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THE PROSECUTION OF SPEECH-BASED TERRORIST OFFENCES: SEARCHING FOR THE BALANCE BETWEEN NATIONAL SECURITY INTERESTS AND FREEDOM OF EXPRESSION

Promotoren: Prof. Dr. K. LEMMENS

& Prof. Dr. J. WOUTERS

Begeleiders: C. DAELMAN, M. MERRIGAN

& L. HAMID

Masterscriptie, ingediend door

Evelien KAPTEIJN DEN BOUWMEESTER

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Abstract

In the context of the threat of terrorism, one can discern a trend of States expanding their counterterrorism legislation in order to target acts of speech. With the motivation of combating the criminal phenomenon "at its roots", governments introduce new ancillary terrorist offences and expand the notion of terrorist acts *sensu stricto* in order to target speech favourable to terrorism. This master's thesis attempts to find out whether the impact of these speech-based terrorist offences on the right to freedom of expression can be justified. In this regard, it draws the balance that should motivate the choices of the States when they introduce speech-based terrorist offences, namely the balance between the obligations to counter terrorism and to respect freedom of expression.

At the global level, UN Security Council Resolutions 1373 and 1624 call for the States to criminalise the offence of incitement to terrorism. However, these Resolutions provide little to no guidance on the components of this offence. Under the Council of Europe Convention on the Prevention of Terrorism and the EU Framework Decision on combating terrorism, States are obliged to criminalise the offence of public provocation to commit terrorist offences. The European instruments describe this offence with considerable precision. The Organisation of African Unity Convention on the Prevention and Combating of Terrorism provides an extremely vague legal basis for the prosecution of speech-based terrorist offences. States are obliged to implement these obligations to counter speech-based terrorism in conformity with article 19 International Covenant on Civil and Political Rights, article 10 European Convention on Human Rights and 9 African Charter on Human and Peoples' Rights. This represents the other side of the balance. The introduction of a speech-based terrorist offence constitutes a limitation of the right to freedom of expression. In all three of the frameworks, the measure has to comply with the principles of legal certainty, legitimate purpose and necessity. Even though the balance is formulated differently in each framework, these principles lead to the uniform conclusion that the circumscription of a speech-based terrorist offence should pay attention to the elements of (i) the required intensity of the impugned expression, (ii) the presence of an intent to incite terrorist violence and, (iii) the presence of a causal link between the impugned expression and the potential occurrence of terrorist violence. The importance of the second and third element should in particular be emphasised. This is illustrated by case studies on section 1 British Terrorism Act 2000 (David Miranda), article 421-2-5 French Penal Code (Dieudonné M'bala M'bala) and the Ethiopian Anti-Terrorism Proclamation (Eskinder Nega).

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In conclusion, I want to thank my parents and my brother, who have always supported me in every possible way.

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List of abbreviations

ACHPR: African Charter on Human and Peoples' Rights

ACommHPR: African Commission on Human and Peoples' Rights

ACtHPR: African Court on Human and Peoples' Rights

AU: African Union

CETS: Council of Europe Treaty Series

CoE: Council of Europe

CPJ: Committee to Protect Journalists

CTC: Counter-Terrorism Committee

ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR: European Court for Human Rights

EPRDF: Ethiopian People's Revolutionary Democratic Front

EU: European Union

GCHQ: Government Communications Headquarters (of the United Kingdom)

HRC: Human Rights Committee

ICCPR: International Covenant on Civil and Political Rights

MLDI: Media Legal Defence Initiative

NGO: non-governmental organisation

NSA: National Security Agency (of the United States)

OAU: Organisation of African Unity

OJ: Official Journal of the European Union

UDHR: Universal Declaration of Human Rights

UK: United Kingdom

UN: United Nations

UNGA: United Nations General Assembly

UNSC: United Nations Security Council

UNSG: United Nations Secretary General

UNTS: United Nations Treaty Series

WGAD: Working Group on Arbitrary Detention

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Introduction

1. It cannot be denied that terrorism is a real threat to contemporary society. Furthermore, past and current events have proven that the existence of a terrorist network depends heavily on the spread of its violent ideology. Consequently, global and regional frameworks have been developed that call upon States to prosecute certain categories of expressions as terrorist offences. It is essential to note that these instruments stipulate explicitly that States have to conduct their counterterrorism policy in compliance with international human rights law, in particular the right to freedom of expression.[1] This balance between the obligation to counter the phenomenon of terrorism and the obligation to respect freedom of expression is continuously being challenged. The abuse of counterterrorism laws by authorities to suppress dissenting voices is neither rare, nor exclusively present in countries with a weak human rights tradition.

2. National counterterrorism frameworks increasingly target acts of speech, as States expand their notion of terrorism and their arsenal of ancillary terrorist offences. In terms of concrete developments, one can refer to the effects of the criminalisation of *"apologie du terrorisme"*[2] in France.[3] In the Belgian Parliament, multiple proposals were put forward in November 2015 that called for the criminalisation of (knowingly and willingly) glorifying, approving of, attempting to justify and grossly minimising acts of terrorism[4], citing inter alia the example of the French Penal Code. In the light of the recent public debate regarding this topic[5], similar legislative proposals are likely to return after the parliamentary summer recess.

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[1] United Nations Security Council Resolution 1624, *Threats to international peace and security*, adopted on 14 September 2005, *UN Doc.* S/RES/1624, preambular paragraph 7 and operative paragraph 4; Article 12 Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, *Council of Europe Treaty Series* No. 196; Preambular paragraph 13 and article 2 Framework Decision of the Council of the European Union 2008/919/JHA, 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, *OJ.L.* 9 December 2008, vol. 330, 21; Article 22 (1) Organisation of African Unity Convention on the Prevention and Combating of Terrorism, 14 June 1999, *OAU Doc.* AHG/Dec. 132 (XXXV).

[2] Article 421-2-5 French Penal Code. This provision was added to the Penal Code in 2014, by virtue of : Loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme (1)).

[3] AMNESTY INTERNATIONAL, *France faces 'litmus test' for freedom of expression as dozens arrested in wake of attacks*, 16 January 2015, available at: https://www.amnesty.org/en/latest/news/2015/01/france-faces-litmus-test-freedom-expression-dozens-arrested-wake-attacks/ [accessed 15/08/2016].

[4] *Parliamentary Proceedings* Chamber of Representatives 2015-16, no. 54-1467/001; *Parliamentary Proceedings* Chamber of Representatives 2015-16, no. 54-1483/001.

[5] X, "N-VA wil vrije meningsuiting inperken voor 'collaborateurs van terrorisme'", *de redactie*, 27 July 2016, available at: http://deredactie.be/cm/vrtnieuws/politiek/1.2723568 [accessed 15/08/2016].

3. The question arises whether the impact of this expansive application of antiterrorism legislation on freedom of expression can be justified. In this context, this dissertation endeavours to look for a balance between the obligations of States to counter terrorism and to respect freedom of expression, in particular in the area of targeting acts of speech as terrorist offences. The first step in solving this question consists of the identification of the categories of speech that States are required to prosecute according to international and regional counterterrorism frameworks. Secondly, an analysis of the other side of the balance is in order, namely the international and regional free speech provisions. In particular, the principles will be identified that a State's policy to counter speech-based terrorist offences has to respect in order not to violate freedom of expression. Lastly, this dissertation turns to the crucial issue of realising the balance at the national level. This part is in particular focused on the hazardous impact of an overbroad counterterrorism policy on freedom of speech.

Methodology

4. During the process of writing this thesis, I undertook an internship of four weeks at Media Legal Defence Initiative, a NGO which performs important work in the fight for freedom of media. This was a wonderful opportunity for me to expand my knowledge on the impact of antiterrorism legislation on journalistic activities. Even though the focus of my internship was on the freedom of expression of journalists[6], the scope of this dissertation will be wider. In contemporary society, all persons participate easily and eagerly in public debate. Therefore, the expansion of speech-based terrorist offences affects everyone's right to freedom of expression. It can however not be denied that the activities of journalists are vital to informing the public debate. Consequently, they find themselves in a more vulnerable position as regard the protection of their freedom of expression. This dissertation will highlight particular hazards of counterterrorism legislation for journalistic work.

5. As a last general methodological note, I would like to clarify the term "speech-based terrorist offence". In the context of this dissertation, this term captures all instances in

[6] If in this dissertation the term "journalist(s)" is used without further specifications, it should be understood as capturing all journalists who publish via print, broadcasting or the internet.

which an expression is targeted as a stand-alone[7] terrorist offence. These instances can be divided into two categories. Firstly, offences have been developed which target specifically speech favourable to the commission of acts of terrorism. This dissertation will focus on incitement to terrorism, public provocation to commit terrorist offences, glorification of terrorism and related offences. These offences are generally not considered as terrorist offences *sensu stricto.*[8] However, considering the connection between these speech offences and terrorism *sensu stricto*, it is justified to include them under the term of "speech-based terrorist offences". The second category of speech-based terrorist offences points to instances in which acts of terrorism *sensu stricto* have been defined expansively to include certain categories of speech.

6. The first chapter of this thesis is devoted to the clarification of certain preliminary issues. MLDI is introduced, with an emphasis on the organisation's role in the fight for freedom of media. The second section of this chapter determines the focus of this thesis on particular world regions, primarily on the basis of the occurrence of MLDI interventions in those respective regions. This determination corresponded with the focus of my internship and facilitated the choice of the national frameworks that are discussed at a later stage. Furthermore, limiting the discussion to certain regional frameworks highlights how international standards trickle down to the regional and national levels.

7. Subsequently this thesis turns to the description of the balance between counterterrorism obligations and freedom of expression in the area of prosecuting speech-based terrorist offences. Thereto, the second chapter turns to the international and regional counterterrorism frameworks and analyses the obligations for States under these frameworks to target certain categories of expressions as terrorist offences. At this point, it is already important to note that these frameworks tend to leave a significant amount of discretion to the national authorities, if one leaves out the provisions that explicitly confirm the applicability of freedom of expression guarantees. Therefore, the connection with the next chapter is essential.

[7] "Stand-alone" in the sense that the expression itself amounts to an offence, the conduct targeted by the expression does not need to take place.

[8] Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, *CETS* No. 196, paragraph 77-78.

8. The third chapter researches the other side of the balance, namely the protection of freedom of expression in international and regional human rights frameworks. The impact of a counterterrorism policy on the right to freedom of expression can follow two schemes of justification. The first scheme leads to the justification of "regular" limitations of the right to freedom of expression. The second scheme represents the scheme of last resort, namely the justification of derogations from freedom of expression in times of war or other public emergencies. The identification of certain categories of speech as terrorist offences constitutes in essence a long-term policy, which remains applicable in times which fall short of war and public emergencies. Furthermore, the presence of a proper legal basis for the prosecution of a speech-based terrorist offence represents a non-derogable human right.[9] Consequently, the research will be limited to the conditions for a legal limitation of freedom of expression. The conditions that are described in this chapter do not provide a readymade formula on the perfect balance between the obligations to counter terrorism and to protect freedom of expression. They represent principles whose implementation on the national level has to be adapted to the practical context.

9. Therefore, the fourth chapter turns to the level of national counterterrorism policies. The use of case studies in this chapter makes it possible to describe in a concrete manner the balancing exercise and the national implications of an overbroad counterterrorism policy. The choice for case studies influenced the selection of countries. The United Kingdom and Ethiopia were selected because MLDI provided case support for the cases of David Miranda and Eskinder Nega. The contradiction between these countries with regard to the strength of human rights traditions makes this selection even more interesting. France was selected as a third country, since it is a stable democratic State which has recently been confronted with multiple terrorist attacks on its territory. The case of Dieudonné M'bala M'bala illustrates in a concrete manner the attitude of the French authorities towards extreme speech in the context of terrorist attacks.

[9] Article 15 International Covenant on Civil and Political Rights and article 7 European Convention on Human Rights are non-derogable rights. This is prescribed in article 4 (2) ICCPR and article 15 (2) ECHR.

