as those encompassing 'a direct call to engage in terrorism, with the intention that this will promote' terrorism.[437] The Security Council's Counter-Terrorism Committee considers that 'United Nations human rights mechanisms have been clear that the offence of incitement to commit terrorist acts must apply only to those communications that are actually *directed at* inciting violence.'[438] And the UN Special Rapporteur's model offence of incitement of terrorism criminalizes those who 'intentionally distribute' a message 'with the intent to incite the commission of a terrorist offence'.[439] This model offence requires an express reference to two elements of intent: 'intent to communicate a message and intent that the message incite the commission of a terrorist act'.[440] The Council of Europe Convention on the Prevention of Terrorism requires the same double intent standard: that the offence is committed 'unlawfully and intentionally', and that the impugned speech is made or distributed 'with intent to incite the commission of a terrorist offence'.[441]

Other bodies have developed intent standards that are applicable in the context of terrorism and public order offences. The Inter-American Commission on Human Rights, adopting a position similar to U.S. domestic law,[442] has held that penalties for hate speech can only be justified when a speaker was 'not simply issuing an opinion' but also had 'intent' to 'promot[e] lawless violence or similar action'.[443] The Inter-American Court has also addressed offences penalizing physical acts of terrorism that were applied to speech, and held that 'the special intent or purpose' of instilling 'fear in the

[436] HRC, *Concluding observations, United Kingdom of Great Britain and Northern Ireland* (2008) UN Doc. CCPR/C/GBR/CO/6, §26. The Human Rights Committee recommended the United Kingdom consider amending this offence to ensure that 'its application does not lead to a disproportionate interference with freedom of expression'. The Committee also recommended that Morocco revise its terrorism-related offences so that they were defined 'on the basis of their objective', expressing concern as to 'reports that charges have been brought under these provisions without proper cause against journalists who were fulfilling their duty to inform the public'. HRC, *Concluding Observations, Morocco* (2016) UN Doc. CCPR/C/MAR/CO/6, §§17–18.

[437] UN Secretary General, *Report on the The protection of human rights and fundamental freedoms while countering terrorism* (2008) UN Doc. A/63/337, §61. See also CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2021) UN Doc. S/2021/973 (Annex), §10 (summarizing best practices outlined by UN human rights bodies as recommending incitement to terror offences 'expressly include both a subjective element (intent that a terrorist act be committed as a result) and an objective element (creation of a danger that this will in fact happen)').

[438] CTED*, Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2016) UN Doc. S/2016/50, §11 (emphasis added).

[439] UN Special Rapporteur on terrorism Martin Scheinin, *Report on Ten areas of best practices in countering terrorism* (2010) UN Doc. A/HRC/16/51, §32.

[440] Ibid., §§30–31.

[441] COE Convention on the Prevention of Terrorism Art. 5; COE, *Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism* (2005) CETS 196, §99.

[442] See ch. 3 (Hate Speech), s. II.2.3.2. (United States) and ch. 2 (Insulting Speech), s. II.1.2. (Intent) (regarding the adoption of the 'actual malice' standard in the Inter-American context).

[443] IACmHR, *Violence against LGBTI Persons* (2015) OAS/Ser.L/V/II.Doc.36/15 Rev.2, §235. See also OAS Special Rapporteur, *Inter-American Legal Framework regarding the Right to Freedom of Expression* (2009) OEA/Ser.L/V/II CIDH/RELE/INF. 2/09, §58.

general population' is a fundamental element to distinguish conduct of a terrorist nature from conduct that is not … without which the conduct would not meet the definition'.[444] And in the African context, the Declaration of Principles on Freedom of Expression in Africa provides that when determining if any type of speech falls into the exceptional category of warranting criminal sanctions, states should take into account the 'existence of a clear intent to incite'.[445]

The European Court of Human Rights will also consider the intent of the speaker as a relevant factor in determining necessity, but sets a lower bar.[446] For example, the European Court held that 'the mechanical repression of media professionals' under a Turkish law which criminalized anyone who 'publish[ed] statements or leaflets by terrorist organizations' 'without taking into account their purpose … cannot be reconciled with the freedom to receive or impart information or ideas'.[447]

However, in a number of cases the European Court has, even in the criminal context, allowed convictions without requiring a clear showing of intent to incite terrorism or even without reaching a conclusion as to the speaker's intent.[448] For example, in *Leroy v. France,* a cartoonist argued that he did not intend to encourage terrorism but to express his anti-American sentiment.[449] The Court, however, found his conviction compatible with his right to free speech, noting that the drawing could 'in itself demonstrate the intention of the author' to 'support[] and glorif[y] … violence'.[450] And the Court ultimately concluded that 'the applicant's intentions are unrelated to the prosecution', given that his intent to critique American imperialism had only been expressed retroactively and could not 'in view of the context … erase [his] positive assessment of the consequences of a criminal act'.[451]

Similarly, the Court found no violation of the right to free speech when an uncle was convicted of 'glorify[ing]' serious crimes when his nephew wore a T-shirt to school which read 'I am the bomb!' and 'Jihad, born on 11 September'.[452] Before the Court, the uncle argued that 'neither the domestic courts nor even the Government dispute that

[444] IACtHR, *Norín Catrimán v. Chile* (Series C, no. 279), 29 May 2014. §§171–174. However the Court found that the application of a presumption of such intent when certain explosives were used violated both the principle of legality and right to the presumption of innocence.

[445] ACmHPR, Declaration of Principles of Freedom of Expression and Access to Information in Africa (2019), Principle 23(2)(c).

[446] See, e.g., ECtHR (GC), *Jersild v. Denmark* (App. no. 15890/89), 23 September 1994 ('the object of the programme was to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background. There is no reason to doubt that the ensuing interviews fulfilled that aim. Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas'); ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §§238–240.

[447] See, e.g., ECtHR, *Gözel and Özer v. Turkey* (App. nos. 43453/04 & 31098/05) 6 July 2010, §63. This includes cases where the Court has allowed criminal penalties for offences that require speech that does not rise to the level of 'incitement' to terrorism: §61. Cf. HRC, *Kurakbaev and Sabdikenova v. Kazakhstan* (Comm. no. 2509/2014), 19 July 2021, §11.3 (providing that 'a ban on a particular publication' is not permissible 'unless specific content, that is not severable, can be legitimately prohibited under article 19(3)').

[448] See s. III.3.2.1. ('Glorification', 'justification' and 'apology' offences).

[449] ECtHR, *Leroy v. France* (App. no. 36109/03), 2 October 2008, §42. See s. III.3.1. (Harm); ch. 3 (Hate Speech), s. III.2.3.1. (Harm).

[450] ECtHR, *Leroy v. France* (App. no. 36109/03), 2 October 2008, §43.

[451] Ibid., §43. See also ECtHR (GC), *Sürek v. Turkey (No. 1)* (App. no. 26682/95), 8 July 1999, §62.

[452] ECtHR, *Z.B. v. France,* App. no. 46883/15 (2 September 2021), §11. See s. III.3.2. (Causal link between speech and harm).

he had a humorous intention when he wrote the disputed message'.[453] But the French government maintained that a humorous intention 'could not erase the presentation in a favourable light of attacks that had caused thousands of deaths'.[454] And the European Court agreed that despite 'the fact that the [uncle] has no links with any terrorist movement, or has not subscribed to a terrorist ideology', he 'could not have been unaware of the particular resonance' of the message shortly after attacks at another school and that this reflected 'a deliberate intention to valorize criminal acts'.[455] And although the Court recognized that only two adults had seen the message on the child's shirt, it decided not to 'speculate on the exact nature of the applicant's intentions' as to how widely he thought the message would be disseminated or the impact this would have.[456]

A number of judges of the European Court have criticized this approach and argued in favour of a higher intent standard. In a series of concurring judgments in 1990s cases concerning the PKK,[457] European Court judges advocated for the Court to consider whether speech was 'intended to inflame or incite to violence'.[458] This standard would bring the Court into line with the 'intent to incite' harm standards articulated by the Council of Europe and UN Special Rapporteur on terrorism.[459]

The Court's approach to intent has serious consequences for those who report on terrorism. Like the Human Rights Committee, which has stated that the 'media plays a crucial role in informing the public about acts of terrorism' and that 'journalists should not be penalized for carrying out their legitimate activities',[460] the European Court's starting point is that 'news reporting based on interviews or declarations by others, whether edited or not, constitutes one of the most important means whereby the press is able to pay its vital role of "public watchdog" '.[461] The Court has held as a result that punishing a journalist 'for assisting in the dissemination of statements made by another person could seriously hamper the contribution of the press to the discussion of matters of public interest'.[462] So where Turkish journalists were convicted and fined for publishing declarations of an illegal organization,[463] the Court found a violation of article 10, noting that a 'blanket ban' on such statements is unjustified, and regard

[453] ECtHR, *Z.B. v France,* App. no. 46883/15 (2 September 2021), §32.
[454] Ibid., §45.
[455] Ibid., §§57, 63.
[456] Ibid., §62.
[457] See s. III.3.2. (Causal link between speech and harm); ECtHR (GC), *Sürek v. Turkey (No. 4)* (App. no. 24762/94), 8 July 1999, Joint Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve. See also ECtHR, *Sürek v. Turkey (No. 1)* (App. no. 26682/95), 8 July 1999; ECtHR (GC), *Sürek v. Turkey (No. 3)* (App. no. 24735/94), 8 July 1999; ECtHR (GC), *Sürek and Özdemir v. Turkey* (App. nos. 23927/94 & 24277/94), 8 July 1999.
[458] ECtHR (GC), *Sürek v. Turkey (No. 4)* (App. no. 24762/94), 8 July 1999, Joint Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve.
[459] COE Convention on the Prevention of Terrorism Art. 5; COE, *Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism* (2005) CETS 196, §99; UN Special Rapporteur on terrorism Martin Scheinin, *Report on Ten areas of best practices in countering terrorism* (2010) UN Doc. A/HRC/16/51, §§30–31.
[460] HRC, General Comment No. 34 (2011), §46.
[461] ECtHR, *Demirel v. Turkey (No. 3)* (App. no. 11976/03), 9 December 2008, §23.
[462] Ibid.
[463] Ibid. See s. III.4.1. (Public Interest).