Chapter 1 Preliminary issues

1.1 Introducing Media Legal Defence Initiative

10. Media Legal Defence Initiative is a non-governmental organisation that is devoted to strengthening the legal defence capacity of journalists, bloggers and other independent media outlets around the world.[10] The organisation aims to accomplish this goal through various means. For instance, MLDI provides direct support to journalists who are being prosecuted, in the form of payment of legal fees and/or the provision of expert legal advice.[11] Another tool for the organisation consists of partaking in third party interventions in cases that are of interest to freedom of media.[12] It is essential to note that support of MLDI is not only focused on helping the journalist in the respective case. MLDI's support also aims to overturn the laws that violate freedom of media and to provide a beneficial impact on this freedom across the country or region in the long run.[13]

11. An important aspect concerning the methodology of MLDI's work is the fact that the NGO attempts to enhance the media legal defence capacity of local actors as much as possible. This is done through the building of partnerships with national legal aid organisations and the facilitation of media law training for lawyers.[14] The reports on the interventions of MLDI show that endangerment of national security – which, inter alia, captures the category of counterterrorism cases – forms a significantly represented legal basis for prosecutions against journalists.[15]

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[10] MEDIA LEGAL DEFENCE INITIATIVE, *About us*, available at: http://www.mediadefence.org/about [accessed 15/08/2016].

[11] MLDI, *MLDI Annual Review 2015*, 4, available at: http://www.mediadefence.org/sites/default/files/MLDI-Annual%20Review%202015.pdf [accessed 15/08/2016].

[12] An example: The intervention of MLDI together with the organisations ARTICLE 19 and English PEN in the *Miranda* case before the High Court in the United Kingdom. Source: MLDI, *MLDI intervenes in David Miranda High Court Challenge*, 6 November 2013, available at: http://www.mediadefence.org/news/mldi-intervenes-david-miranda-high-court-challenge [accessed 15/08/2016]. These three organisations intervened at the appeal stage of this case as well. Source: MLDI, *Miranda judgment: UK terror laws violate free speech*, 19 January 2016, available at: http://www.mediadefence.org/news/miranda-judgment-uk-terror-laws-violate-free-speech [accessed 15/08/2016].

[13] MLDI, *MLDI Annual Review 2014*, 3, available at: http://www.mediadefence.org/sites/default/files/MLDI-Annual%20Review%202014.pdf [accessed 15/08/2016]; MLDI, *MLDI Annual Review 2015*, 4-5.

[14] MLDI, *MLDI Annual Review 2015*, 5.

[15] Ibid, 10-11; MLDI, *MLDI Annual Review 2014*, 8-9.

1.2 Delimitation with regard to world regions

12. This section determines the focus of this dissertation on certain world regions. This determination is primarily based on the occurrence of MLDI interventions in each of the regions. The sources for this analysis consist of MLDI's Annual Reviews of 2014 and 2015 and the relevant documents on the organisation's website.[16]

13. These sources demonstrate that the regions of Europe, Sub-Saharan Africa and Asia receive the most case support of MLDI.[17] Asia counts a certain share of cases involving alleged endangerment of national security by journalists.[18] However, there exists no regional human rights mechanism.[19] Since an analysis of regional frameworks would be of limited value and since this dissertation stands under constraints of time and length, the region of Asia will not be further discussed.

14. Consequently, the research in this thesis will be limited to the regions of Europe and Africa. Regarding the European regional frameworks, it has to be noted that MLDI turns primarily to the European Court of Human Rights for the enforcement of freedom of media.[20] The reason for this lies in the fact that the competence of the ECtHR is more attuned to this type of cases than the competence of the European Court of Justice.

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[16] Particularly relevant sections of MLDI's website: MLDI, *Our impact*, available at: http://www.mediadefence.org/our-impact [accessed 15/08/2016]; MLDI, *News*, available at http://www.mediadefence.org/news [accessed 15/08/2016].

[17] MLDI, *MLDI Annual Review 2014*, 8-9; MLDI, *MLDI Annual Review 2015*, 10-11.

[18] A recent example: The revocation of Section 66 A of the Information Technology Act in India. A new law will be introduced to address the security concerns following the revocation of Section 66A. Attention has to be paid to whether this new law will respect the requirements of freedom of media. Source: MLDI, *MLDI Annual Review 2015*, 16-17.

[19] I. BANTEKAS and L. OETTE, *International Human Rights: Law and Practice*, Cambridge, Cambridge University Press, 2013, 269.

[20] No mention of the European Court of Justice in the Annual Reviews of 2014 and 2015 and in the relevant sections of the website of MLDI.

Chapter 2 International and regional counterterrorism frameworks on the prosecution of speech-based terrorist offences

2.1 Global framework

2.1.1 Identification of instruments

15. Since the attacks of 11 September 2001, the phenomenon of international terrorism has taken a predominant place on the agendas of the UN and its Security Council. The analysis has to start with the role of UN Security Council Resolution 1373[21]. This resolution identifies international terrorism as a threat to international peace and security[22] and it imposes uniform and mandatory counterterrorism obligations on all States.[23] It finds its legal basis in Chapter VII of the UN Charter[24] and it dictates obligations for all States in a strong language.[25] In particular, Resolution 1373 prescribes the criminalisation of the perpetration of terrorist acts and of various forms of material involvement – namely financing, planning and preparation – in terrorism.[26] Furthermore, this resolution hints at the need for criminalising the speech-based terrorist offence of incitement to terrorism. It stipulates the obligation for States *"to take the necessary steps to prevent the commission of terrorist acts…"*.[27] A connection can be made with the role of inciting speech in the realisation of terrorist acts[28] and the declaration later on in the resolution that knowingly inciting terrorist acts is contrary to the purposes and principles of the UN.[29] Resolution 1373 also established the Counter-Terrorism Committee. The task of the CTC is to monitor

[21] United Nations Security Council Resolution 1373, *Threats to international peace and security caused by terrorist acts*, adopted on 28 September 2001, *UN Doc.* S/RES/1373.
[22] Ibid, preambular paragraph 4.
[23] High-level Panel on Threats, Challenges and Change Report, *A more secure world: our shared responsibility*, 2 December 2004, *UN Doc.* A/59/565, par. 151; J. DHANAPALA, "The United Nations Response to 9/11" in M. RANSTORP and P. WILKINSON (eds.), *Terrorism and Human Rights*, London, Routledge, 2008, 10. Before Resolution 1373, States had international counterterrorist obligations to the extent that they were parties of the international counterterrorism treaties and protocols. For more explanation about these treaties and protocols, see *infra*, at 23.
[24] UNSC Resolution 1373, preambular paragraph 11; Article 25 and Article 41 Charter of the United Nations, 24 October 1945, *United Nations Treaty Series*, Vol. 1, p. XVI. States are obliged to comply with the "decisions" of the Security Council.
[25] UNSC Resolution 1373, operative paragraphs 1 and 2: *"[The Security Council] decides that all States shall …"*.
[26] Ibid, operative paragraph 2 (e). Notice the strong language ("*decides*") and the explicit order to criminalise these practices.
[27] Ibid, operative paragraph 2 (b). Notice the strong language ("*decides*").
[28] Y. RONEN, "Incitement to terrorist acts and international law", *Leiden Journal of International Law* 2010, Vol. 23 (3), 655-657. RONEN describes inciting speech as a *conditio sine qua non* for the survival of modern terrorism.
[29] UNSC Resolution 1373, operative paragraph 3 (5).

the implementation of the resolution by means of a reporting and dialogue procedure involving the national authorities.[30] Lastly, it should be noted that Resolution 1373 does not explicitly confirm that States are bound by international human rights law when formulating and applying their counterterrorism policies.[31]

16. Gradually, the focus of the international counterterrorism movement turned to the background and motives of the phenomenon. The call to combat terrorism "at its roots" became particularly prevalent in the aftermath of the suicide bombings of July 2005 in London. As part of the UK Government's strategy to introduce the criminal offence of glorifying terrorism in domestic legislation, Prime Minister Blair played a primary role in the realisation of Security Council Resolution 1624[32], which was adopted in September 2005.[33] This resolution represents the primary component of the global effort to prosecute speech-based terrorist offences. At its core, it *"calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to (a) prohibit by law incitement to commit a terrorist act or acts and (b) to prevent such conduct…"*[34] None of the provisions of Resolution 1624 possess binding effect, since there is no mention of Chapter VII of the UN Charter as a legal basis. However, the normative strength of this resolution should not be underestimated. The CTC is granted with the additional power to conduct dialogues with States on their efforts to implement Resolution 1624.[35] The reports of the CTC show that States are quite diligent in reporting and in addressing incitement to terrorism and related offences.[36]

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[30] Ibid, operative paragraph 6; DHANAPALA (2008), 10-11; Y. RONEN, "Terrorism and freedom of expression in international law" in B. SAUL (ed.), *Research Handbook on International Law and Terrorism*, Cheltenham, Edward Elgar Publishing, 2014, 438.

[31] This was mended later on. United Nations Security Council Resolution 1566, *Threats to international peace and security caused by terrorist acts*, adopted on 8 October 2004, *UN Doc.* S/RES/1566, preambular paragraph 7 *"reminds"* States that their counterterrorism measures should comply with international human rights law. Even though the application of human rights is not dependent on this kind of statement, one can argue that the forgetfulness in Resolution 1373 was not beneficial for the conceptual clarity of UNSC resolutions in the field of counterterrorism policy.

[32] United Nations Security Council 1624, *Threats to international peace and security*, adopted on 14 September 2005, *UN Doc.* S/RES/1624.

[33] I. CRAM, *Terror and the War on Dissent: Freedom of expression in the Age of Al-Qaeda*, Heidelberg, Springer, 2009, 39; The (British) prime minister's statement on anti-terror measures, 5 August 2005, available at: http://www.theguardian.com/politics/2005/aug/05/uksecurity.terrorism1 [accessed 15/08/2016].

[34] Ibid, operative paragraph 1 (a) and (b).

[35] Ibid, operative paragraphs 4 and 6 (a); RONEN (2014), 438.

[36] Counter-Terrorism Committee Executive Directorate, *Global Survey of the Implementation by Member States of Security Council Resolution 1624*, 9 January 2012, *UN Doc.* S/2012/16, par. 4 and 9.

17. Resolution 1624 does not expressly call upon States to prohibit incitement to terrorism through the medium of criminal law. However, the need for criminal measures is certainly implied.[37] In the preamble, the resolution reminds States that they are under the obligation to combat terrorism *"by all means".*[38] The essential operative paragraph of the resolution – which was cited in full above – calls for States to *"take measures as may be necessary and appropriate".*[39] Additionally, Resolution 1624 stands in direct connection with Resolution 1373[40], which explicitly calls for criminalisation of the respective terrorist practices. A final important feature of Resolution 1624 consists of the explicit confirmation of the applicability of international human rights on measures taken in the implementation of this resolution.[41]

2.1.2 Guidance on the components of the speech-based terrorist offence

18. It is clear that the global counterterrorism framework prescribes an obligation for States to criminalise the practice of incitement to terrorism. The next step is to identify whether this framework provides guidance on the components of such an offence.

19. First of all, incitement to terrorism is implicitly characterised by Resolution 1624 as an inchoate offence. This means that the expression which constitutes incitement is punishable, regardless of whether a terrorist act is actually committed as a result of it.[42] This makes it all the more imperative to look for further guidance on the qualification of an expression as incitement. It is uncontroversial that the instruments at the level of the UN call for the criminalisation of direct calls to terrorism.[43] However, the framework does not provide a conclusive answer to the debate about whether expressions which fall short of direct incitement pass the threshold.

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[37] L. DOSWALD-BECK, *Human Rights in Times of Conflict and Terrorism*, Oxford, Oxford University Press, 2011, 137-138; RONEN (2010), 648. DOSWALD-BECK and RONEN share this line of reasoning.

[38] UNSC Resolution 1624, preambular paragraph 3.

[39] Ibid, operative paragraph 1.

[40] Ibid, preambular paragraph 2.

[41] Ibid, preambular paragraph 7 and operative paragraph 4.

[42] UNSC Resolution 1624 makes no mention of a requirement that an actual terrorist act should occur as a result of the inciting expression; RONEN (2014), 440-441; F. GALLI, "Freedom of thought or 'thought-crimes'? Counter-terrorism and freedom of expression" in A. MASFERRER and C. WALKER (eds.), *Counter-terrorism, human rights and the rule of law: crossing legal boundaries in defence of the state*, Cheltenham, Edward Elgar Publishing, 2013, 121-122.

[43] United Nations Secretary General, *Report to the General Assembly: the protection of human rights and fundamental freedoms while countering terrorism*, 28 August 2008, *UN Doc.* A/63/337, par. 61-62; CRAM (2009), 39-40.

20. The ambiguous language of Resolution 1624 constitutes a significant issue in this debate. In the preamble, the Security Council *"condemns in the strongest terms the incitement of terrorist acts and repudiates attempts at the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts."*[44] The justification and glorification of terrorist acts – under certain conditions[45] – have to be considered as indirect forms of incitement. One line of reasoning is that the preamble separates incitement to terrorist acts from the justification and glorification of terrorist acts. The resolution goes on by only calling for the criminalisation of (direct) incitement to terrorism.[46] However, national authorities have made use of the ambiguous language of the resolution to reason in the other direction. The government of the UK interpreted the function of the cited preambular paragraph as "setting the context" for the subsequent call to prohibit (all forms of) incitement to commit terrorist acts. This interpretation of the resolution led to a successful adoption of section 1 of the British Terrorism Act 2006.[47] The offence described by this provision, the encouragement of terrorism, clearly resorts under the threshold of direct incitement.

21. It also has to be noted that the language of the UN counterterrorism instruments is dominated by the general purpose of creating an environment that is not conducive to the spread of terrorism.[48] This purpose implies the requirement for States to take action against indirect forms of incitement to terrorism. They do face the challenge of formulating the offence of indirect incitement in such a manner that it does not impede legitimate speech. The precise considerations that national authorities have to make in this context are researched in the next chapter.

22. The offence of incitement to terrorism does not require the actual occurrence of a terrorist act. Nevertheless, it is still essential to describe the boundaries that the global framework

[44] UNSC Resolution 1624, preambular paragraph 5.

[45] As acknowledged by the cited preambular paragraph 5 of the resolution, glorification and justification may, but not necessarily will amount to (indirect) incitement. Chapter 3 delves more into the legitimate conditions for indirect incitement to terrorism.

[46] Ibid, operative paragraph 1(a); RONEN (2014), 446.

[47] CRAM (2009), 40; T. CHOUDHURY, "The Terrorism Act 2006: Discouraging Terrorism" in I. HARE and J. WEINSTEIN (eds.), *Extreme speech and democracy*, Oxford, Oxford University Press, 2010, 469.

[48] UNSC Resolution 1624, preambular paragraph 14; United Nations General Assembly Resolution 60/288, *The United Nations Global Counter-Terrorism Strategy*, adopted on 8 September 2006, *UN Doc.* A/RES/60/288, 4-5 (*"measures to address the conditions conducive to the spread of terrorism*").

sets on the concept of terrorism. Unfortunately, Resolutions 1373 and 1624 provide no definitional guidance. Furthermore, it has to be noted that the negotiations on a comprehensive treaty on international terrorism are still ongoing.[49] Consequently, one has to turn to the guidance given by other global counterterrorism instruments. Firstly, a reference to Security Council Resolution 1566[50] is in order. This resolution finds it legal basis in Chapter VII of the UN Charter[51], was adopted unanimously[52] and provides for a general circumscription of terrorist acts. This definition is used as a basis for the above mentioned negotiations.[53] Furthermore, it has been alleged multiple times that this definition has customary status.[54] According to this definition, terrorist acts are *"criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose 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 organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism."*[55]

23. The conventions and protocols that Resolution 1566 refers to prescribe obligations for States Parties to criminalise and punish perpetration, participation and, to a certain extent, preparation of specific acts of terrorism.[56] These acts include hostage-taking; hijacking; aircraft and maritime sabotage; attacks at airports; attacks against diplomats and

[49] United Nations, *International Terrorism: Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996*, available at: http://legal.un.org/committees/terrorism/ [accessed 15/08/2016]; M.C. MELIÁ and A. PETZSCHE, "Terrorism as a criminal offence" in A. MASFERRER and C. WALKER (eds.), *Counter-terrorism, human rights and the rule of law: crossing legal boundaries in defence of the state*, Cheltenham, Edward Elgar Publishing, 2013, 92.

[50] United Nations Security Council Resolution 1566, *Threats to international peace and security caused by terrorist acts*, adopted on 8 October 2004, *UN Doc.* S/RES/1566.

[51] UNSC Resolution 1566, last preambular paragraph.

[52] Special Tribunal for Lebanon (Appeals Chamber), *Ayash et Al.*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, par. 88.

[53] Ibid.

[54] Ibid; K. AMBOS, "Our terrorists, your terrorists? The United Nations Security Council urges states to combat "foreign terrorist fighters" but does not define "terrorism"", *EJIL: Talk!*, 2 October 2014, available at: http://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/ [accessed 15/08/2016].

[55] UNSC Resolution 1566, operative paragraph 3.

[56] S. KRAEHENMAN, *Academy Briefing No. 7: Foreign Fighters under International Law*, Geneva Academy of International Humanitarian Law and Human Rights, October 2014, 34; H-P. GASSER, "Acts of Terror, "Terrorism" and International Humanitarian Law", *International Review of the Red Cross* 2002, No. 847, 550-551.

government officials; attacks against UN peacekeepers; use of bombs or biological, chemical or nuclear materials, and financing terrorist organisations.[57] These conventions and protocols do not provide for the criminalisation of mere membership of a terrorist group.

24. In order to be as exhaustive as possible with regard to the global concept of terrorism, one also has to refer to the controversial decision by the Appeals Chamber of the Special Tribunal for Lebanon on 16 February 2011. The Tribunal decided that according to international customary law, an international crime of terrorism had taken place if the following elements were present: *" (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element".*[58] It must be noted that this decision is not without criticism.[59]

25. Resolution 1566, with its reference to the counterterrorism conventions and protocols, sets fairly clear limits to the global concept of terrorism. However, States do not consider it as

[57] Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, *UNTS*, vol. 1035, p. 167; International Convention against the Taking of Hostages, 17 December 1979, *UNTS*, vol. 1316, p. 205; Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980, *UNTS*, vol. 1249, p. 13; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991; International Convention for the Suppression of Terrorist Bombings, 15 December 1997, *UNTS*, vol. 2149, p.256; International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, *UNTS*, vol. 2178, p. 197; International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005, *UNTS*, vol. 2445, p. 89.

[58] Special Tribunal for Lebanon (Appeals Chamber), *Ayash et Al.*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (16 February 2011), par. 85.

[59] K. AMBOS and A. TIMMERMAN, "Terrorism and Customary International Law" in B. SAUL (ed.), *Research Handbook on International Law and Terrorism*, Cheltenham, Edward Elgar Publishing, 2014, 28-30; D. ANDERSON, *The Terrorism Acts in 2013: Report of the Independent Reviewer on the operation of the Terrorism Act 2000 and part 1 of the Terrorism Act 2006*, July 2014, par. 10.3.

a comprehensive definition and overstep its boundaries generously in their counterterrorism policies.[60] It can be concluded that the lack of definitional constraints in Resolutions 1373 and 1624 and of a comprehensive treaty on international terrorism result in a significant amount of discretion for States in the prosecution of speech-based terrorist offences. They can feel authorised by the global counterterrorism framework to introduce the criminal offence of incitement to terrorism with little restriction regarding its required components. This discretion is to a certain extent curtailed by guarantees brought forward under the right to freedom of expression. These guarantees will be discussed in the next chapter.

2.2 European frameworks

2.2.1 Council of Europe

26. At this level, the Council of Europe Convention on the Prevention of Terrorism[61] calls for primary attention. This convention obliges the States Parties to criminalise the unlawful and intentional perpetration of public provocation to commit a terrorist offence.[62] The act of public provocation to commit a terrorist offence is described as *"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."*[63] The convention explicitly stipulates the obligation for States to respect human rights, in particular the right to freedom of expression, while establishing, implementing and applying this criminalisation.[64]

27. In comparison to the global framework, the CoE Convention and its explanatory report are certainly more elaborate on the characteristics of the offence of public provocation to commit a terrorist offence. The convention explicitly stipulates that this is an inchoate offence. [65] Regarding the requirement of unlawful perpetration, the explanatory report clarifies that this points to the inapplicability of classical legal defences or other principles

[60] DOSWALD-BECK (2011), 138-139.
[61] Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, *CETS* No. 196.
[62] Article 5 (2) CoE Convention on the Prevention of Terrorism.
[63] Article 5 (1) CoE Convention on the Prevention of Terrorism.
[64] Article 12 CoE Convention on the Prevention of Terrorism.
[65] Article 8 CoE Convention on the Prevention of Terrorism.

of domestic law which lead to the exclusion of criminal liability.[66] Furthermore, it is required that the act of public provocation – i.e. the distribution or making available of the message – takes place intentionally. As set out in the explanatory report, the drafters of the CoE Convention were of the opinion that the exact interpretation of "intentionally" should be left to the national authorities when implementing this convention.[67] This requirement of intent has to be distinguished from the requirement of specific intent to incite the commission of a terrorist act by the message.[68]

28. All public messages that directly or indirectly advocate terrorism are eligible to meet the threshold for criminalisation under the offence of public provocation to commit a terrorist offence. This broad range of expressions is limited by the other requirements stipulated in the definition. The speaker must have the specific intent to incite a terrorist offence. The emphasis of the explanatory report on the presence of a "specific" intent[69] delimits its meaning to a *mens rea* of purpose. Consequently, the offence of public provocation did not take place if the speaker merely knew or recklessly disregarded that his or her expression might incite acts of terrorism.[70] Furthermore, the impugned expression must cause a danger that a terrorist offence may be committed. One must assess the significance and credible nature of this danger according to the case law of the ECtHR.[71] The presence of these three elements – the description of the required intensity of the message, the presence of specific intent to incite and the presence of a causal link between the expression and the potential occurrence of a terrorist act – in the criminalisation of a speech-based terrorist offence are of significant value in the light of respect for freedom of expression. Therefore, these elements are analysed more extensively in the next chapter.

[66] Explanatory Report to the CoE Convention on the Prevention of Terrorism, par. 81-82. Example: the commission of the offence under duress would lead to exclusion of criminal liability.
[67] Ibid, paragraph 85.
[68] Ibid, paragraphs 84 and 99.
[69] Ibid, paragraphs 84 and 99.
[70] Joint Committee on Human Rights of the UK Parliament, *The Council of Europe Convention on the Prevention of Terrorism: First Report of Session 2006-07*, January 2007, 3 and 13; S. SOTTIAUX, "Leroy v. France: apology of terrorism and the malaise of the European Court of Human Rights' free speech jurisprudence", *European Human Rights Law Review* 2009, Vol. 3, 422; GALLI (2013), 112-113.
[71] Explanatory Report to the CoE Convention, par. 100; DOSWALD-BECK (2011), 132 and 415-419: the ECtHR pays attention to inter alia the author and the addressee of the message, and the context in which the expression took place.

29. With regard to the terrorist offences advocated by the messages, the CoE Convention constitutes an almost exact implementation of UNSC Resolution 1566.[72] The *mens rea* element that is required for a terrorist act is described as *"the purpose by nature or context to seriously intimidate a population or unduly compel a government or international organisation to perform or abstain from performing any act or to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation."*[73] With regard to the material elements a direct referral is made to the offences stipulated in the international counterterrorism conventions and protocols that have already been discussed.[74]

2.2.2 European Union

30. At the level of the European Union, the amended Framework Decision 2002/475/JHA on combating terrorism provides for the criminalisation of public provocation to commit a terrorist offence.[75] The framework decision almost completely reproduces the offence defined by the CoE Convention. A concrete addition is made by the preamble, which states that *"the expression of radical, polemic or controversial views in the public debate on sensitive political questions, including terrorism",* should not be captured by national public provocation offences.[76] Furthermore, the EU definition of terrorist offences targeted by the provoking messages is broader than the one in the CoE Convention, which refers to the international counterterrorism instruments. In particular, the framework decision considers a wider range of material acts as potential terrorist acts.[77] A clear example is the

[72] See *supra,* at 22-23.

[73] Preambular paragraph 10 CoE Convention on the Prevention of Terrorism.

[74] Article 1 CoE Convention on the Prevention of Terrorism; See also *supra,* at 14.

[75] Article 1 (1) Framework Decision of the Council of the European Union 2008/919/JHA, 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, *OJ.L.* 9 December 2008, vol. 330, 21.

[76] Ibid, preambular paragraph 14.

[77] Article 1 (1), second subsection Framework Decision 2002/475/JHA, 13 June 2002 on combating terrorism, *OJ.L.* 22 June 2002, vol. 164, 3.
The provision labels the following acts as terrorist offences, if they are combined with the required *mens rea* element: *" (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life (i) threatening to commit any of the acts listed in (a) to (h)."*

mention of the act of interfering with or disrupting the supply of water.[78] The concept of (advocated) terrorist offences is also widened under the framework decision by the lack of the requirement of a transnational element.[79] The decision does reproduce the *mens rea* element of the CoE Convention.[80] As a last general note, it is explicitly confirmed that States have to respect the right to freedom of expression while implementing the offence of public provocation to commit terrorist offences.[81]

31. It cannot go unnoticed that the amended Framework Decision 2002/475/JHA prescribes the criminalisation of incitement to commit terrorist offences as well.[82] However, this offence is generally considered to set a higher threshold than the offence of public provocation to commit a terrorist offence.[83] Therefore, due to considerations of time and convenience, this dissertation is limited to research on the latter offence.