must be had to whether the article, 'taken as a whole, can be considered an incitement to violence'.[464]

Similarly, the Court found a violation of article 10 when Turkey criminalized media professionals 'solely on the grounds that they had published statements by terrorist organizations, without carrying out any analysis of the content of the disputed writings or the context in which they were set'.[465] In this case, two editors-in-chief of monthly magazines were fined under a law that penalized anyone who 'prints or publishes statements or leaflets by terrorist organizations'.[466] The Court held that 'the mechanical repression of media professionals [under this law] without taking into account their purpose … or the public's right to be informed from another point of view about a conflict situation, cannot be reconciled with the freedom to receive or impart information or ideas'.[467]

The Court came to the same conclusion when a newspaper received a caution under Russian anti-extremist legislation for publishing an article which contained statements and images from an ultra-right wing political organization that could allegedly incite social, racial or ethnic 'discord'.[468] The Court found that the article, written on the anniversary of the murder of two individuals allegedly by members of the organization, in fact 'aimed to uncover the true nature' of the organization as 'essentially fascist' and sought to 'draw the attention of the public and the authorities to matters of public interest, namely the existence and the activities' of the extremist organization.[469] According to the Court, the impugned quotations, 'when considered in the context of the journalistic and interview parts of the article, did not appear from an objective point of view to have had as their purpose the promotion of extremist ideals'.[470] The caution therefore ran counter to article 10 and did not answer any pressing social need.[471]

But the European Court has not always applied these principles consistently. In the cases in which the Court has found article 17 to apply to terrorist speech the Court does not always address the intent of the speaker.[472] And the Court has allowed the conviction of a media professional who provided an 'outlet' for terrorist speech that may have been intended to incite to violence, but without holding such intent themselves.[473] In this case, in which the owner of a weekly publication was convicted for disseminating separatist 'propaganda' after publishing readers' pro-Kurdish letters, the Court held that was 'a clear intention to stigmatize the other side to the conflict' by the use of phrases

[464] ECtHR, *Demirel v. Turkey (No. 3)* (App. no. 11976/03), 9 December 2008, §27.
[465] ECtHR, *Gözel and Özer v. Turkey* (App. nos. 43453/04 & 31098/05), 6 July 2010, §61.
[466] Ibid., §23. The fine was less than 200 EUR each.
[467] Ibid., §63.
[468] ECtHR, *RID Novaya Gazeta v. Russia* (App. no. 44561/11), 11 May 2021, §89.
[469] Ibid., §93. The fact the quoted interviews were accompanied by 'text amounting to an editorial statement' demonstrated that the newspaper 'considered the views expressed [by the organization] unacceptable': ECtHR, *RID Novaya Gazeta v. Russia* (App. no. 44561/11), 11 May 2021, §96.
[470] Ibid., §97. The Court also found that the public display of symbols indistinguishable from Nazi symbols in the article 'were intended to contribute to a public debate': ECtHR, *RID Novaya Gazeta v. Russia* (App. no. 44561/11), 11 May 2021, §107.
[471] Ibid., §99.
[472] See s. III.3.1. (Harm); ECtHR, *Roj TV A/S v. Denmark* (App. no. 24683/14), 17 April 2018. See also s. III.3.2. (Causal link between speech and harm); s. III.3.3. (Intent).
[473] ECtHR, *Sürek v. Turkey (no. 1)* (App. no. 26682/95), 8 July 1999, §63.

such as 'the fascist Turkish army' and 'the hired killers of imperialism' alongside references to 'massacres', 'brutalities' and 'slaughter' in the letters.[474] The Court accepted that the owner of the publication 'did not personally associate himself with the views contained in the letters', but held that 'he nevertheless provided their writers with an outlet for stirring up violence and hatred' and thereby found that his conviction and fine did not breach article 10.[475] As the owner of the publication, the Court considered he was 'vicariously subject to the "duties and responsibilities" which the review's editorial and journalistic staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension'.[476] This case, decided decades ago, should however be considered an outlier, as was recognized by a number of judges who dissented at the time on the basis that the Court's rationale was 'inconsistent' with a number of its other decisions.[477]

The European Union's decision to sanction Russian state media is an example of the challenges of applying these principles in practice. In 2022, the EU prohibited the 'broadcasting' of 'any content' by Russian outlets Russia Today (RT) and Sputnik.[478] The European Commission justified the ban on the basis of the 'massive propaganda and disinformation' on these outlets that was a 'significant and direct threat to the Union's public order and security'.[479] And the Commission declared it applied to 'all means for transmission and distribution, such as via cable, satellite, IPTV, platforms, websites and apps'.[480] The ban was put in place until the end of the Russian aggression in Ukraine or when Russia and its media outlets 'cease to conduct propaganda'.[481] Despite the global condemnation of Russia's invasion of Ukraine, and the deterioration of media freedom in Russia since that time,[482] this decision has also received strong criticism from groups that promote press freedom. The European Federation of Journalists opposed the decision as a 'complete break' from 'democratic guarantees', and the 'first time in modern

[474] Ibid., §62.

[475] Ibid., §§63–65. See also ECtHR, *Sürek and Özdemir v. Turkey* (App. no. 23927/94 & 24277/94), 8 July 1999, §61 (when determining whether a journalist should be penalized for reporting the statements of a terrorist, the European Court will examine whether the reporting 'taken as a whole' can be considered 'to incite to violence or hatred').

[476] ECtHR, *Sürek v. Turkey (no. 1)* (App. no. 26682/95), 8 July 1999, §63.

[477] Ibid., Joint Partly Dissenting Opinion of Judges Tulkens, Casadevall and Greve and Partly Dissenting Opinion of Judge Palm. See also ECtHR (GC), *Jersild v. Denmark* (App. no. 15890/89), 23 September 1994, §31; ECtHR (GC), *Bladet Tromsø v. Norway* (App. no. 21980/93), 20 May 1999, §63; ECtHR (GC), *Zana v. Turkey* (App. no. 18954/91), 25 November 1997.

[478] Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine. The ban was later extended to three other Russian media outlets: IRIS Legal Observations of the European Audiovisual Observatory, 'Three additional Russian media outlets added to list of banned media in the EU'.

[479] See, e.g., B. Baade, 'The EU's "Ban" of RT and Sputnik' (Verfassungsblog, 8 March 2022).

[480] European Commission, 'Ukraine: Sanctions on Kremlin-backed outlets Russia Today and Sputnik' (2 March 2022). The United States, in a similar act, seized thirteen web domains belonging to the Lebanese Hizballah. Under US law, the domains were subject to seizure as assets of 'entities and organizations engaged in planning or perpetrating acts of terrorism'. According to the US Justice Department, the seizure 'disrupt[ed] terrorist activity by blocking one avenue these groups and individuals use to gather support and influence'. See US Attorney's Office for the Eastern District of Virginia, 'EDVA Seizes Thirteen Domains Used by Lebanese Hizballah and its Affiliates' (11 May 2023).

[481] Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

[482] See, e.g., Freedom House, 'Freedom on the Net: Russia' (2022).

history' that 'Western European governments are banning media'.[483] Others have critiqued the total banning of a platform as likely to be inconsistent with the European Court's harm and proportionality thresholds.[484] And free speech group Article 19 argued that 'any justification on the basis of public order and security' is unlikely to be convincing, given the EU is 'not directly engaged in armed conflict with Russia' and in light of the 'limited distribution and impact' of these channels in EU countries.[485] In 2022 a Dutch journalists' union filed multiple challenges to the ban before the EU's Court of Justice.[486]

4. Exclusions, Exceptions and Defences

4.1. Public interest

The requirement that a speaker should only be penalized under terrorism laws if they intend to incite terrorism means that, as a starting point, journalists merely reporting on terrorist speech should not be subject to criminal penalties.[487]

In addition, 'political' speech, or speech concerning a matter of 'public interest' is entitled to higher protection than speech that is not, even if it relates to national security.[488] The Human Rights Committee has stated that a 'public interest in the subject matter of a criticism' should be recognized as a defence'[489] and that it is not permissible to use national security laws 'to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information'.[490] The Human Rights Committee has also noted that the 'media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted', meaning that 'journalists should not be penalized for carrying out their legitimate activities'.[491]

[483] European Federation of Journalists, 'Fighting disinformation with censorship a mistake' (1 March 2022).

[484] See, e.g., D. Voorhoof, 'EU silences Russian state media: a step in the wrong direction' (Columbia Global Freedom of Expression, 9 May 2022); Article 19, 'Response to the consultation of the UN Special Rapporteur on Freedom of Expression on her report on challenges to freedom of opinion and expression in times of conflicts and disturbances' (19 July 2022). Cf. HRC, *Kurakbaev and Sabdikenova v. Kazakhstan* (Comm. no. 2509/2014), 19 July 2021, §11.3 (providing that 'a ban on a particular publication' is not permissible 'unless specific content, that is not severable, can be legitimately prohibited under article 19(3)').