32. The EU framework in this area of law is likely to undergo change in the near future. A proposal for a directive[84] which is aimed to replace the framework decisions, is in an advanced stage of the legislative process.[85] In this proposal, the core provisions regarding the criminalisation of public provocation to commit a terrorist offence remain unchanged.[86] However, the preamble has changed its tone drastically with regard to the public provocation offence. The seventh recital stipulates that *"the offenses related to public*

[78] Article 1 (1), second subsection (h) Framework Decision 2002/475/JHA.
[79] Contrary to the offences in the global counterterrorism treaties and protocols. For example, article 3 of the International Convention for the Suppression of Acts of Nuclear Terrorism excludes the application of that Convention if there is no transnational element present.
[80] Article 1 (1), first subsection Framework Decision 2002/475/JHA.
[81] Preambular paragraph 13 and article 2 Framework Decision 2008/919/JHA.
[82] Article 1 (2) Framework Decision 2008/919/JHA; Article 4 (2) amended Framework Decision 2002/475/JHA. The article refers to the circumscription of terrorist offences *sensu stricto* in article 1 (1) of the Framework Decision.
[83] European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism*, 5 September 2014, COM (2014) 554 Final, 4 (section 1.2) and 5-6 (section 2.1.1).
[84] European Commission, *Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism*, COM (2015) 625 final.
[85] EUR-LEX, *Procedure 2015/0281/COD: COM (2015) 625: Proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism*, available at: http://eur-lex.europa.eu/procedure/EN/2015_281?qid=1449431205018&rid=6 [accessed 15/08/2016].
[86] Article 3 (2) and article 5 of the Proposal, COM (2015) 625 final.

provocation to commit a terrorist offence comprise, inter alia, the glorification and justification of terrorism or the dissemination of messages or images including those related to the victims of terrorism as a way to gain publicity for the terrorists cause or seriously intimidating the population, provided that such behaviour causes a danger that terrorist acts may be committed." This recital hints at a wider dimension for the offence of public provocation, since the acts of justification and glorification of terrorism encompass a broader sphere of expressions than the expressions which strictly adhere to the prescribed components. As shall be explained at a later point in this thesis,[87] freedom of expression requires caution with regard to expansive interpretation of speech-based terrorist offences.

2.3 African framework

33. The Organisation of African Unity Convention on the Prevention and Combating of Terrorism[88] is the first instrument to consider at this regional level. The legal basis for the prosecution of speech-based terrorist offences is contained in the general obligation for States Parties to criminalise all acts described as terrorist acts in the convention.[89] For the determination of the components of these terrorist acts, one has to look at the first article of the OAU Convention. The first part of this provision considers as terrorist acts *"any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to: (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State.* [90]

34. Speech-based terrorist offences appear in the second part of this provision. This part equates *any* promotion, sponsoring, contribution to, command, incitement and

[87] In particular, see 68 and 73.
[88] Organisation of African Unity Convention on the Prevention and Combating of Terrorism, 14 June 1999, *OAU Doc.* AHG/Dec. 132 (XXXV).
[89] Article 2 (a) OAU Convention on the Prevention and Combating of Terrorism.
[90] Article 1 (3) (a) OAU Convention on the Prevention and Combating of Terrorism.

encouragement expressed with the intent to cause the commission of the acts mentioned in the first part, with actual terrorist acts.[91] These offences are implicitly characterised as inchoate, which means that the targeted conduct – one or more of the acts described in the first part of the provision – does not need to take place. The convention does provide an exclusion from the qualification of terrorism for acts and expressions which were done in the context of a struggle for self-determination or liberation. This struggle has to correspond with the relevant principles in international law at its turn.[92] Lastly, there is explicit confirmation in the convention that national measures which implement these obligations of criminalisation have to correspond with the African Charter on Human and Peoples' Rights.[93] This charter includes the protection of the right to freedom of expression.[94]

35. It should be noted that the legal basis in the OAU Convention for the prosecution of speech-based terrorist offences allows States a considerable amount of discretion. With regard to the expression, there is a low threshold of intensity in order to qualify for criminalisation. A certain safeguard is provided by the required presence of intent. With regard to the acts potentially promoted by the expression, a broad range is provided by the convention.[95] For example, an act which may cause damage to public or private property and which is intended to disrupt public service can meet the threshold.[96] It is not stipulated that the impugned expression must increase the likelihood of the occurrence of the targeted conduct. These characteristics are of particular relevance for the discussion of free speech guarantees in the next chapter. Lastly, considerable value must be accorded to the exclusion from prosecution of expressions made in the context of a legitimate exercise of the right to self-determination.[97]

36. The Member States of the African Union made efforts to concretise the provisions of the OAU Convention. A first important document in this context is the 2002 Plan of Action

[91] Article 1 (3) (b) OAU Convention on the Prevention and Combating of Terrorism.
[92] Article 3 (1) OAU Convention on the Prevention and Combating of Terrorism.
[93] Article 22 (1) OAU Convention on the Prevention and Combating of Terrorism.
[94] Article 9 ACHPR.
[95] DOSWALD-BECK (2011), 135-136: warns for the abuse of the vague terms in Article 1 (3) (a) OAU Convention.
[96] If it also constitutes a violation of the State's criminal laws.
[97] M. EWI and K. ANING, "Assessing the role of the African Union in preventing and combating terrorism in Africa", *African Security Review* 2006, Vol. 15 (3), 36-37.

on the Prevention and Combating of Terrorism.[98] With respect to the prosecution of speech-based terrorist offences, the plan states that the Member States should, *"for purposes of criminal responsibility, place … the apologist … the instigator … of a terrorist act on the same pedestal as the perpetrator of such an act".* Furthermore, the plan targets journalistic activities, by stipulating that Member States must *"take adequate measures to prevent and outlaw the printing, publication and dissemination by one or several persons residing on the territory of any Member State, of news items and press releases initiated by apologists of terrorist acts which are prejudicial to the interests and security of any other Member State."*[99] One can conclude that this plan motivates States to repress a broad range of unfavourable speech.

37. A second important document concretising the OAU Convention is the African model anti-terrorism law, which was endorsed by the Assembly of the AU in 2011.[100] This model law is an instrument of considerable value,[101] since it describes in a comprehensive manner the implementation of international and regional counterterrorism obligations. It implicitly confirms the inchoateness of the speech-based terrorist offences in the OAU Convention.[102] Furthermore, the model law hints at tolerance for peacefully intended dissent, protest and advocacy.[103] This is a positive characteristic in the context of the free speech guarantees discussed in the next chapter.

[98] African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa, *Plan of Action of the African Union for the Prevention and Combating of Terrorism,* 11-14 September 2002, Mtg/HLIG/Conv.Terror/Plan.(I).
[99] 2002 Plan of Action of the AU for the Prevention and Combating of Terrorism, 5.
[100] Assembly of the AU, *The African Model Anti-Terrorism Law*, 30 June – 1 July 2011 (17th Ordinary Session).
[101] EWI and ANING (2006), 41: discussion of the effort that the AU devoted to the preparation of this model law.
[102] Article 23 African Model Anti-Terrorism Law.
[103] Ibid, article 4 xxxix) and xl).

Chapter 3 International and regional free speech frameworks on the balance between national security and freedom of expression

3.1 General

38. Virtually all instruments in the previous chapter explicitly confirm that States have to implement their obligations to prosecute speech-based terrorist offences in conformity with the right to freedom of expression. The inherent purpose of the instruments discussed in the previous chapter, namely the prevention of terrorism, is an essential policy objective. However, the need to strike a balance with the right to freedom of expression is vital in a democratic society, since this human right safeguards the open and critical debate by the public on issues of interest.[104] The media performs a vital role in informing the public debate. Therefore, the right of media outlets to disseminate information freely forms an essential component of freedom of expression.[105]

39. At each level that was researched in the previous chapter, there exists an instrument which protects the right to freedom of expression. At the global level, the International Covenant on Civil and Political Rights[106] takes up this role. At the European level, the relevant instruments are the European Convention on Human Rights[107] and the Charter of Fundamental Rights of the European Union.[108] Considering the more attuned jurisdiction of the ECtHR for the enforcement of freedom of expression at the European level[109] and the equivalent protection of the freedom in the ECHR[110], a further analysis of the EU

[104] DOSWALD-BECK (2011), 407-409; D. MURRAY, "Freedom of expression, counter-terrorism and the internet in light of the UK Terrorist Act 2006 and the jurisprudence of the European Court of Human Rights", *Netherlands Quarterly of Human Rights* 2009, Vol. 27 (3), 335-336; S. SOTTIAUX, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution*, London, Hart Publishing, 2008, 68.

[105] Human Rights Committee, *General Comment No. 34 on Article 19: Freedom of opinion and expression*, adopted on 12 September 2011, *UN Doc.* CCPR/C/GC/34, paragraphs 13 and 46; M. SCHEININ, "Limits to freedom of expression: lessons from counter-terrorism" in T. MCGONAGLE and Y. DONDERS (eds.), *The United Nations and Freedom of Expression and Information*, Cambridge, Cambridge University Press, 2015, 428.

[106] International Covenant on Civil and Political Rights, 16 December 1966, *United Nations Treaty Series*, vol. 999, p. 171.

[107] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, *Council of Europe Treaty Series* No. 005.

[108] Charter of Fundamental Rights of the European Union, 1 December 2009, *OJ.C.* 26 October 2012, vol. 326, 391.

[109] See *supra*, at 14.

[110] Comparison of article 10 ECHR with articles 11 and 52 of the EU Charter of Fundamental Rights.

Charter will be absent. In the African framework, freedom of expression is protected by the African Charter on Human and Peoples' Rights.[111]

40. The ICCPR, the ECHR and the ACHPR do not consider the right to freedom of expression as absolute. The impact of a counterterrorism policy on this right can be subjected to two schemes of justification. Firstly, all three instruments provide for the possibility to justify "regular" limitations of freedom of expression. The second option constitutes of the scheme of derogations from the right to freedom of expression provided for in the ICCPR[112] and the ECHR[113]. This scheme holds the possibility for States to suspend the application of freedom of expression in times of war or other public emergencies. As was explained in the introduction, this thesis is limited to the conditions that a counterterrorism policy has to meet in order to qualify as a lawful limitation of the right to freedom of expression. It is however worthwhile to mention that the introduction of public emergencies has not become obsolete in a world that deals with the threat of international terrorism. This is underlined by the events at the time of writing. Following the terrorist attacks in the Paris region on 13 November 2015, the French authorities proclaimed the presence of a public emergency on their territory. This state of emergency was still in effect at the time of writing.[114]

41. The first section sets out possible manifestations of the international and regional counterterrorism obligations in national law, which constitute interferences with the right to freedom of expression. Subsequently, the chapter turns to each of the relevant frameworks and describes how freedom of expression provides counterweight for the counterterrorism obligations at the particular level. There will be some repetition with

[111] African Charter on Human and Peoples' Rights, 27 June 1981, *Organisation of African Unity Documents* CAB/LEG/67/3 rev. 5.
[112] Article 4 ICCPR.
[113] Article 15 ECHR.
[114] Secretariat General of the Council of Europe, *Reservations and Declarations for Treaty No.005 – Convention for the Protection of Human Rights and Fundamental Freedoms: Declaration in a Note Verbale from the Permanent Representation of France,* 24 November 2015; Secretariat General of the Council of Europe, *Declaration in a Note Verbale from the Permanent Representation of France,* 25 February 2016; Secretariat General of the Council of Europe, *Declaration in a Note Verbale from the Permanent Representation of France,* 25 May 2016; Secretariat General of the Council of Europe, *Reservations and Declarations for Treaty No.005 – Convention for the Protection of Human Rights and Fundamental Freedoms: Declaration in a Note Verbale from the Permanent Representation of France*, 22 July 2016.

regard to the principles that have to be implemented, but the balance will still take on a different shape in each framework.

3.2 Counterterrorism laws as interferences with freedom of expression

42. It is particularly important to emphasise that the characterisation of certain expressions as terrorist offences is connected to a range of possible measures by national authorities, of which criminal conviction potentially constitutes the final stage. Counterterrorism laws can thus pose an array of different kinds of interferences with freedom of expression. Concretely, a counterterrorism measure will represent an interference if it causes a detriment to a person because of the expression of his or her views or if it induces a "chilling effect", namely a climate of discouragement or fear to exercise one's freedom of expression.[115]

43. At the centre of the range of possible interferences stands the criminalisation of certain categories of expressions as speech-based terrorist offences. This act brings a certain expression within the realm of counterterrorism instruments. Criminalisations within this realm in general bring along a harsher degree of punishments than criminalisations of non-terrorist offences.[116] It should be noted that the resort to criminal law in restricting freedom of expression is in itself considered to be a significantly intrusive interference, so the height of the sentence is not that essential.[117] Another recurring counterterrorist measure consists of the blocking of websites with content which is deemed to incite or speak favourably about terrorism. In certain States, this measure can be imposed by an administrative authority without a court order.[118] The power to close other kinds of media outlets when

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[115] HRC, *Malcolm Ross v. Canada,* Communication No. 736/1997, 18 October 2000, *UN Doc.* CCPR/C/70/D/736/1997, par. 11.1; Joint Committee on Human Rights, *The CoE Convention on the Prevention of Terrorism,* January 2007, 15; MURRAY (2009), 358-359.

[116] For example, in the Belgian legal system, one can compare the criminalisation of public provocation to commit terrorist acts in the Criminal Code (article 140bis Belgian Criminal Code) with the criminalisation of incitement to violence and hatred in the antidiscrimination legislation (article 22 2° wet 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie, *Belgisch Staatsblad* 30 mei 2007, 29.016). The first offence carries along five to ten years of imprisonment and a fine of one hundred to five thousand euros. The second offence is punished with one month to one year of imprisonment and a fine of fifty to one thousand euros.

[117] European Court of Human Rights, *Lopes Gomes da Silva v. Portugal,* Application No. 37698/97, 28 September 2000, par. 36; African Court on Human and Peoples' Rights, *Lohé Issa Konaté v. Burkina Faso,* Application No. 004/2013, 5 December 2014, par. 165 – 166; SCHEININ (2015), 440.

[118] France has such legislation in place. Article 6-1 Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique; article 3 Décret n°2015-125 du 5 février 2015 relatif au blocage des sites provoquant à des actes de terrorisme ou en faisant l'apologie et des sites diffusant des images et représentations de mineurs à caractère pornographique.

they are deemed "pro-terrorism", and to confiscate their publications, exists in varying degrees as well.[119]

44. Furthermore, once an offence with a terrorist character is in focus, national authorities are inclined to grant law enforcement authorities more extensive investigatory powers. One can think of far-reaching powers of law enforcement officers to stop, question, detain and search persons who are suspected of terrorist activities.[120] The power of searching persons is in general complemented by the power to seize objects found on the person which may be related to (planned) terrorist activities.[121] Furthermore, the law enforcement authorities are often granted extensive powers to enter and search premises in the context of investigations into terrorist activities.[122] Again, this power will usually be complemented with the authority to retain found property which relates to the investigations. Lastly, it is worthwhile to note that law enforcements authorities tend to have at their disposal broad powers of intercepting or conducting surveillance on communications of persons suspect of terrorist activities.[123] All of these extensive investigatory measures bring along a "chilling effect" on the freedom of expression of anyone that is subjected to them. These measures form particularly significant interferences when they target journalists, because they represent a danger for the confidentiality of their sources and materials.[124] The confidentiality of journalistic sources and materials forms an essential part of the freedom of media.[125] If journalists and their sources cannot be certain of the security afforded by

[119] In the Ethiopian legal order, prosecutors can take such measures by virtue of article 42 Proclamation on Freedom of the Mass Media and Access to Information No. 590/2008, *Federal Negarit Gazeta* 4 December 2008. In certain cases, a court order is not required. Practice shows that this power is often (ab)used in the counterterrorism area. Source: HRC, *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee: Ethiopia,* 25 July 2011, *UN Doc.* CCPR/C/ETH/CO/1, par. 24.

[120] British Terrorism Act 2000, Schedule 7 paragraphs 2 and 8: combination of all these powers to determine whether a person *"appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism"*, when that person is at a(n) (air)port or in the border area and when the examining officer believes that the person's presence there is connected with his entering or leaving Great Britain or Northern Ireland. These powers are prescribed without the requirement of judicial oversight, but this feature was successfully attacked in the *Miranda* case. For more explanation, see *infra*, section 4.1.2.

[121] Ibid, Schedule 7 paragraph 11.

[122] Ibid, section 42.

[123] For example, in Ethiopian law: Article 14 Proclamation on Anti-Terrorism No 652/2009, *Federal Negarit Gazeta* 28 August 2009. This article grants extensive surveillance powers to the National Security and Intelligence Service.

[124] The UK *Miranda* case illustrates this. See *infra*, section 4.1.2.

[125] HRC, General Comment No. 34, par. 45.

confidentiality, they could be discouraged to provide information on matters of public interests.[126]

3.3 Global framework

3.3.1 Identification of instruments

45. The Universal Declaration of Human Rights was the first instrument to award universal protection to the right to freedom of expression. It stipulates this protection in the following words.

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any medium and regardless of frontiers."* [127]

46. This statement of the right has to be considered as authoritative, but it suffered from the UDHR's lack of binding force. It took almost two decades for the right to freedom of expression to be translated into a binding norm at the global level. This took place in 1966, in the form of article 19 ICCPR, which prescribes the following in relevant part.

> *"…*
>
> *2. Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
>
> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) For respect of the rights or reputations of others;*
>
> *(b) For the protection of national security or of public order (ordre public), or of public health or morals."*

[126] Explicitly confirmed by ECtHR jurisprudence. ECtHR, *Financial Times Ltd and Others v. United Kingdom,* Application No. 821/03, 15 December 2009, par. 70; ECtHR, *Sanoma Uitgevers BV v. Netherlands,* Application No. 38224/03, 14 September 2010, par. 71.

[127] Article 19 United Nations General Assembly Resolution 217 (III) A, *Universal Declaration of Human Rights,* adopted on 10 December 1948, *UN Doc.* A/RES/217(III) A.

47. Multiple global soft law instruments are brought in to help with the concretisation of the obligations for States under article 19 ICCPR in the context of prevention of terrorism. In particular, it is sought out whether these instruments concur on certain aspects. Soft law instruments have taken an important place in the international legal sphere and there exist multiple factors which induce the compliance of States with them.[128] A first group of non-binding documents which will be referred to consists of authoritative determinations by the Human Rights Committee on the interpretation of the ICCPR, in the form of General Comments, Views on communications and Concluding Observations on state reports. These documents are closely linked to the binding ICCPR and its (First) Optional Protocol and a certain follow-up on them is provided by the HRC. [129] These factors play a significant role in inducing the efforts of States to comply.[130]

48. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights[131] and the Johannesburg Principles on National Security, Freedom of Expression and Access to Information[132] are utilised in the discussion as well. These instruments are not easily disregarded by States either. The Siracusa Principles are closely connected to the binding ICCPR. Furthermore, they were published as a UN document and have been positively referred to by several UN actors.[133] The

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[128] J.L. CHARNEY, "Commentary: Compliance with International Soft Law" in D. SHELTON (ed.), *Commitment and compliance: the role of non-binding norms in the international legal system,* Oxford, Oxford University Press, 2000, 116. CHARNEY poses that in some situations, the status of an international norm as law or non-law may be important to compliance, but in most cases it is not. He finds it more important whether the norm contributes to the ordering of relations within the international community; D. SHELTON, "Editor's Concluding Note: The Role of Non-binding Norms in the International Legal System" in D. SHELTON (ed.), *Commitment and compliance: the role of non-binding norms in the international legal system,* Oxford, Oxford University Press, 2000, 554 and 556.

[129] The procedure of State Reporting to the HRC can be found in article 40 ICCPR. The procedure of consideration of individual communications can be found in the (First) Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, *UNTS,* vol. 999, p. 171. The power of the HRC to adopt General Comments on the interpretation of the treaty has been developed on the basis of the Committee's power to adopt general comments in relation to its consideration of state reports (Source: Article 40 par. 4 ICCPR & BANTEKAS & OETTE (2013), 197-198.)

[130] J.L. CHARNEY (2000), 117-118; E. BROWN WEISS, "Conclusions: Understanding Compliance with Soft Law" in D. SHELTON (ed.), *Commitment and compliance: the role of non-binding norms in the international legal system,* Oxford, Oxford University Press, 2000, 536-538.

[131] United Nations Economic and Social Council, *The Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights,* 28 September 1984, *UN Doc.* E/CN .4/1985/4.

[132] ARTICLE 19, *"*The Johannesburg Principles on National Security, Freedom of Expression and Access to Information", *Human Rights Quarterly* 1998, Vol. 20, 1-11.

[133] HRC, *General Comment No.29 on States of Emergency (article 4),* 31 August 2001, *UN Doc.* CCPR/C/21/Rev.1/Add.11, 6; Special Rapporteur on the promotion and protection of the right to freedom of

Johannesburg Principles have been praised by *inter alia* the UN Special Rapporteur on Freedom of Expression and Opinion.[134] These references by UN actors connect the Siracusa and Johannesburg Principles with a valuable institutional environment.[135] The involvement of the global civil society in their creation and promotion[136] provides for a further positive factor in the process of ensuring compliance with these principles.[137] With regard to their content, it has to be noted that both the Siracusa Principles and the Johannesburg Principles represent established and evolving standards for the protection of freedom of expression in the international and national legal order.[138] Consequently, a certain underlying consensus can be identified, which is another important factor in the induction of compliance.[139]

49. Lastly, relevant reports of UN Special Rapporteurs and Secretary Generals are also invoked. The legitimacy of these actors cannot be denied.[140] One particular report that needs to be highlighted is the final report of Mr Martin Scheinin as the Special Rapporteur on human rights and counter-terrorism, in which he sets out ten best practices in countering terrorism.[141] It is content-wise highly relevant for this dissertation, because these best practices represent a qualitative concretisation of the balance between the prevention of terrorism and the respect for human rights.[142]

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opinion and expression, *Annual Report to the Human Rights Council,* 20 April 2010, *UN Doc.* A/HRC/14/23, par. 78.

[134] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report to the Commission on Human Rights: Civil and Political Rights, Including the Question of freedom of expression, UN Doc.* E/CN.4/1999/64, par. 23.

[135] BROWN WEISS (2000), 545: the institutional setting of the norm is an important factor for the compliance with it.

[136] Introductions of the Siracusa and Johannesburg Principles.

[137] BROWN WEISS (2000), 546.

[138] Introductions of the Siracusa Principles and the Johannesburg Principles. Examples: the stipulation of the doctrine of necessity in a democratic society in paragraphs 10 and 19-20 of the Siracusa Principles and principle 1.3 of the Johannesburg Principles.

[139] BROWN WEISS (2000), 542.

[140] Ibid, 543: Another important factor to induce compliance with the soft law norm is the fact that the source which developed the norm is viewed as legitimate.

[141] Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Report to the Human Rights Council: Ten areas of best practices in countering terrorism,* 22 December 2010, *UN Doc.* A/HRC/16/51.

[142] Ibid, par. 9-10.

3.3.2 Role of articles 5 and 20 ICCPR

50. The scope of protection under the right to freedom of expression in principle encompasses information and ideas that may be perceived as deeply offending, shocking or disturbing.[143] Therefore, the utterance of an expression that constitutes a speech-based terrorist offence in principle still triggers the protection of article 19 ICCPR. However, before one turns to the test for permissible limitations under article 19 (3), the question comes up whether the protection of the ICCPR is extinguished by the application of article 5 (1) and article 20 ICCPR.