[485] Article 19, 'Response to the consultation of the UN Special Rapporteur on Freedom of Expression on her report on challenges to freedom of opinion and expression in times of conflicts and disturbances' (19 July 2022). See also Article 19, 'UN: Statement on propaganda for war and free expression' (22 September 2023). See also ch. 1 (Introduction), II.1.3.1.2. (ICCPR: Article 20) and ch. 3 (Hate Speech), s. III.1. (Mandatory Restrictions on Hate Speech) for a discussion of 'propaganda for war' in article 20(1) of the ICCPR.

[486] T. Sterling, 'Dutch journalists, rights group file lawsuit challenging EU ban on RT, Sputnik' (Reuters, 25 May 2022). See also NVJ, 'Tweede klacht over blockade Russiche nieuwzenders bij Europees Hof' (7 September 2022). The EU Court of Justice dismissed a similar challenge on 27 July 2022, commenced by RT France: 'Russian anger after EU court upholds ban on RT' (France24, 27 July 2022).

[487] See s. III.3.3. (Intent); ECtHR (GC), *Sürek and Özdemir v. Turkey* (App. nos. 23927/94 & 24277/94), 8 July 1999, §61; ECtHR, *Gözel and Özer v. Turkey* (App. nos. 43453/04 & 31098/05), 6 July 2010, §63.

[488] See ch. 5 (Espionage and Official Secrets Laws), s. III.5.1. (Public interest defence).

[489] HRC, General Comment No. 34 (2011), §47 (in the context of defamation laws).

[490] Ibid., §30.

[491] Ibid., §46. See s. III.1.3.2.1. ('Glorification', 'justification' and 'apology' offences) (regarding the Committee's response to Ethiopia's 'encouragement of terrorism' offences); s. III.5. (Penalties).

Similarly, the European Court of Human Rights has held that there is 'little scope' for restrictions on free speech 'in two fields, namely political speech and matters of public interest'[492] and that 'public interest' extends beyond political speech.[493] The Court has found that a 'particularly narrow margin of appreciation' will be accorded to states regulating speech when remarks 'concern matters of the public interest',[494] meaning that the 'punishment of a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to the discussion of matters of public interest, and should not be envisaged unless there are particularly strong reasons for doing so'.[495]

But the European Court has also found that where 'remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression'.[496] And the Court has emphasized that although 'a prison sentence imposed for an offence committed in the context of political debate is compatible with freedom of expression only in exceptional circumstances', such circumstances include when 'the speech exhorts the use of violence or constitutes hate speech'.[497]

Terrorism cases illustrate the balancing of these competing values. For example, the European Court considered the case of a Turkish journalist placed under pretrial detention for 'attempting to overthrow the constitutional order' after the 2016 attempted military coup that Turkish authorities alleged was instigated by US-based cleric Fethullah Gülen.[498] Turkish authorities argued that the journalist had visited Gülen at his home and made comments in news articles and a television broadcast 'serving the interests' of the terrorist organization linked to Gülen.[499] But the journalist claimed that his comments had instead warned against further coups, and that he had only interacted with Gülen in his professional capacity as a journalist.[500] The European Court indicated that it was 'prepared to take into account the circumstances' surrounding the Turkish cases brought before it, including that the 'coup attempt and other terrorist acts have clearly posed a major threat to democracy'.[501] However, 'the Court considers that one of the principal characteristics of democracy is the possibility it offers of resolving problems

[492] ECtHR (GC), *Bédat v. Switzerland* (App. no. 56925/08), 29 March 2016, §49. See, similarly, ECtHR (GC), *Sürek v. Turkey* (*No. 2) (*App. no. 24122/94), 8 July 1999, §34, citing ECtHR, *Wingrove v. United Kingdom* (App. no. 17419/90), 25 November 1996, §58; ECtHR, *Castells v. Spain* (App. no. 11798/85), 23 April 1992, §43.

[493] See ECtHR, *Lingens v. Austria* (App. no. 9815/82), 8 July 1986, §41: 'Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on *political issues just as on those in other areas of public interest*' (emphasis added).

[494] And it requires 'very strong reasons justifying restrictions on political speech', ECtHR (GC), *Bédat v. Switzerland* (App. no. 56925/08), 29 March 2016, §49; ECtHR, *Dmitriyevskiy v. Russia* (App. no. 42168/06), 3 October 2017, §95; ECtHR, *Alekhina v. Russia* (App. no. 38004/12), 17 July 2018, §212.

[495] ECtHR, *Demirel v. Turkey (No. 3)* (App. no. 11976/03), 9 December 2008, §23. And the Court in 'no way consider[s] the personality of the author of a piece of writing to be the sole determining factor in punishing the publication in question'. ECtHR, *Gözel and Özer v. Turkey* (App. nos. 43453/04 & 31098/05), 6 July 2010, §54.

[496] ECtHR (GC), *Sürek and Özdemir v. Turkey* (App. nos. 23927/94 & 24277/94), 8 July 1999, §60. See s. III.3.2. (Causal link between speech and harm).

[497] ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021, §39.

[498] See, e.g., 'Turkey's failed coup attempt: All you need to know' (Al Jazeera, 15 July 2017).

[499] ECtHR, *Mehmet Hasan Altan v. Turkey* (App. no. 13237/17), 20 March 2018, §25.

[500] Ibid., §25.

[501] Ibid., §210.

through public debate'.[502] In this context, 'criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda'.[503] And the Court found a violation of the journalist's right to free speech as a result.[504]

The European Court also weighed whether public interest speech could be prosecuted as 'incitement to violence' when the owner and editor of a weekly newspaper were convicted and fined for 'publishing declarations of an illegal organisation' in an article by Abdullah Öcalan, the former leader of the PKK.[505] The Court examined the article and held that it could not be construed 'on any reading, as encouraging violence, armed resistance or an uprising' and was instead 'newsworthy content since it provided, however one-sided, historical information about an organisation which has since 1985 waged armed opposition against the State'.[506] The Court held that, when a publication cannot be categorized as 'incitement to violence', states cannot 'with reference to national security or territorial integrity restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media'.[507] As a result, the conviction under criminal law violated article 10.[508]

The Court came to the same conclusion when a leading politician in the Basque independence movement was sentenced to a one-year suspended sentence and a seven-year ban from office for the crime of 'praise or justification' of terrorism, following a keynote speech in which he paid tribute to a former member of a terrorist organization.[509] The European Court determined that the 'question of the Basque Country's independence', and 'the debate about whether or not to use armed violence to achieve independence' were 'a public debate of general interest'. However, the Court noted that 'the fact that this is a matter of general interest does not mean that the right to freedom of expression in this area is unlimited'.[510] Instead, it was necessary to determine 'whether the speech exhorts the use of violence or constitutes hate speech'.[511] The Court found that, '[a]lthough the speech was delivered as part of an act of homage' to a member of a terrorist group, 'it was clear from the applicant's words that he was advocating reflection with a view to embarking on a new democratic path' and that the speech 'read as a whole did not incite the use of violence or armed resistance'.[512]

[502] Ibid., §210.
[503] Ibid., §211. The Court also held that, even where such charges are brought, pre-trial detention 'should only be used as an exceptional measure of last resort'.
[504] Ibid., §214.
[505] ECtHR, *Demirel v. Turkey (No. 3)* (App. no. 11976/03), 9 December 2008.
[506] Ibid., §26.
[507] Ibid., §27.
[508] Ibid., §§27–30.
[509] ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021. See s. III.3.1. (Harm).
[510] ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021, §44.
[511] Ibid., §39. The Court noted that one of the 'factors that must be taken into account' when deciding whether hate speech has taken place is where the speech 'could be construed as a direct or indirect call to violence or as a justification for violence, hatred or intolerance': §40(ii). See s. III.3.1. (Harm).
[512] ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021, §§46–49.

The Inter-American Court and Commission and the African Court have also consistently provided a high level of protection for speech in the public interest or relating to public officials.[513] In one case, the Inter-American Commission found that charges against Cuban citizens who had disseminated documents criticizing Cuba's socio-economic problems violated the right to freedom of expression, and held that the test 'for the necessity of limitations [on speech] must be applied more strictly whenever dealing with expressions concerning the State, matters of public interest, public officials in the performance of their duties, candidates for public office, private citizens involved voluntarily in public affairs, or political speech and debate'.[514]

4.2. Truth and opinion

Although the defences of opinion and truth are less likely to arise in the context of terrorism laws than in contexts such as defamation, they remain applicable. The Human Rights Committee has made clear that, at least in the context of criminal laws that penalize defamatory speech, courts should recognize a 'defence of truth' and that such criminal laws 'should not be applied with regard to those forms of expression that are not, of their nature, subject to verification'.[515] The European Court and the Inter-American Court also consider that truth should be an exemption or defence from liability in defamation laws.[516] The UN Special Rapporteur has recommended a number of limits on hate speech laws, including that 'no one should be penalized for statements that are true'.[517] Similarly, the Declaration of Principles on Freedom of Expression in Africa provides that, at least in relation to defamation laws, '[n]o one shall be found liable for true statements'.[518] The truthfulness of a statement is relevant to the analysis of intent and reasonableness of conduct of speakers who have violated espionage or official secrets laws.[519] And the OAS Special Rapporteur on Freedom of Expression has similarly observed that the imposition of sanctions for incitement to violence 'must be backed up by actual, truthful, objective and strong proof that the person was not simply issuing an opinion (even if that opinion was hard, unfair or disturbing)'.[520]

An example of the European Court's approach to these defences in a case of 'extremist' speech is when the Court found Russia had violated article 10 by convicting feminist band Pussy Riot for performing their song '*Punk Prayer—Virgin Mary, Drive Putin Away*' in cathedrals in Moscow and uploading videos of these performances to

[513] See, e.g., IACtHR, *Herrera-Ulloa v. Costa Rica* (Case 12.367), 2 July 2004, §101(2)(c); ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §155. See also OAS Special Rapporteur, *Inter-American Legal Framework regarding the Right to Freedom of Expression* (2009) OEA/Ser.L/V/II CIDH/RELE/INF. 2/09, §§37–38.