51. Article 5 (1) contains the prohibition of abuse of rights. Concretely, it prohibits the invocation of freedom of expression to justify an act of speech aimed at the destruction of the human rights of others or at the limitation of these rights to a greater extent than is provided for in the Covenant. This provision becomes of particular relevance when the expression constituting a speech-based terrorist offence reaches a certain degree of malice. It can then be argued that the speech impugns upon the right of other people or communities to live free from incitement to hostility. However, the HRC is reluctant to apply the provision in order to remove an act of speech from the protection of the ICCPR.[144] In its decision on the communication of *M.A. v. Italy* in 1984 the HRC suggested that extreme speech – in this case speech of a fascist nature – extinguishes the protection of the ICCPR by virtue of article 5.[145] Consequently, the communication was inadmissible on the basis of its incompatibility *ratione materiae* with the ICCPR.[146] However, this is the only instance of the HRC using article 5 in its decisions on communications to keep a controversial expression out of the scope of article 19.[147]

52. By virtue of article 20 ICCPR, a State is obliged to prohibit by law any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Speech-based terrorist offences of a certain malicious

[143] HRC, General Comment No. 34, par. 11; HRC, *Ross v. Canada,* par. 10.6.
[144] SCHEININ (2015), 429 and 435-437.
[145] HRC, *M.A. v. Italy*, Communication No. 117/1981, 10 April 1984, *UN Doc.* Supp. No. 40 (A/39/40), 190, par. 13.3. The incompatibility *ratione temporis* was the principal reason for the inadmissibility of the communication (par. 13.1).
[146] On the legal basis of article 3 of the (First) Optional Protocol to the ICCPR.
[147] In *Ross v. Canada*, the State Party argued for the inadmissibility of the communication by virtue of article 5 (1) (at paragraph 6.3). The HRC did not accept this argument and addressed the case on its merits, under the three-part test of article 19 (3).

nature will reach this threshold. In *J.R.T. and the W.G. Party v. Canada,* the HRC came to the conclusion that the impugned expression constituted advocacy of racial and religious hatred which Canada was obliged to prohibit under article 20 (2).[148] Subsequently, it was decided that the part of the claim which argued for the protection of the impugned expression under article 19 was inadmissible on the basis of its incompatibility with the provisions of the Covenant.[149] This case clearly evidences a use of article 20 ICCPR to deny certain categories of expression the protection of article 19. However, the HRC explicitly turned away from this approach in *Ross v. Canada,* in which it decided that restrictions on freedom of expression which fall within the scope of article 20 must also be permissible under article 19 (3).[150] This relationship between the provisions was confirmed in the HRC's General Comment No. 34 on the freedoms of opinion and expression.[151] This document further clarifies that article 20 only forms a *lex specialis* to article 19 in the aspect that the former article predetermines a specific form for the restriction of the described expressions, namely prohibitions by law.[152]

53. It has to be concluded that at the global level, the proper legal framework to monitor measures which counter speech-based terrorist offences is comprised of the permissible limitations clause of article 19 (3) ICCPR. Whilst applying this test for permissible limitations, it is of high relevance whether the impugned expression falls within the scope of articles 5 and 20 ICCPR.

3.3.3 Application of the "three-part" test under article 19 (3) ICCPR

54. A State's policy on countering speech-based terrorism restricts the right to freedom of expression. In order to be lawful, the measures of this policy have to be provided by law and they have to be necessary in order to fulfil a stipulated legitimate purpose. This constitutes the three-part test of article 19 (3). The implementation of these principles represents the search for balance between national security interests – in particular the prevention of terrorism – and freedom of expression. It is imperative to emphasise that

[148] HRC, *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981, 6 April 1983, *UN Doc.* CCPR/C/18/D/104/1981, par. 8 (b).
[149] On the legal basis of article 3 of the (First) Optional Protocol to the ICCPR.
[150] HRC, *Ross v. Canada*, par. 10.6.
[151] HRC, General Comment No. 34, par. 50.
[152] Ibid, paragraph 51.

freedom to debate on issues of public interest constitutes the norm, while restriction of this freedom in the name of prevention of terrorism constitutes the exception.[153]

3.3.3.1 Legal certainty

55. The first part of the test is to be translated into the principle of legal certainty. It prescribes that a policy to counter speech-based terrorism must be grounded in a domestic legal basis of sufficient quality. This entails first of all requirements for the formal characteristics of the legal basis. In particular, it is not lawful to restrict freedom of expression on the basis of traditional, religious or other such customary law.[154]

56. With regard to the substantive aspect, the HRC identifies three main requirements for the legal basis of measures countering speech-based terrorism.[155] The most straightforward one dictates that the legal basis in which the concerned measure is written down has to be accessible for members of the general public.[156] Furthermore, the counterterrorism law that restricts freedom of expression has to be formulated with sufficient precision. A citizen who is subjected to this law must be able to foresee, to an extent that is reasonable in the particular situation, whether a certain expression triggers the application of the law.[157] Absolute rigidity is not required, since this would defeat a law's purpose to react with certain flexibility to a phenomenon. The HRC recognises the permissibility of a certain amount of discretion for national courts and authorities to interpret and apply the law.[158]

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[153] Ibid, paragraph 21; HRC, *Robert Faurisson v. France*, Communication No. 550/1993, 19 July 1995, *UN Doc.* CCPR/C/58/D/550/1993, par. 8.

[154] HRC, General Comment No. 34, paragraph 24; HRC, *General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, adopted on 23 August 2007, *UN Doc.* CCPR/C/GC/32, par. 4.

[155] Ibid, paragraph 25. This provision states the following. *"For the purposes of [article 19] paragraph 3, a norm, to be characterised as a "law, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not."* DOSWALD-BECK (2011), 72-74: illustrates how well-established these conditions are.

[156] HRC, *Nurbek Toktakunov v. Kyrgyzstan*, Communication No. 1470/2006, 21 April 2011, *UN Doc.* CCPR/C/101/D/1470/2006, par. 7.6: constitutes an example of the application of the requirement of accessibility. The requirement is also decreed by the *Johannesburg Principles*, principle 1.1 (a); *Siracusa Principles*, par. 17.

[157] HRC, *Johannes Maria De Groot v. The Netherlands*, Communication No. 578/1994, 24 July 1995, *UN Doc.* CCPR/C/54/D/578/1994, par. 4.3; HRC, *Concluding Observations regarding Ethiopia*, 25 July 2011, par. 15; *Johannesburg Principles*, Principle 1.1 (a); *Siracusa Principles*, par. 17.

[158] HRC, *De Groot v. The Netherlands*, par. 4.3; HRC, *Faurisson v. France*, par. 9.5. Whilst investigating this requirement, the HRC primarily focuses on whether the law was interpreted and/or applied arbitrarily or whether the application of the law amounts to a denial of justice.

The HRC prescribes as a third requirement under the principle of legal certainty that a policy on countering speech-based terrorism should provide effective safeguards and remedies against the abusive and arbitrary restriction of freedom of expression. There exists a close connection with the previous requirement, since a law that describes the powers of the responsible authorities and the sorts of restricted expressions with precision, provides a significant safeguard against unfettered discretion in the execution. As a further safeguard against the arbitrary use of powers, there should be effective scrutiny on the application of laws which restrict expressions in the name of counterterrorism by a court or another independent and impartial decision-making body.[159]

57. In the context of this dissertation, it is of particular relevance to delve more into the application of the second and third substantive requirements to the global prohibition on incitement to terrorism. As was already concluded in the previous chapter, there is little to no guidance to be found in Security Council Resolutions 1373 and 1624 on the concept of incitement. The global counterterrorism framework relied on the domestic authorities to criminalise incitement to terrorism in a manner that respects the principle of legal certainty. As practice has shown, the domestic authorities failed in this task. They took the opportunity to invoke in particular Resolution 1624 as a justification for laws that criminalise categories of speech favourable to the commission of terrorism with little to no restriction with respect to their content.[160] The UN Secretary General repudiated this phenomenon in his report of 2008 on the respect for human rights in the fight against terrorism. Furthermore, he put forward that only criminalisation of direct incitement to terrorism complied with freedom of expression. This offence was to be understood as the direct encouragement to engage in terrorism, that is intended to promote terrorism, and is likely to result in terrorist action.[161]

58. One can follow the train of thought that "direct incitement to terrorism", "direct encouragement to terrorism" or other similar circumscriptions suffice to cover the mentioned three elements. It is reasonable to presume that these circumscriptions imply the presence of an intention to incite a terrorist act and of a causal link between the

[159] *Johannesburg Principles*, principle 1.1 (b).
[160] DOSWALD-BECK (2011), 138-140.
[161] UNSG, *Report to the General Assembly* (28 August 2008), par. 61-62.

expression and the potential occurrence of a terrorist act.[162] However, at the global level, it is wise to require more detail, since it is impossible to guarantee that each UN Member State has at its disposal a judicial apparatus which provides an effective and independent oversight on the implementation of the global prohibition on incitement to terrorism. This reasoning underlines the importance of the third substantive requirement under the principle of legal certainty. The presence of effective scrutiny by a judicial or other independent decision-making body can provide a certain compensating role for vagueness in the circumscription of a speech-based terrorist offence.[163]

59. With regard to indirect forms of incitement to terrorism, the 2008 report of the Secretary General should not be considered as completely rejecting the practice of including these forms into the circumscription of speech-based terrorist offences. The document rather has the purpose of condemning vague measures of criminalisation because of their disproportionate impact on freedom of expression. This can be derived from the language in the report[164] and from statements made by other UN actors. The HRC recognises the existence of crimes of indirect incitement to terrorism, but urges that these crimes have to be defined sufficiently precise.[165] Furthermore, the Special Rapporteur on freedom of expression praised article 5 CoE Convention on the Prevention of Terrorism highly, which constitutes a regime that criminalises indirect advocacy of terrorism.[166] It is clear that laws which criminalise such offences as glorification, justification and encouragement of terrorism, without the provision of other elements, will not be in line with the condition of legal certainty. Even with the presence of an independent judicial mechanism with a strong human rights tradition, this kind of criminalisation does not confer the necessary certainty

[162] E. BARENDT, "Incitement to, and glorification of, Terrorism" in I. HARE and J. WEINSTEIN (eds.), *Extreme speech and democracy,* Oxford, Oxford University Press, 2010, 447-449 and 453; RONEN (2010), 665 and 669. BARENDT and RONEN agree with this line of reasoning.

[163] RONEN (2014), 448: Divergence between the approach in the report of the UNSG in 2008 and the approach by the Council of Europe can be explained by the presence of a stronger consensus and an effective human rights mechanism at the level of the Council of Europe.

[164] Ibid, par. 61: *"vague terms of uncertain scope".*

[165] HRC, General Comment No. 34 (2011), par. 46.

[166] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report to the General Assembly on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 16 August 2006, par. 28.

for an individual to be able to regulate his or her acts of speech in accordance with the law.[167]

60. Consequently, the three aforementioned elements – the description of the intensity of the expression, the presence of an intention to incite terrorist acts and the presence of a causal link between the expression and the potential occurrence of a terrorist act – become important again. In this context, it is valuable to propose the following definition for the offence of incitement to terrorism at the global level. In essence, it is the definition set out by SCHEININ in his last report as Special Rapporteur[168], with the introduction of one change. According to this definition, incitement to terrorism is present when someone intentionally and unlawfully distributes or otherwise makes available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a substantial danger that one or more such offences may be committed.[169] The change to "substantial danger" has been introduced to provide stricter guidance on the component of the causal link. This provides for the optimal level of legal certainty at the global level, where there is no guarantee of the presence of independent scrutiny on the implementation of counterterrorism obligations.[170]

61. Until this point, this section has discussed the required degree of precision of the criminalised expression. However, the principle of legal certainty also leads to the obligation for the legal basis to stipulate with a certain amount of precision the terrorist acts that are targeted by the criminalised expression. In this regard, the global

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[167] BARENDT (2010), 452-454: emphasises the need for specifications in order to avoid illegitimate impediment of political speech.

[168] Special Rapporteur on the promotion and protection of human rights while countering terrorism, *Ten areas of best practices in countering terrorism*, par. 31-32. The model offence of incitement to terrorism by SCHEININ is composed as following: *"It is an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed."*

[169] SCHEININ at his turn borrowed a significant amount of elements from the criminalisation of public provocation to commit a terrorist offence in the CoE Convention (*supra*, at 17). He did changed the wording of *"whether or not directly advocating terrorist offences"* to *"whether or not expressly advocating terrorist offences"*. The reason for this is explained at a later point in this thesis, at 66.