[514] IACmHR, *Roca Antúnez v. Cuba* (Case 12.127), 2 February 2018, §86.

[515] HRC, General Comment No. 34 (2011), §47.

[516] See ch. 2 (Insulting Speech), s. III.4.1. (Truth); IACtHR, *Herrera-Ulloa v. Costa Rica* (Series C, no. 107), 2 July 2004, §132; ECtHR, *Castells v. Spain* (App. no. 11798/85), 23 April 1992, §48.

[517] UN Special Rapporteur F. La Rue, *Promotion and protection of the right to freedom of opinion and expression* (2012) UN Doc. A/67/357, §50 (citing the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur, Joint Statement on Racism and the Media (2001)).

[518] ACmHPR, Declaration of Principles of Freedom of Expression and Access to Information in Africa (2019), Principle 21.

[519] See ch. 5 (Espionage and Official Secrets Laws), s. III.5.3. (Truth).

[520] OAS Special Rapporteur, Inter-American Legal Framework regarding the Right to Freedom of Expression (2009) OEA/Ser.L/V/II CIDH/RELE/INF. 2/09, §58.

YouTube.[521] The band members were convicted of 'hooliganism for reasons of religious hatred and enmity' for the performances and Russian courts found that their website contained 'extremist' material and banned access to it.[522] In its reasoning, the European Court noted that it has previously found breaches of article 10 in cases 'where under the domestic law an applicant was unable effectively to contest criminal charges brought against him, as he was either not allowed to adduce evidence of the truth of his statements, or to plead a defence of justification'.[523] This meant that the Russian court did not provide 'relevant and sufficient reasons' to interfere with the band's free expression.[524]

5. Penalties

The proportionality of a penalty imposed on speech is a central factor in assessing whether it is 'necessary' and therefore compatible with international standards.[525] International human rights bodies have generally found criminal sanctions to be a disproportionate response to speech, including in the national security and terrorism context, although incitement to violence and even 'hatred' are notable exceptions in the jurisprudence of the European Court.[526]

The Human Rights Committee's jurisprudence demonstrates that it has exercised 'great caution in the imposition of criminal penalties that punish speech', to the point that a term of imprisonment has *never* been found to be an appropriate penalty to speech in individual cases that have come before the Committee.[527] The Committee has also criticized counterterrorism laws in nations such as Cameroon and Bangladesh that are punishable by the death penalty.[528] And the Counter-Terrorism Committee 'considers that the imposition of the death penalty in cases of incitement to commit acts of terrorism may run afoul of the requirements of international human rights law'.[529]

Similarly, the Working Group on Arbitrary Detention has asserted that 'a vague and general reference to the interests of national security or public order, without being

[521] The band uploaded multiple videos to YouTube, one in which they perform the song without incident, and another in which they do not manage to perform the song in full, but members of the band stood in front of a cathedral altar wearing brightly coloured dresses and balaclavas before security stopped them. At points the band members sung, knelt and crossed themselves. ECtHR, *Alekhina v. Russia* (App. no. 38004/12), 17 July 2018, §§11–16.

[522] Ibid., §§48, 231.

[523] Ibid., §266.

[524] Ibid., §267.

[525] See, e.g., HRC, General Comment No. 34 (2011), §§34–35; ECtHR, *Guja v. Moldova* (App. no. 14277/04), 12 February 2008, §78; IACtHR, *Palamara-Iribarne v. Chile* (Series C, no. 135), 22 November 2005, §85; ACtHPR, *Konaté v Burkina Faso* (App. no. 4/2013), 5 December 2014, §145.

[526] See ch. 1 (Introduction), s. II.3.2.6. (Criminal penalties for speech); ch. 5 (Espionage and Official Secrets Laws), s. III.5.5. (Penalties).

[527] HRC, *Rabbae v. Netherlands* (Comm. No. 2124/2011), 14 July 2016, Individual Opinion (concurring) of Committee members Sarah Cleveland and Mauro Politi, §7. See ch. 1 (Introduction), s. II.3.2.6. (Criminal penalties for speech).

[528] HRC, *Concluding Observations: Cameroon* (2017) UN Doc. CCPR/C/CMR/5, §§11–12; HRC, *Concluding Observations: Bangladesh* (2017) UN Doc. CCPR/C/BGD/CO/1, §§9–10.

[529] CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2016) UN Doc. S/2016/50 (Annex), §22; see s. I. (Introduction (describing the mandate of the UN Counter-Terrorism Committee)).

properly explained and documented, is insufficient to convince the Working Group that … restrictions … by way of deprivation of liberty are necessary'.[530] For example, the Working Group has criticized the proportionality of article 105 of China's Criminal Law, which includes fixed-term prison sentences of up to life imprisonment for 'subverting state power or overthrowing the socialist system'.[531] The Working Group, observing that this provision can apply to criminalize the 'exercise of fundamental freedoms, including those of expression and association', considered it to be 'neither necessary to protect public or private interests against injury nor proportionate to guilt'.[532]

Although the European Court of Human Rights considers the 'imposition of a prison sentence for a press offence' or for public interest speech to be compatible with free speech 'only in exceptional circumstances', it classifies 'incitement to violence' or 'dissemination of hate speech' as constituting such circumstances.[533] So while the Court will generally find that states should 'display restraint in resorting to criminal proceedings',[534] in a number of instances the European Court has allowed criminal convictions and punishment—even imprisonment—for speech that was related to terrorism.[535]

One of the few cases in which a prison term was found compatible with free speech by the Court was when a former Turkish mayor was sentenced to 12 months' imprisonment for suggesting he supported the PKK national liberation movement.[536] In an interview published in a newspaper, the mayor said: 'I support the PKK national liberation movement; on the other hand, I am not in favour of massacres' and suggested that the PKK kill women and children 'by mistake'.[537] The Court found that the comments—even though 'both contradictory and ambiguous' and liable to being 'interpreted in several ways'—should be viewed in the context of 'murderous attacks carried out by the PKK' in south-east Turkey, and the 'extreme tension' at that time.[538] In those circumstances, comments from a former mayor in a daily newspaper 'had to be regarded as *likely* to exacerbate an already explosive situation', and the Court held that the penalty imposed 'could reasonably be regarded as answering a 'pressing social need' that was justified under the European Convention.[539] This was despite the fact that the

[530] WGAD, *Gulmira Imin v. China* (Opinion no. 29/2012), 29 August 2012, §29.

[531] WGAD, *Chen Shuqing and Lü Gengsong v. China* (Opinion no. 76/2019), 21 November 2019, §7 ('Article 105 (1) of the Criminal Law of China ("subversion of state power") stipulates a fixed term of imprisonment of not more than three years for participants, three to 10 years for active participants, and not less than 10 years or life imprisonment for those who organize, plot or carry out the scheme of subverting State power or overthrowing the socialist system').

[532] Ibid., §46. Before the Working Group, Chinese authorities did not contest the claim that the applicants in the case, both freelance writers and political dissidents, had been 'charged, tried and imprisoned for their online and offline political activities and their role in the banned Democracy Party of China': §§49–50.

[533] ECtHR (GC), *Cumpănă v. Romania* (App. no. 33348/96), 17 December 2004, §115; ECtHR, *Rouillan v. France* (App. no. 28000/19), 23 June 2022, §74 See ch. 1 (Introduction), s. II.3.2.6. (Criminal penalties for speech).

[534] ECtHR (GC), *Incal v. Turkey* (App. no. 22678/93), 9 June 1998, §54.

[535] See, e.g., ECtHR, *Sürek v. Turkey (No. 1)* (App. no. 26682/95), 8 July 1999, §64. See also ECtHR, *Altintas v. Turkey* (App. no. 50495/08) 10 March 2020, §31–36; ECtHR (GC), *Sürek v. Turkey (No. 3)* (App. no. 24735/94), 8 July 1999, §31.

[536] The court noted that only one-fifth of his sentence was served in prison: ECtHR (GC), *Zana v. Turkey* (App. no.18954/91), 25 November 1997, §61. See s. III.3.2. (Causal link between speech and harm).

[537] Ibid., §12.

[538] ECtHR (GC), *Zana v. Turkey* (App. no. 18954/91), 25 November 1997, §§58–59.