[170] RONEN (2014), 668: agrees with this line of reasoning, but proposes the standard of *"likely to result in criminal action"*, which is used by the Secretary General in his report to the General Assembly of 28 August 2008 (see *supra*, at 57). BRANDT (2010), 455-459: agrees with a less specified intensity of the expression and with an emphasis on the causal link, but attaches less importance to the requirement of intention.

counterterrorism framework should be marked for the lack of guidance in UNSC Resolutions 1373 and 1624 on the concept of terrorism and for the lack of a well-established comprehensive definition of the concept in another instrument.[171] Consequently, it is valuable to refer to the proposed definition of terrorism in the aforementioned report of SCHEININ on the ten best practices in the field of countering terrorism. This definition should be praised for finding the balance between the goals of countering terrorism and respecting human rights, by limiting the definition to conduct that is truly terrorist in nature.[172] Furthermore, it can be strongly argued that this definition is comprehensive, since it is not limited to the crimes in the counterterrorism conventions and protocols. The definition is cited in its original structure to enhance its clarity.[173]

"Terrorism means an action or attempted action where

1) *The action:*
   a) *Constituted the intentional taking of hostages; or*
   b) *Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or*
   c) *Involved lethal or serious physical violence against one or more members of the general population or segments of it.*

And

2) *The action is done or attempted with the intention of:*
   a) *Provoking a state of terror in the general public or a segment of it; or*
   b) *Compelling a Government or international organisation to do or abstain from doing something*

[171] *See supra*, at 22-25.
[172] Special Rapporteur on the promotion and protection of human rights while countering terrorism, *Ten areas of best practices in countering terrorism*, par. 26-28; DOSWALD-BECK (2011), 141.
[173] Special Rapporteur on the promotion and protection of human rights while countering terrorism, *Ten areas of best practices in countering terrorism*, par. 28.

And

3) The action corresponds to:

a) 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

b) All elements of a serious crime defined by national law."

3.3.3.2 Legitimate purpose

62. The second part of the test dictates that a policy on countering speech-based terrorism may only be imposed if it serves a legitimate purpose that is stipulated in article 19 (3) (a) and (b) ICCPR. Furthermore, the policy may only be applied to serve its prescribed purposes.[174] Consequently, one must look out for hidden illegitimate purposes.[175]

63. The research in the previous chapter on the global counterterrorism instruments shows that their call for measures to prohibit incitement to terrorism and related offences was made with the aim of preventing the creation of an environment which is conducive for terrorist acts.[176] This aim answers to several legitimate objectives that are stipulated in the ICCPR. Firstly, the protection of the rights of others can be mentioned. The term "others" refers to other persons individually or as members of a community.[177] It has to be noted that restrictions in this context also derive support from article 20 ICCPR. Measures against speech-based terrorist offences of a certain malicious nature serve the purpose of protecting the right of other persons to live free from fear for national, racial or religious hatred which can realistically incite discrimination, violence or hostility.

64. A second legitimate purpose that is served by a policy against speech-based terrorism constitutes the maintenance of public order. This concept includes the circumstances that

[174] HRC, General Comment No. 34, par. 22.

[175] HRC, *Albert Womah Mukong v. Cameroon,* Communication No. 458/1991, 21 July 1994, *UN Doc.* CCPR/C/51/D/458/1991**,** par. 9.7: the HRC established that the legitimate aims of national security and public order had been used as a pretext. It stipulated in particular that these interests could not be served by *"attempting to muzzle advocacy of multi-party democracy, democratic tenets, or human rights."* See also DOSWALD-BECK (2011), 75.

[176] See *supra,* at 21.

[177] Ibid, par. 28; HRC, *Ross v. Canada,* par. 11.5.

promote the proper functioning of the democratic institutions and the realisation of the fundamental principles on which the society is built.[178]

65. The third legitimate objective with a fundamental role is the protection of national security. It serves purposes of clarity to mention at this point[179] that States are allowed to adopt the most far-reaching counterterrorism measures in the face of a threat to national security. Therefore, this objective is the most likely to be used as a pretext.[180] The Johannesburg Principles' approach to this challenge should be seen as valuable. In particular, principle 2 states that a restriction of freedom of expression will only have the protection of a national security interest as objective if "*its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government."*[181]

66. It has to be concluded that the targeting of an expression as a speech-based terrorist offence does not fulfil the second requirement of the test, if that expression creates no realistic threat of materialisation of terrorism.

3.3.3.3 Necessity

67. The third requirement stipulates that a policy on countering speech-based terrorism has to be necessary in order to attain the legitimate purpose of the prevention of terrorist acts. From the beginning, it should be noted that the global counterterrorism instruments implicitly call for criminal measures to counter incitement to terrorism and related offences. Criminal measures are instruments of a considerably intrusive nature with regard

[178] *Siracusa Principles,* par. 22; DOSWALD-BECK (2011),75 and 415.
[179] This is actually an aspect of the principle of necessity.
[180] HRC, General comment No. 34, par. 30: *"Extreme care must be taken by States parties…"*; HRC, *Toktakunov v. Kyrgyzstan,* par. 7.7; HRC, *Keun-Tae Kim v. Republic of Korea,* Communication No. 571/1994, 4 January 1999, *UN Doc.* CCPR/C/64/D/574/1994, par. 12.4; S. COLIVER, "Commentary to: the Johannesburg Principles on National Security, Freedom of Expression and Access to Information", *Human Rights Quarterly* 1998, Vol. 20, 18-22 and 27. In the cases of *Toktakunov* and *Keun-Tae Kim,* the State did not provide sufficient proof of a risk to the national security.
[181] Should be seen in connection with *Johannesburg Principles,* Principle 1.2.

to freedom of expression.[182] Therefore, their application should be limited to circumstances of certain severity in order to fulfil the test of necessity.

68. The first task for a State is to identify in specific and individualised fashion the precise nature of the threat posed by the expression. It is of particular relevance that the State can prove that the expression and the identified threat are closely connected.[183] Furthermore, the restriction – i.e. the respective criminal measure to counter speech-based terrorism – should constitute a proportionate and necessary reaction to the threat.[184] The HRC summarises the factors for this second threshold in the following terms. *"Restrictions must not be overbroad… restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected… The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination."* [185]

69. If the impugned expression answers to the definition of incitement to terrorism proposed at the end of the section about legal certainty – which is lenient as regards the inciting intensity of the expression but does require the presence of an intention to incite and of a strong causal link between the expression and the potential occurrence of a terrorist act[186] – its restriction by criminal law will in principle pass the necessity test. This kind of expressions causes a realistic threat of materialisation of terrorist acts. Furthermore, the

[182] ECtHR, *Lopes Gomes da Silva v. Portugal,* par. 36; ACtHPR, *Konaté v. Burkina Faso,* par. 165 – 166; SCHEININ (2015), 440.

[183] HRC, General Comment No. 34, par. 35; HRC, *A.K. and A.R. v. Uzbekistan,* Communication No. 1233/2003, 31 March 2009, *UN Doc.* CCPR/C/95/D/1233/2003, par. 7.2. In *A.K. and A.R.,* the HRC stated that the national courts took careful steps to identify a threat to national security. See also DOSWALD-BECK (2011), 415-416.

[184] HRC, *Hak-Chul Shin v. Republic of Korea,* Communication No. 926/2000, 16 March 2004, *UN Doc.* CCPR/C/80/D/926/2000, par. 7.3; DOSWALD-BECK (2011), 76; H. KELLER and M. SIGRON, "State Security v. Freedom of Expression: Legitimate Fight against Terrorism or Suppression of Political Opposition", *Human Rights Law Review* 2010, Vol. 10 (1), 158.

[185] HRC, General comment No. 34, par. 34.

[186] See *supra,* at 60. This definition stated that *"incitement to terrorism is present when someone intentionally and unlawfully distributes or otherwise makes available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a substantial danger that one or more such offences may be committed."*

offence is described with sufficient precision, which excludes to a significant extent disproportionality.

70. It is more contentious whether the criminalisation of such offences as glorification, justification and encouragement of terrorism, without the prescription of an intention to incite and a causal link between the expression and the potential occurrence of a terrorist act, passes the necessity test. It can be argued that these acts of speech still aim to establish an environment which is conducive to terrorism. However, the materialisation of this threat has to be considered as a considerably distant risk. A lot depends on the specific circumstances, which are better accounted for in the aforementioned criminalisation of incitement to terrorism. Moreover, it has been established that such offences as glorification of terrorism, justification of terrorism, encouragement of terrorism and other speech-based terrorist offences which are left undefined, are overbroad and run the risk of impeding the spread of legitimate views and information.[187] Furthermore, criminal measures against this kind of speech – speech which does not cause a realistic risk of materialisation of terrorist violence – will be counterproductive. The suppression of discontent with society runs the risk of that discontent attracting legitimacy and evolving into recourse to violence.[188] The construction of a solid counter-narrative framework forms a better alternative in order to dispel the allures of violent extremist opinions.[189]

71. The necessity test also requires that the circumscription of the terrorist conduct targeted by the expression should be limited to conduct that is truly terrorist in nature.[190] It is valuable to refer to the definition of terrorism proposed by SCHEININ which was mentioned at the end of the section on legal certainty.[191]

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[187] HRC, General Comment No. 34, par. 46; HRC, *Concluding observations on the fifth periodic report of France*, 21 July 2015, *UN Doc.* CCPR/C/FRA/CO/5, par. 10.

[188] CHOUDHURY (2010), 486-487; A. OEHMICHEN, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany and France,* Antwerp, Intersentia, 2009, 174.

[189] Research about this topic: HEDAYAH and INTERNATIONAL CENTRE FOR COUNTER-TERRORISM – THE HAGUE, *Developing Effective Counter-Narrative Frameworks for Countering Violent Extremism*, September 2014, 10 p.

[190] An example: HRC, *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*, 21 July 2015, *UN Doc.* CCPR/C/GBR/CO/7, par. 14: the HRC expresses its concern about the broad definition of terrorism in British law, for being *"unduly restrictive of political expression".*

[191] See *supra*, at 61.

72. Not only the circumscription of the speech-based terrorist offence has to reflect the principle of proportionality. The judicial and administrative authorities also have to apply the restrictive measures surrounding the offence in a manner that respects the principle. This implies that the authorities will take into account all specific circumstances of a case.[192] In particular, they will consider whether the case involves the exercise of "watchdog" functions, namely the spread of views and information on matters of legitimate public concern.[193] The HRC explicitly recognises that this watchdog function can be exercised not only by the professional media and journalists, but also by private individuals and associations.[194]

3.4 European framework

3.4.1 Identification of instruments

73. Article 10 ECHR provides vital protection of the right to freedom of expression at the European level. It stipulates this protection in the following terms.

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…*
>
> *2. The exercise of these freedoms, since it carries duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

74. Naturally, the jurisprudence of the ECtHR on article 10 ECHR is of primary importance in the discussion of this framework.[195]

[192] HRC, General comment No. 34, par. 34. For full citation, see *supra,* at 68.
[193] DOSWALD-BECK (2011), 421-422.
[194] HRC, *Toktakunov v. Kyrgyzstan,* par. 6.3 and 7.4.
[195] Article 46 ECHR prescribes that (final) judgments of the ECtHR have binding force for States in cases to which they are parties. In general, States take into account all judgments of the ECtHR.

3.4.2 Role of article 17 ECHR

75. The principle that freedom of expression is also applicable to utterances that offend, shock or disturb the State or any sector of the population is firmly established at the European level as well.[196] The next question remains whether the protection is extinguished in the case of a speech-based terrorist offence by virtue of article 17 ECHR. This provision reiterates the prohibition of abuse of rights of article 5 (1) ICCPR.[197] Case law of the ECtHR has shown that instances of open calls for or justification of violence[198], propaganda of totalitarian views[199] and hateful utterances of the strongest form[200] run the risk of being declared inadmissible under article 17 *juncto* article 35 (3) (a) ECHR. This determination is of particular relevance for anyone who seeks protection under article 10 ECHR for an expression that amounts to a speech-based terrorist offence at the respective national level. However, little consistency can be found in the application of article 17 ECHR by the Court.[201] Furthermore, a recent trend can be discerned in which the ECtHR seems to favour the assessment of extreme speech on the merits under article 10 ECHR.[202] This has to be seen as beneficial from a human rights perspective, since it implies a balancing exercise of the interests involved. Consequently, article 10 (2) ECHR, the

[196] ECtHR, *Handyside v. United Kingdom,* Application No. 5493/72, 7 December 1976, par. 49; Committee of Experts on Terrorism of the Council of Europe (CODEXTER), *Freedom of Expression and Apologie du Terrorisme*, 24-26 November 2008, par. 3.

[197] See *supra,* at 51.

[198] A. BUYSE, "Dangerous expression: the ECHR, violence and free speech", *International and Comparative Law Quarterly* 2014, vol. 63, 494-495 and 502. BUYSE refers as an example to ECtHR, *Hizb Ut-Tahrir and others v. Germany,* Application No. 31098/08, 12 June 2012.

[199] BUYSE (2014), 494-495. BUYSE refers as an example to ECtHR, *Ždanoka v Latvia,* Application No. 58278/00, 16 March 2006.

[200] BUYSE (2014), 495 and 502. BUYSE refers to ECtHR, *Norwood v. UK,* Application No. 23131/03, 16 November 2004.