[539] Ibid., §§60–62.

mayor argued that he had told journalists he supported a 'national liberation movement but was opposed to violence', that he was not a member of the PKK and had advocated for non-violent action as a political figure for many years.[540]

The European Court applied a similar focus to the timing and context in a case involving an uncle who dressed his nephew in a T-shirt which read 'I am the bomb!' and 'Jihad, born on 11 September'.[541] The nephew only wore the T-shirt for one afternoon in his kindergarten class and the wording was only viewed by two adults who were helping dress the child.[542] The uncle was sentenced to two months' suspended imprisonment and a fine for 'glorify[ing]' serious crimes.[543] In finding that the penalty was acceptable,[544] the European Court took into account that the incident took place 'only a few months after other terrorist attacks, which caused the death of three children in a school' and held that the French courts were in a 'privileged position to apprehend the need for a sentence' in the case and to better appreciate the 'specific societal problems in particular communities'.[545]

But the European Court will not always uphold criminal penalties even when speech incites violence. For example, in a recent case a former member of an extreme left-wing terror group active in the 1980s—who had spent 25 years in prison for acts of terrorist murder—was interviewed by journalists in a radio broadcast which was also uploaded to a website. When asked about terrorist attacks that had been committed in France in 2015, he said that even though 'we can say we're absolutely against their reactionary idea', 'we can't say that these kids are cowards' and that he 'found them very brave' as they know 'there are two or three thousand cops around them'.[546] He was sentenced to a fine and eight months' imprisonment which was increased on appeal to 18 months' imprisonment, including 10 months' probation, which he served in his home.[547]

The Court determined his interview amounted to 'indirect incitement to the use of terrorist violence' as he 'presented the terrorist method of action … in a romantic light by using positive and glorious images of the perpetrators'.[548] And the Court held that domestic courts had taken care to justify 'not only the principle of the penalty imposed, but also its nature and quantum'.[549] However, in light of its 'nature' and 'severity', the Court held his prison sentence was disproportionate to the aim pursued, and found a violation of article 10 with specific 'regard to the severity of the criminal sanction imposed'.[550]

[540] Ibid., §52.
[541] ECtHR, *Z.B. v France* (App. no. 46883/15), 2 September 2021, §11. See s. III.3.2. (Causal link between speech and harm).
[542] ECtHR, *Z.B. v France* (App. no. 46883/15), 2 September 2021, §§8, 62.
[543] The boy's mother was also convicted and sentenced to one month suspended sentence and a fine, and they both were required to pay damages in a civil action.
[544] The European Court considered, but ultimately dismissed, an argument by France that article 17 of the Convention applied: ECtHR, *Z.B. v France* (App. no. 46883/15) 2 September 2021, §§1827.
[545] Ibid., §§62–66.
[546] ECtHR, *Rouillan v. France* (App. no. 28000/19), 23 June 2022, §5. See s. III.3.2.1 ('Glorification', 'justification' and 'apology' offences).
[547] For approximately 6 months of the 10-month probation period he was placed under electronic surveillance.
[548] ECtHR, *Rouillan v. France* (App. no. 28000/19), 23 June 2022, §§69, 71.See s. III.3.2.1. ('Glorification', 'justification' and 'apology' offences).
[549] Ibid., §75.
[550] Ibid., §§75–77. See s. III.5. (Penalties).

The Inter-American Court of Human Rights has held that a penalty for speech 'must be proportionate to the right affected and to the responsibility of the perpetrator, so that it should be established based on the different nature and seriousness of the acts'.[551] In one of the only terrorism cases before the Inter-American Court, the Court found that penalizing speakers by disqualifying them from using social media was disproportionate.[552] In this case, leaders of the Mapuche indigenous people were convicted under Chile's Counter-terrorism Act for acts of protest and unrest, including threats of terrorist arson.[553] They were sentenced to five years' imprisonment, 'absolute and permanent disqualification from public office and positions' and disqualification for 15 years 'from operating a social communications media outlet' or performing functions 'connected with the broadcast or dissemination of opinions or information'.[554] Although the Inter-American Court held that the convictions ultimately violated the principle of legality and procedural guarantees, the Court also noted that it considered the penalties restricting the freedom of expression of the Mapuche leader 'contrary to the principle of the proportionality of the punishment'.[555] In circumstances where the defendants played a 'decisive role in communicating the interests' of their communities, this penalty limited their right to expression 'in the exercise of their functions as leaders or representatives', and in turn 'could have instilled a reasonable fear in other members' of these communities who participate in lawful protests.[556] The Court therefore considered the restriction to have a 'negative impact on the social dimension of the right to freedom of thought and expression' as the Court had established in its case law, and found a violation of article 13.[557]

The African Court has also held that custodial sentences for violations of the laws of freedom of speech are generally inappropriate, and will only be lawful in 'serious and very exceptional circumstances' such as 'incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or group of people, because of specific criteria such as race, colour, religion and nationality'.[558]

[551] IACtHR, *Norín Catrimán et al. v. Chile* (Series C, no. 279), 29 May 2014, §374.
[552] Ibid., §374. See s. III.3.3. (Intent).
[553] IACtHR, *Norín Catrimán v. Chile* (Series C, no. 279), 29 May 2014.
[554] Ibid., §117. This sentence was handed down against three of the applicants in this case. There were five other applicants in the proceedings who received different sentences: §§120–152.
[555] Ibid., §§374–376.
[556] Ibid.
[557] Ibid., §§375–378.
[558] ACtHPR, *Konaté v. Burkina Faso* (App. no. 4/2013), 5 December 2014, §165. Although this case grapples with criminal defamation laws, it reflects the Court's reluctance to consider criminal penalties for expression proportionate in any circumstances. Cf. ECOWAS CCJ, *Federation of African Journalists v. Gambia* (Suit no. ECW/CCJ/APP/36/15), 13 February 2018, where the Community Court of Justice of ECOWAS held that the practise of imposing criminal sanctions for sedition, defamation and false news publication has a chilling effect that may unduly restrict journalists' freedom of expression.

6. Approach of Private Companies to Online Incitement to Terrorism

Technology and social media companies play a critical role in responding to incitement to terrorism. As ISIS rose to power in Iraq and Syria, an estimated 40,000 foreign fighters travelled to the region to support them, many recruited through social media.[559] In 2019, attacks on two mosques in Christchurch, New Zealand, which led to the deaths of 51 people, were livestreamed on Facebook for 17 minutes and viewed 4,000 times before being removed.[560]

A number of technology and social media companies have committed to ensuring that they address hateful and violent speech in a manner consistent with international human rights standards.[561] For example, Twitter's Rules reference freedom of expression grounded in 'the United States Bill of Rights and the European Convention on Human Rights', and informed by 'works such as United Nations Principles on Business and Human Rights'.[562] Meta's policy declares that it is 'committed to respecting human rights as set out in … the International Covenant on Civil and Political Rights' and other treaties.[563] It also has Community Standards stating that it 'look[s] to international human rights standards to make … judgments' about content moderation.[564] And the Global Network Initiative, an alliance of internet companies that includes Meta, Microsoft and other tech giants, recognizes that such companies 'have the responsibility to respect and promote the freedom of expression', and 'should comply with … internationally recognized human rights' including the rights set out in the ICCPR.[565] The Initiative also provides that the scope of article 19(3) to be 'read within the context of further interpretations issued by international human rights bodies, including the Human Rights Committee and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression'.[566]

[559] See, e.g., US Department of State, 'Country Reports on Terrorism (2019)'.

[560] Christchurch Call, 'Christchurch Call story'.

[561] UN Special Rapporteur D. Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2018) UN Doc. A/HRC/38/35, §70. See also E.M. Aswad, 'The Future of Freedom of Expression Online' (2018) 17 *Duke Law & Technology Review* 26, 34. See ch. 3 (Hate Speech), s. V. (Approach of Private Companies to Online Hate Speech).

[562] Twitter (known as X since July 2023), 'Defending and respecting the rights of people using our service'; @jack, 'Tweet dated 10 August 2018'. In November 2022, after Elon Musk laid off the entire human rights team at Twitter, the UN High Commissioner for Human Rights sent an open letter to Musk urging that 'human rights are central to the management of Twitter under your leadership' and noting 'Twitter's responsibility to respect human rights … set out in more detail in the UN Guiding Principles on Business and Human Rights': V. Türk, 'Open letter from Volker Türk, United Nations High Commissioner for Human Rights, to Mr. Elon Musk, Chief Executive Officer at Twitter' (5 November 2022).

[563] Meta, 'Corporate Human Rights Policy'.

[564] Meta, 'Facebook Community Standards'. See also TikTok, 'Upholding human rights' ('Our philosophy is informed by the International Bill of Human Rights … and the United Nations Guiding Principles on Business and Human Rights'); Meta Newsroom, 'Hard Questions: Where Do We Draw the Line on Free Expression?' (9 August 2018) ('We look for guidance in documents like Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which set standards for when it's appropriate to place restrictions on freedom of expression').

[565] GNI, 'GNI Principles on Freedom of Expression and Privacy' (2017).

[566] GNI, 'GNI Principles on Freedom of Expression and Privacy' (2017), n 7. The GNI Principles have also 'been drafted with reference to' the Johannesburg Principles: n 9. And Facebook, Google, Microsoft and Twitter also

An additional commitment was made regarding terrorist speech by 55 governments, the European Commission, 14 online service providers and numerous civil society organizations in the Christchurch Call.[567] Established by France and New Zealand in the aftermath of the 2019 Christchurch attacks, the Christchurch Call includes commitments made by tech companies and governments, as well as joint commitments. The companies that have joined the Christchurch Call—which include Facebook (Meta), Twitter, Microsoft and Google—have committed to taking transparent measures to prevent the upload and dissemination of 'terrorist and violent extremist content … in a manner consistent with human rights and fundamental freedoms'.[568] These providers have also committed to (a) 'greater transparency in the setting of community standards and terms of service'; (b) regular public reporting 'on the quantity and nature' of terrorist content being detected and removed and (c) providing 'an efficient complaint and appeals process for those wishing to contest the removal of their content'.[569] In addition, the Christchurch Call requires companies to conduct a review of the operation of algorithms that may drive or amplify terrorist content. This includes using algorithms that direct users to 'credible, positive alternatives or counter-narratives'.[570]

While many human rights and media freedom organizations expressed broad support for the key values of the Christchurch Call,[571] a coalition of civil society organizations expressed some concerns in response to the Call.[572] So far the Call does not define 'terrorism and violent extremism' and does not distinguish between the obligations of user-generated content platforms—such as Facebook and YouTube—and those of internet access providers, including search engines such as Google. Some civil society actors have argued that '[e]fforts to restrict content should be limited to the level of user-generated content platforms and should not reach the infrastructure level' on the basis that broadening the 'scope of the Call beyond social media platforms can endanger the global and open nature of the Internet'.[573]

Two recent decisions of the US Supreme Court—decided on the same day—have also established the limits of technology companies' responsibility for the consequences of terrorist speech. In *Twitter v. Taamneh,* the US Supreme Court considered a case in which victims of terror attacks attempted to sue three of the largest social media

have policies in place to engage with human rights experts and civil society organizations to ensure they are correctly implementing these standards. See, e.g., Meta, 'Facebook Community Standards'.

[567] Christchurch Call, 'Support'.
[568] Ibid.; Christchurch Call, 'Christchurch Call text'.
[569] Ibid.
[570] Ibid.
[571] See also UN Counter-Terrorism Committee, 'Delhi Declaration on countering the use of new and emerging technologies for terrorism purposes' (2022), which '[n]otes the importance of continuing discussions on the challenges posed by emerging technologies being used for terrorist purposes … including … the Christchurch Call' and expressing an 'intention to develop … a set of non-binding guiding principles' with a view to assisting states to 'counter the threat posed by the use of new and emerging technologies for terrorist purposes, including by compiling good practices on the opportunities offered by the same set of technologies to counter the threat, consistent with international human rights'.
[572] F Badii et al., 'Civil Society Positions on Christchurch Call Pledge' (Electronic Frontier Foundation).
[573] Ibid., 3. See, e.g., Article 19, 'New Zealand: Christchurch Call, violent extremism and human rights' (14 May 2021).

companies in the world—Facebook, Twitter and Google (which owns YouTube)—for aiding and abetting ISIS.[574] The case was brought by the family members of a victim of an ISIS terrorist attack in Istanbul, who accused the companies of 'knowingly allowing ISIS and its supporters to use their platforms and benefit from their "recommendation" algorithms, enabling ISIS to connect with the broader public, fundraise, and radicalize new recruits'.[575] But the Court found against them, holding that ISIS' use of these platforms was insufficient to fulfil the aiding and abetting standard of 'a conscious, voluntary, and culpable participation in another's wrongdoing'.[576] Justice Thomas, delivering the Court's unanimous opinion, held the companies' algorithms were 'agnostic as to the nature of content, matching any content (including ISIS' content) with any user' more likely to view it.[577] To find otherwise, the Court considered, would 'necessarily' hold the companies liable 'as having aided and abetted each and every ISIS terrorist act committed anywhere in the world'.[578]

In the companion case of *Gonzalez v. Google,* the Supreme Court was asked to consider the scope of section 230 of the Communications Decency Act, which protects an 'interactive computer service' such as YouTube, Google, Facebook or Twitter from liability arising from the speech of their users.[579] The plaintiffs, family members of 23-year-old Nohemi Gonzalez who was killed in a 2015 ISIS attack in Paris, argued that these companies lose section 230 immunity when they 'recommend' certain content to users by way of algorithms.[580] Google strongly contested this interpretation, as did a number of technology companies and free speech advocates who filed amicus briefs in the case.[581] Arguing that the plaintiffs' interpretation might 'threaten the basic organizational decisions of the modern internet', Google observed that platforms such as YouTube have to 'make constant choices about what information to display and how' to ensure that the vast amount of data online can be consumed by users.[582] And as

[574] US Supreme Court, *Twitter, Inc v. Taamneh* 591 U.S. 471, 18 May 2023. The plaintiffs argued that these companies had aided and abetted ISIS in violation of 18 U.S.C §2333(a) (which provides that US nationals who have been 'injured … by reason of an act of international terrorism' may sue for damages) and §2333(d)(2) (which imposes civil liability on 'any person who aids and abets, by knowingly providing substantial assistance').

[575] Ibid., 5. The plaintiffs also had a specific set of allegations against Google, namely that it was gaining revenue from advertisements that were placed on ISIS videos.

[576] Ibid., 493.

[577] Ibid., 499.

[578] Ibid., 501. See also, ACLU, 'ACLU Comments Supreme Court Decisions Allowing Free Speech Online to Flourish' (18 May 2023). In a short concurring decision, Justice Jackson noted that both *Twitter v. Taamneh* and *Google v. Gonzalez* were 'narrow' decisions. She observed that to the extent the Court drew on 'general principles of tort and criminal law' to 'inform its understanding of §2333(d)(2)' these propositions 'do not necessarily translate to other contexts': US Supreme Court, *Twitter, Inc v. Taamneh* 598 U.S. 471, 18 May 2023, Concurring Opinion of Jackson J.

[579] US Supreme Court, *Gonzalez v. Google LLC* 598 U.S. 617, 18 May 2023. Section 230 of the Communications Decency Act provides 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content providers': 47 U.S.C. §230(c)(1).

[580] See US Court of Appeals, Ninth Circuit, *Gonzalez v. Google LLC,* 2 F.4th 871, 881 (22 June 2021) ('The Gonzalez Plaintiffs' theory of liability generally arises from Google's recommendations of content to users', alleging that 'Google "has recommended ISIS videos to users"').

[581] See, e.g., US Supreme Court, *Gonzalez v. Google LLC* 598 U.S. 617, 18 May 2023, Brief of Amici Curiae Article 19: Global Campaign for Free Expression and the International Justice Clinic at the University of California, Irvine School of Law in Support of Respondent (19 January 2023); US Supreme Court, *Gonzalez v. Google LLC* 598 U.S. 617, 18 May 2023, Brief of Microsoft Corp. as Amicus Curiae in support of the Respondent (19 January 2023).

[582] US Supreme Court, *Gonzalez v. Google LLC* 598 U.S. 617, 18 May 2023, Brief in Opposition (5 July 2022), 22.

an amicus brief filed by the former UN Special Rapporteur on freedom of expression contended, if section 230 protections were removed, websites would face 'potentially crushing liability' and be forced to 'err on the side of caution by removing or blocking any content that might even remotely touch on illegal behaviour'.[583]

In a short *per curiam* decision, the Supreme Court declined to address the application of section 230, leaving its protections in place. In light of its decision in *Twitter v. Taamneh,* the US Supreme Court held that the complaint had 'little, if any, plausible claim for relief' on the merits, and remanded the case for reconsideration on the basis of *Twitter v. Taamneh.*[584] However, US lawmakers have called for law reform, with Democrats arguing that platforms should be responsible for taking down more content and Republicans arguing the opposite view.[585]

IV. Recommendations

The following recommendations draw on minimum international standards applicable to speech-related terrorism and public order laws. Where there is a divergence or lacunae in such standards, this chapter suggests a best practice approach based on national jurisprudence or emerging international standards. These recommendations are addressed to states as signatories to the international treaties that underlie such standards. However, they are also intended to guide private companies seeking to apply them.[586] And these recommendations are intended to be cumulative: they should *all* be implemented to ensure that terrorism and public order laws comply with minimum international standards.

International standards governing terrorism and public order laws are closely related to other types of speech—in particular the wider body of jurisprudence governing the interplay between speech and national security (of which terror-related speech is a subset), as well as hate speech that incites to violence. The lines between hateful speech that incites violence and speech that incites *terrorist* violence are often blurred, particularly in light of the contested definition of what physical conduct amounts to terrorism.[587] In light of this, these recommendations correlate with and should be read alongside recommendations with respect to hate speech and espionage and official secrets laws.[588]

[583] US Supreme Court, *Gonzalez v. Google LLC* 598 U.S. 617, 18 May 2023, Brief of Amici Curiae Article 19: Global Campaign for Free Expression and the International Justice Clinic at the University of California, Irvine School of Law in Support of Respondent (19 January 2023), 3.

[584] US Supreme Court, *Gonzalez v. Google LLC* 598 U.S. 617, 18 May 2023, 622.

[585] See, e.g., A. Liptak, ' Supreme Court Won't Hold Tech Companies Liable for User Posts' (The New York Times, 18 May 2023).

[586] See ch. 3 (Hate Speech), s. V. (Approach of Private Companies to Online Hate Speech).

[587] See Introduction (discussing the contested definition of terrorism).

[588] See ch. 3 (Hate Speech), s. VI. (Recommendations); ch. 5 (Espionage and Official Secrets Laws), s. IV. (Recommendations).

1. States must provide clear definitions of the violent conduct defined as 'terrorism' in their laws.

The lack of an internationally agreed definition of terrorism does not discharge a state's obligation to fulfil the principle of legality,[589] which means that terrorism laws must be 'formulated with sufficient precision to enable people to regulate their conduct' and to 'foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[590] This is particularly critical as terrorism laws often subject speech to heavy criminal penalties.[591]

The same requirements apply to criminal laws that regulate speech in the name of 'public order'.[592] Such offences should never penalize speech that is merely critical of a political party or government of the day, and peaceful protest and dissent must be lawful as restrictions cannot 'put in jeopardy the right itself'.[593]

Consistently with soft law guidance, criminalizing 'extremism' without a clear link to serious unlawful conduct is 'irreconcilable with the principle of legality'.[594] And laws that penalize 'glorification', 'justification' and 'apology' of terrorism are similarly likely to fail minimum legality requirements.[595]

2. States' terrorism laws should only criminalize speech if the speaker intends to incite an act of terrorist violence.

For all penalties imposed on speech, states must 'demonstrate in specific and individualized fashion the precise nature of the threat' caused by the speech.[596] International bodies have observed that speech that incites violence can clearly be penalized, as can incitement to a serious criminal offence, 'armed resistance' and 'serious disturbances' of public order.[597] In the *Rabbae* case, members of the Human Rights Committee

[589] See s. III.1. (Legality).

[590] ECtHR, *Alekhina v. Russia* (App. no. 38004/12), 17 July 2018, §254. States should also clearly define national security in their terrorism laws: See ch. 5 (Espionage and Official Secrets Laws), s. IV.2. (Recommendations).

[591] IACtHR, *Norín Catrimán v. Chile* (Series C, no. 279), 29 May 2014, §163. Terror laws, like all criminal laws, must also be non-discriminatory and non-retroactive. UN Special Rapporteur on terrorism Martin Scheinin, *Report on Ten areas of best practices in countering terrorism* (2010) UN Doc. A/HRC/16/51, §27.

[592] See s. III.1.3. (Definition of public order).

[593] HRC, General Comment No. 34 (2011), §21.

[594] See s. III.1.2. (Definition of extremism); UN Special Rapporteur on terrorism, *Report on Human rights impact of policies and practices aimed at preventing and countering violent extremism* (2020) UN Doc. A/HRC/43/46, §14.

[595] See s. III.1.1. (Definition of terrorism). Such laws may also fail on the basis of insufficiently stringent intent or causation requirements. See s. III.3.2.1. ('Glorification', 'justification' and 'apology' offences); See also s. IV.5. (Recommendations).

[596] HRC, General Comment No. 34 (2011), §35.

[597] See s. III.3.1. (Harm); HRC, *Rabbae v. Netherlands* (Comm. no. 2124/2011) Individual Opinion (concurring) of Committee members Sarah Cleveland and Mauro Politi, §7; HRC, *Marchant Reyes v. Chile* (Comm. no. 2627/2015), 7 November 2017; ECtHR, *Leroy v. France* (App. no. 36109/03), 2 October 2008, §45; ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021, §46.; IACmHR, *Roca Antúnez v. Cuba* (Case 12.127) 24 February 2018, §107; ACHR Art. 13(5).

suggested that speech should only be criminalized if it 'incites the commission of criminal offences or acts of violence'.[598] And when speech is criminalized on the basis that it is likely to incite a serious terrorist offence, that offence must itself comply with international human rights standards.[599] For example, offences such as criticizing a state's leaders or institutions—themselves incompatible with international human rights law—cannot be used as a legitimate basis to penalize speech likely to incite such a 'crime'.[600] And any terror offence that discriminates against a particular religion is similarly incompatible with international standards.[601]

A stringent harm requirement—such as requiring incitement to acts of violence or serious criminal offences that risk serious physical injury or endanger human life—is required to avoid overbroad criminalization that may result from the European Court's malleable conception of harm.[602] The Court interprets 'incitement to violence' to include implied calls for violence, and to be only one of 'several factors' it will consider in its assessment of whether (even criminal) penalties imposed on speech are 'necessary'.[603] And the Court allows penalization of speech if it 'could be seen as a call for violence, *hatred or intolerance*', meaning that speech does not need to 'involve an explicit call for an act of violence, or other criminal acts' for a penalty to be considered 'necessary'.[604]

But allowing criminal laws to target speech that promotes 'intolerance' casts an overbroad net over speech.[605] And authoritarian regimes are well placed to manipulate terms such as 'intolerance' and argue they were following international standards by doing so. Nor is the Court's analysis of speech under article 17—which obviates the need to consider intent, harm and causation altogether—compatible with the balancing test required under international treaties.[606] A strict harm standard such as that articulated by members of the Human Rights Committee in the *Rabbae* case is a better approach, minimizing the risk that non-dangerous speech will be penalized.[607]

[598] See s. III.3.1. (Harm); HRC, *Rabbae v. Netherlands* (Comm. no. 2124/2011) Individual Opinion (concurring) of Committee members Sarah Cleveland and Mauro Politi, §7.

[599] See, e.g., HRC, General Comment No. 34 (2011), §26 (laws restricting speech 'must also themselves be compatible with the provisions, aims and objectives of the Covenant').

[600] See ch. 2 (Insulting Speech), s. III.3.3.1.1. (Statements about public officials including heads of state or government). See also ch. 4 (False Speech), s. IV.4. (Recommendations).

[601] See, e.g., HRC, General Comment No. 34 (2011), §26 ('Laws must not violate the non-discrimination provisions of the Covenant').

[602] See s. III.3.1. (Harm).

[603] See s. III.3.1. (Harm). See, e.g., ECtHR, *Rouillan v. France* (App. no. 28000/19), 23 June 2022; ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §§204–208.

[604] ECtHR, Guide on Article 10 of the Convention, 31 August 2022, §§554, 557 (emphasis added); ECtHR, *Ibragimov v. Russia* (App. nos. 1413/08 & 28621/11), 28 August 2018, §§94–98; ECtHR, *Vejdeland v. Sweden* (App. no. 1813/07), 9 February 2012, §55.

[605] See, e.g., ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021, Concurring Opinion of Judge Lemmens (finding it 'somewhat ambiguous as to the types of remarks, in connection with terrorism' that authorities may restrict), §1. International standards on incitement to 'hatred' are dealt with in Chapter 3: See ch. 3 (Hate Speech), s. III.2.3.1. (Harm).

[606] See ss III.3.1. (Harm) and III. (International Legal Standards) (setting out the tripartite test pursuant to Art. 19 of the ICCPR); ECtHR, *Roj TV A/S v. Denmark* (App. no. 24683/14), 17 April 2018; ECtHR, *Hizb Ut-Tahrir v. Germany* (App. no. 31098/08), 12 June 2012; ECtHR, *Kasymakhunov and Saybatalov v. Russia* (App. nos. 26261/05 & 26377/06), 14 March 2013.

[607] HRC, *Rabbae v. Netherlands* (Comm. no. 2124/2011) Individual Opinion (concurring) of Committee members Sarah Cleveland and Mauro Politi, §7.

3. There should be an objective probability that the harm the speaker intended to incite would imminently occur as a direct result of the speech.

International standards provide that states must demonstrate a causal link between speech and harm before speech can be penalized.[608] National terrorism and public order laws that do not do so violate international law. Consistent with recommendations for criminal hate speech and espionage and official secrets laws,[609] it is recommended that states should only criminalize speech under terror or public order laws if it is objectively probable that an act of violence or serious criminal offence would imminently occur as a direct result of the impugned speech.[610] This standard accords with the Human Rights Committee's position that states must establish a 'direct and immediate' causal link between speech and harm if it is to be penalized.[611] And it is consistent with the UN-approved Rabat Plan of Action, which recommends 'a *reasonable probability* that the speech would succeed in *inciting actual action* against the target group, recognizing that such causation should be rather direct'.[612]

The European Court's relatively weak and inconsistent causation tests of whether speech is 'capable of' or 'liable to' or 'could' be 'seen as a call for violence, hatred or intolerance',[613] and its disregard of causation when assessing cases under article 17,[614] leave too much speech unprotected or subject to viewpoint-based restrictions.[615] As articulated in a number of concurring judgments handed down by European Court judges, these tests have seen the Court place 'too much weight' on the 'form of words' used by speakers, or its 'offensive' nature[616] when it should instead focus on the speaker's intent and the words' 'likely impact'.[617] Like hate speech, speech endorsing terrorism may be particularly abhorrent but, as judges of the Court have argued, the focus should be on whether there was a 'real and genuine risk' that language would 'incite to violence' and whether there was an intention to do so.[618] In practice, the flexibility of the

[608] See s. III.3.2. (Causal link between speech and harm).

[609] See ch. 3 (Hate Speech), s. VI.3. (Recommendations) and ch. 5 (Speech Related to National Security: Espionage and Official Secrets Laws), s. IV.3. (Recommendations).

[610] Objective probability meaning more probable than not. See s. IV.2. (Recommendations).

[611] HRC, General Comment No. 34 (2011), §35; UN Special Rapporteur on the right to freedom of opinion and expression F. LaRue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (2013) UN Doc. No A/68/362, §§52–53.

[612] Rabat Plan of Action, §29(f) (emphasis added). See also UN Special Rapporteur on terrorism, *Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders* (2019) UN Doc. A/HRC/40/52, §37.

[613] See, e.g., ECtHR (GC), *Sürek v. Turkey (No. 3)* (App. no. 24735/94), 8 July 1999, §40; ECtHR (GC), *Sürek v. Turkey (No. 4)* (App. no. 24762/94), 8 July 1999, §58; ECtHR, *Ibragimov v. Russia* (App. nos. 1413/08 & 28621/11), 28 August 2018, §98; ECtHR (GC), *Perinçek v. Switzerland* (App. no. 27510/08), 15 October 2015, §207.

[614] See, e.g., ECtHR, *Lilliendahl v. Iceland* (App. no. 29297/18), 12 May 2020, §46. See s. III.3.2. (Causal link between speech and harm); See also ch. 3 (Hate Speech), s. VI.3. (Recommendations).

[615] For example, blasphemy or denialism laws which prohibit speech on the basis of content rather than harm or intent: See ch. 3 (Hate Speech), s. VI.1. (Recommendations).

[616] Dyer (n 399) 78, 94, 97107.

[617] ECtHR (GC), *Sürek v. Turkey (No. 4)* (App. no. 24762/94), 8 July 1999, Joint Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve.

[618] Ibid.

Court's varied causation standards has seen it develop a patchwork of jurisprudence from which it is difficult to draw patterns and predict what speech will be lawful.[619]

4. Terrorism laws should incorporate a dual intent requirement: intent to communicate the impugned message and intent to incite the commission of a terrorist act.

Terrorism laws should incorporate a dual intent requirement: intent to communicate the impugned message and intent to incite the commission of a terrorist act.[620] Intent should not be presumed.[621] Stringent intent standards are particularly important to protect those who report on terrorism. Journalists should never be punished 'solely on the grounds that they had published statements by terrorist organizations'.[622] Penalization for media reporting of terrorism should only take place in the exceptional circumstances where media intend to incite violence or a serious offence and there is an objective probability this imminently occurs as a direct result of the reporting.[623] If a journalist repeats what a speaker has said in order to report the news, and that speaker's words amount to incitement to terrorism, this does not mean that the journalist's reporting amounts to incitement. Instead, like all speakers, a journalist should expect their speech to be protected if they did not intend to incite terrorism.

The European Court has not always adhered to this high bar. For instance, the Court allowed a conviction for a media professional who provided an 'outlet' for terrorist speech by way of published letters from readers, even though he 'did not personally associate himself with the views contained in the letters'.[624] This case, rightly considered an outlier and criticized by judges on the Court, does not accord with international intent standards or the bulk of the Court's jurisprudence.[625] And the Court should abandon its practice of analysing terrorism laws' application to speech under article 17 since, even if there are some cases that would be appropriately dealt with under article 17, this application of article 17 is akin to content-based regulation that bypasses an analysis of intent—as well as harm and causation—altogether.[626]

[619] See s. III.3.2. (Causal link between speech and harm).

[620] See s. III.3.3. (Intent); see, e.g., UN Special Rapporteur on terrorism, Martin Scheinin, *Report on Ten areas of best practices in countering terrorism* (2010) UN Doc. A/HRC/16/51, §§30–31; COE Convention on the Prevention of Terrorism Art. 5; COE, *Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism* (2005) CETS 196, §§99–100; UN Secretary General, *The protection of human rights and fundamental freedoms while countering terrorism* (2008) UN Doc. A/63/337, §61.

[621] IACtHR, *Norín Catrimán v. Chile* (Series C, no. 279), 29 May 2014, §171.

[622] ECtHR, *Gözel and Özer v. Turkey* (App. nos. 43453/04 & 31098/05), 6 July 2010, §61. See s. III.3.3. (Intent).

[623] See s. III.4.1. (Public Interest).

[624] ECtHR, *Sürek v. Turkey (no. 1)* (App. no. 26682/95), 8 July 1999, §§63–65; see s. III.3.3. (Intent).

[625] ECtHR, *Sürek v. Turkey (no. 1)* (App. no. 26682/95), 8 July 1999, Joint Partly Dissenting Opinion of Judges Tulkens, Casadevall and Greve and Partly Dissenting Opinion of Judge Palm. See also ECtHR (GC), *Jersild v. Denmark* (App. no. 15890/89), 23 September 1994, §31. See s. III.3.3. (Intent).

[626] See s. III.3.1. (Harm); ECtHR, *Roj TV A/S v. Denmark* (App. no. 24683/14), 17 April 2018; ECtHR, *Hizb Ut-Tahrir v. Germany* (App. no. 31098/08), 12 June 2012; ECtHR, *Kasymakhunov and Saybatalov v. Russia* (App. nos. 26261/05 & 26377/06), 14 March 2013.

5. 'Glorification', 'justification' and 'apology' of terrorism laws that are not compatible with requirements of intent, harm and causation under international human rights law should be repealed.

Crimes such as 'glorification', 'justification' and 'apology' of terrorism which do not provide minimum intent, harm and causation requirements are incompatible with freedom of speech and should be reformed or repealed.[627] The key question is not the name of the offence but whether a state seeks to restrict speech without demonstrating either the connection between speech and serious harm or a speaker's intent to harm.[628] It is possible that vague or overbroad *incitement* to terror offences may also fail minimum causation and intent standards for this reason.[629] In a similar manner to blasphemy or denial laws, any terrorism offence which allows criminal penalties to be meted out against speakers on the basis of the *content* of speech, rather than the intent of the speaker and probable or actual harm caused by the speech sets a worrying precedent whereby a state or court decides which viewpoint is or is not acceptable.[630]

The European Court's approach to 'glorification', 'justification' and 'apology' of terrorism laws contradicts other international bodies and should be reconsidered.[631] It diverges from the Council of Europe's formulation under the Convention on the Prevention of Terrorism, which provides that speech should be prohibited if the speaker has the 'intent to *incite* the commission of a terrorist offence' where such speech '*whether or not directly advocating* terrorist offences, *causes a danger that* one or more such offences may be committed'.[632] A push to reconsider this jurisprudence was recently articulated by a judge on the Court, who observed that the offence of 'praising or justifying terrorism' without 'incitement to violence or hatred' was contrary to article 10 and that the 'disproportionate nature of the interference' was rooted in the law itself.[633]

6. States should provide additional protection to political speech or 'public interest' speech.

Speech in the public interest or of a political nature should only lead to liability if there are 'very strong reasons' for doing so.[634] This applies even if the speech concerns

[627] See s. III.3.2.1. ('Glorification', 'justification' and 'apology' offences).
[628] See s. III.3. (Necessity).
[629] See s. III.1. (Legality).
[630] See ch. 3 (Hate Speech), s VI.1. and VI.2. (Recommendations).
[631] See, e.g., Article 19, 'European Court of Human Rights: Contradictory rulings in two key free expression and terrorism cases' (2 September 2021) (arguing that the European Court 'consistently fails to heed international standards on freedom of expression accordingly to which the "praise", "glorification" or "support" of violence or terrorism are overly vague legal standards').
[632] COE Convention on the Prevention of Terrorism (2005) Art. 5 (emphasis added).
[633] See s. III.3.2.1. ('Glorification', 'justification' and 'apology' offences); ECtHR, *Erkizia Almandoz v. Spain* (App. no. 5869/17), 22 June 2021, Concurring Opinion of Judge Lemmens, §7.
[634] See s. III.4.1. (Public Interest).

matters related to national security.[635] Political or public interest speech should not be subjected to criminal sanction unless rising to the level of intentional incitement of acts of violence or serious criminal offences that may cause serious physical injury or endanger human life.[636]

The wide berth given to public interest speech is particularly important for journalists reporting on political issues. The media plays a 'crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted'.[637] In particular, international bodies have made clear that journalists disseminating the statements of others—including in the form of interviews—is a key facet of the role of the press in a democratic society.[638] Such speech should be protected by way of strict intent and harm requirements but may also be subject to additional protections in national laws.[639]

7. States can only impose penalties for speech under terrorism laws to the extent that the penalty is necessary and proportionate to advancing a legitimate aim. Criminal sanctions should only be used in exceptional circumstances.

International standards regulating free speech mandate that any penalty imposed on speech must be proportionate.[640] Although the majority of terrorism and public order laws that restrict speech are criminal in nature,[641] international standards dictate that criminal penalties for speech should only be resorted to in exceptional circumstances.[642] Custodial sentences will rarely be justified for speech, unless, for instance, the speech intentionally incites death or serious physical injury.[643] And although the European Court has allowed terms of imprisonment in a small number of cases related to speech-based terror offences, the Court recognizes that the 'imposition of a prison sentence for a press offence' will be compatible with article 10 of the Convention 'only in exceptional circumstances',[644] 'incitement to violence' being one of them.[645]

[635] HRC, General Comment No. 34 (2011), §30. See s. III.4.1. (Public interest) and ch. 5 (Speech Related to National Security: Espionage and Official Secrets Laws), s. IV.3.3. (Recommendations).

[636] See s. IV.2. (Recommendations). In some legal systems this may include recklessness as to such harm being created: see ch. 3 (Hate Speech), s. VI.3.1. (Recommendations); see ch. 4 (False Speech), s. IV.6. (Recommendations).

[637] HRC, General Comment No. 34 (2011), §46.

[638] See s. III.3.3. (Intent).

[639] See s. III.4.1. (Public interest).

[640] See, e.g., HRC, General Comment No. 34 (2011), §§34–35; ECtHR, *Guja v. Moldova* (App. no. 14277/04), 12 February 2008, §78.

[641] See s. III.5. (Penalties); CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2021) UN Doc S/2021/973 (Annex), §2.

[642] See, e.g., IACtHR, *Álvarez Ramos v. Venezuela* (Series C, no. 380) 30 August 2019, §§119, 120; ACtHPR, *Konaté v Burkina Faso* (App. no. 004/2013), 5 December 2014, §165; HRC, General Comment No. 34 (2011), §47 (in the context of defamation); CERD, General Recommendation No. 35 (2013), §12.

[643] See s. III.5. (Penalties).

[644] ECtHR (GC), *Cumpănă v. Romania* (App. no. 33348/96), 17 December 2004, §115. See ch. 1 (Introduction), s. II.3.2.6. (Criminal penalties for speech).

[645] See s. III.5. (Penalties); ECtHR (GC), *Cumpănă v. Romania* (App. no. 33348/96), 17 December 2004, §115.

Consistently with the principle of proportionality, states should consider non-punitive responses to speech that may sometimes be appropriate, for instance where speech may promote non-violent harms such as 'intolerance'. As noted by the UN Security Council's Counter-Terrorism Committee, 'the law enforcement approach may in some instances prove to be less effective than other actions and even counter-productive'.[646] Effective counter-messaging, developing strategies to address the underlying conditions contributing to marginalization and intolerance—which may in turn contribute to extremist sentiments—and partnerships with media, civil and religious community groups may be less intrusive responses to speech than criminal sanctions.[647]

8. Tech companies should recognize international human rights standards as a floor, not a ceiling, of free speech protection.

Social media and technology companies should uphold the commitment to regulating speech in line with the Global Network Initiative principles, which recognize that international human rights law including article 19 of the ICCPR should be respected and 'read within the context of further interpretations issued by international human rights bodies'.[648] International human rights standards are a floor—rather than a ceiling—of protection for speech, and should be treated as such by private companies that have a role in regulating speech.[649]

[646] CTED, *Global survey of the implementation of Security Council resolution 1624 (2005) by Member States* (2016) UN Doc. S/2016/50 (Annex), §10.
[647] Ibid., §§13–14.
[648] GNI, 'GNI Principles on Freedom of Expression and Privacy' (2017), n 7.
[649] See ch. 3 (Hate Speech), s. VI.5. (Recommendations).

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