[201] BUYSE (2014), 495 – 496. BUYSE refers as an example to ECtHR, *Schimanek v. Austria*, Application No. 32307/96, 1 February 2000. In this case, the Court applied article 10 ECHR (with reference to article 17), even though it concerned the expression totalitarian ideologies.

[202] BUYSE (2014), 495- 496 and 502. For example, in ECtHR, *Leroy v. France*, Application No. 36109/03, 2 October 2008, par. 27: the Court refuses to apply article 17 ECHR and deny the impugned expression the protection of article 10 ECHR, because it feels that *"the offence caused to the memory of the victims of the attacks of 11 September 2001"* should be considered on the merits under article 10 ECHR. Another example: ECtHR, *Vona v. Hungary*, Application No. 35943/10, 9 July 2013: centred on the organisation of paramilitary marches by the movement of the Hungarian Guard Association. These marches took place in villages with Roma populations, and involved calls by the uniformed members for the defence of ethnic Hungarians against "Gypsy crime". The Court refused to apply article 17 because it was of the opinion that the facts did not reveal *"prima facie acts aimed at the destruction of the rights of others or which amounted to an apology or propaganda of totalitarian views."* (par.38) One can sense behind this reasoning a desire to assess the case on its merits under article 10 ECHR.

"permissible limitations clause", constitutes the essential framework for the assessment of measures countering speech-based terrorism.

3.4.3 Application of the "three-part" test under article 10 (2) ECHR

76. The three-part test for legitimate restrictions of the right to freedom of expression in the ECHR follows the same principles as the test of article 19 (3) ICCPR. Measures that counter speech-based terrorism have to be prescribed by a domestic legal basis of sufficient quality and they have to be necessary in a democratic society in order to serve one or multiple legitimate interests stated in the provision.

3.4.3.1 Legal certainty

77. Similarly to its application at the level of the ICCPR[203], this principle sets standards of accessibility and foreseeability for the legal basis, to an extent that is reasonable in a given situation.[204] Furthermore, the presence of the ECtHR guarantees independent and effective scrutiny against the misuse of counterterrorism obligations by States.[205]

78. The amount of detail in the description of the offence of public provocation to commit a terrorist offence in the European counterterrorism regimes[206] and the scrutiny of the ECtHR over the implementation[207] are positive factors. However, SCHEININ is right to note an ambiguity in the European definition of the offence of public provocation which can have a detrimental impact on the protection of freedom of expression.[208] On the one hand, the requirements of intent to incite the commission of a terrorist offence and of an increased likelihood of the occurrence of a terrorist offence demonstrate that the impugned expression must reach the standard of incitement to violence. However, the line *"whether or not directly advocating terrorist offences"* supports the notion that States are justified

[203] See *supra*, at 56.
[204] ECtHR, *Sunday Times v. United Kingdom*, Application No. 6538/74, 26 April 1979, par. 49; ECtHR, *Gözel and Özer v. Turkey*, Application Nos. 43453/04 and 31098/05, 6 July 2010, par. 43-44; GALLI (2013), 125.
[205] The presence of effective and impartial scrutiny is an important aspect of the principle of legal certainty. See *supra*, at 56 and ECtHR, *Malone v. United Kingdom*, Application No. 8691/79, 2 August 1984, par. 67.
[206] Article 5 CoE Convention on the Prevention of Terrorism; Article 1 (1) Framework Decision of the Council of the European Union 2008/919/JHA; See *supra*, at 26 and 30.
[207] An example of the influence of the ECtHR: Explanatory Report to the CoE Convention on the Prevention of Terrorism, par. 100: while considering whether the impugned expression causes a danger that a terrorist offence might be committed, one must take into account the author and the addressee of the message, as well as the context of the expression, in accordance with the case-law of the ECtHR.
[208] SCHEININ (2015), 430 - 431.

in criminalising speech which remains under that standard. This ambiguity is also reflected in the seventh recital of the newly proposed EU Directive on combating terrorism, which seems to suggest that glorification and justification of terrorism as such can amount to the offence of public provocation.[209] The full effect of this ambiguity became apparent in the ECtHR case of *Leroy v. France*[210], in which the CoE Convention on the Prevention of Terrorism was explicitly considered as the pertinent international instrument.[211] Rather than investigating whether the impugned publication encouraged readers to violence, the Court noted as vital issue that *"through his choice of language, the applicant commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of victims".*[212] Furthermore, the requirements of an intention to incite a terrorist offence[213] and a credible danger of a terrorist offence occurring because of the cartoon[214] carried little to no relevance in the reasoning of the ECtHR. In order to prevent the erosion of these requirements and of the incitement standard in general, it might be wise to follow the suggestion of SCHEININ to change the contentious line to *"whether or not expressly advocating terrorist offences"*.[215]

79. With regard to the requirement of a detailed description of the terrorist acts targeted by the expression, the EU Framework Decision on combating terrorism has to be complimented on its comprehensiveness.[216] The CoE Convention on the Prevention of Terrorism refers in this regard to the international conventions and protocols. In principle, this implies fairly

[209] See *supra*, at 32.
[210] ECtHR, *Leroy v. France*, 2008. Denis Leroy was convicted at the national level for complicity in the apology of terrorism. The impugned publication was a cartoon of the falling twin towers of the World Trade Centre, accompanied by the caption – which resembled the advertising slogan of a famous brand – "We have all dreamt of it… Hamas did it". Leroy submitted the cartoon to his editor on the day of the attack – 11 September 2001 – and it was published on 13 September 2001. The ECtHR considered the CoE Convention on the Prevention explicitly as a pertinent instrument for the case, since France had ratified it.
[211] Ibid, par. 19. France had ratified the CoE Convention months before this case.
[212] Ibid, par. 43.
[213] ECtHR, *Leroy v. France*, 2008, par. 43.
[214] ECtHR, *Leroy v. France*, 2008, par. 45. The Court states that the cartoon instigated reactions of the readers (in the form of letters and e-mails) and had a certain impact on public order in the region. This is a far stretch from causing a credible danger of occurrence of terrorist violence.
[215] Special Rapporteur on the promotion and protection of human rights while countering terrorism, *Ten areas of best practices in countering terrorism*, par. 30-32.
[216] See *supra*, at 30 (in particular footnote 77).

precise boundaries to the circumscription. However, States tend to see it as too specific and to introduce broader terrorist offences *sensu stricto* in their national legal order.[217]

80. States have a certain amount of discretion with regard to the implementation of the obligation to criminalise public provocation to commit terrorist offences, as long as the right to freedom of expression is respected.[218] Consequently, States tend to introduce speech-based terrorist offences in other forms. It is important to note that the ECtHR is reluctant to identify a violation of the "prescribed by law" condition, even when the national legal basis is formulated in extremely broad terms.[219]

3.4.3.2 Legitimate purpose

81. The ECtHR connects measures which counter speech-based terrorism to various legitimate interests stipulated in article 10 (2) ECHR. These include inter alia the protection of national security, territorial integrity and public safety and the prevention of disorder and crime.[220]

3.4.3.3 Necessity in a democratic society

82. In general, this principle dictates that the counterterrorism measure interfering with freedom of expression has to meet a pressing social need. In particular, the ECtHR investigates whether the measure is proportionate to the pursued legitimate interest and whether the motivation of the national courts for the measure is pertinent and sufficient.[221] The requirement of proportionality at its turn implies that there is a reasonable relationship

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[217] The problem of a lack of a comprehensive definition of "terrorism" (already discussed, see *supra,* at 25 and 61) also exists at this level. Source: DOSWALD-BECK (2011), 304; GALLI (2013), 125.

[218] Article 12 CoE Convention on the Prevention of Terrorism; article 2 Framework Decision 2008/919/JHA; Explanatory Report to the CoE Convention on the Prevention of Terrorism, par. 98. Furthermore, Framework Decision 2008/919/JHA has as a legal basis former article 31 (1)(e) of the Treaty of the European Union, which aims for *"progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of … terrorism"* (contemporary equivalent: articles 82 and 83 of the Treaty on the Functioning of the European Union).

[219] ECtHR, *Leroy v. France,* 2008, par. 36; ECtHR, *Gözel and Özer v. Turkey,* 2010, par. 44 (Court explicitly refuses to analyse the fulfilment of this condition, preferring to rule the case on the condition of necessity); ECtHR, *Belek v. Turkey,* Application Nos. 36827/06, 36828/06 and 36829/06, 20 November 2012, par. 26.

[220] ECtHR, *Leroy v. France,* 2008, par. 36; ECtHR, *Gözel and Özer v. Turkey,* 2010, par. 45; ECtHR, *Belek v. Turkey,* 2012, par. 26.

[221] ECtHR, *Zana v. Turkey,* Application No. 18954/91, 25 November 1997, par. 51; ECtHR, *Gözel and Özer v. Turkey,* 2010, par. 46; GALLI (2013), 125-126; S. SOTTIAUX, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution,* London, Hart Publishing, 2008, 70.

between the impact on the individual's right to freedom of expression and the furtherance of the interest of preventing terrorist violence.[222]

83. Through a range of cases, the Court concretised the necessity test into a more or less fixed standard in order to deal with speech advocating illegal conduct.[223] Under this standard, the counterterrorism measure was upheld if the contested expression constituted incitement to violence or hate speech.[224] The assessment under this standard involved a variety of factors, which were never explicitly listed. However, it is safe to conclude that the content of the impugned expression, its probable effects and the intention of the speaker played a vital role. Furthermore, it should be underlined that the Court invoked the contextual setting of an expression in order to pinpoint the content of the used words and the probability of dangerous consequences. [225] This contextual evaluation paid attention to, for instance, the means used to spread the message[226], the authority of a speaker[227] and the prevailing security situation[228]. The involvement of a journalist spreading information on issues of public interest certainly plays a role according to these factors.[229] The European crime of public provocation to commit terrorist offences was inspired by the incitement standard.

84. As discussed earlier, in *Leroy*, the incitement standard was watered down by the ECtHR.[230] Various authoritative authors considered this evolution rightly as a threat to freedom of expression.[231] If instances of glorification and justification of terrorism venture into the

[222] ECtHR, *Leroy v. France*, 2008, par. 37; Office for Democratic Institutions and Human Rights (OSCE/COE Expert Workshop on Preventing Terrorism: Fighting Incitement and Related Terrorist Activities), *Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences*, 19-20 October 2006, 13-14; GALLI (2013), 125-126.

[223] Of particular importance in this evolution were the July 1999 cases. These were the thirteen judgments in cases against Turkey delivered by the ECtHR on 8 July 1999. Source: SOTTIAUX (2008), 92. These cases included inter alia: ECtHR, *Karataş v. Turkey*, Application No. 23168/94, 8 July 1999; ECtHR, *Sürek and Özdemir v. Turkey*, Application Nos. 23927/94 and 24277/94, 8 July 1999; ECtHR, *Sürek v. Turkey (No. 1)*, Application No. 26682/95, 8 July 1999.

[224] Inter alia ECtHR, *Sürek and Özdemir v. Turkey*, 1999, par. 60.

[225] DOSWALD-BECK (2011), 417-419; SOTTIAUX (2009), 419 - 420.

[226] ECtHR, *Karataş v. Turkey*, 1999, par. 52: the use of poetry as a medium for a violence-conducive message reduces the probability of dangerous consequences.

[227] ECtHR, *Zana v. Turkey*, 1997, par. 60.

[228] ECtHR, *Sürek v. Turkey (No. 1)*, 1999, par. 62.

[229] Or another person exercising the "watchdog" function. See *supra*, at 72.

[230] See *supra*, at 78.

[231] Inter alia: SOTTIAUX (2009), 415 – 427, SCHEININ (2015), 437-438.

area of (indirect) incitement, they are captured by the ECtHR's incitement standard. The use of criminal law against acts of speech which do not reach this standard, how despicable they may be, is unjustified. Firstly, the criminal prohibition will be overbroad.[232] Secondly, the threat of terrorists acts occurring because of these expressions – which provides the pressing social need for the combat against speech-based terrorist offences – is too remote. Furthermore, as was already explained, the provision of adequate counter-narrative content constitutes a better and less intrusive response to this kind of speech.[233]

85. Post-*Leroy* case law shows a return to the incitement standard[234], but not all ambiguity is lost. In *Gözel and Özer v. Turkey*, the ECtHR reasons that States can be vigilant towards expressions which constitute public provocation to commit terrorism or apology of terrorism. At a later point, it invokes the standard of incitement to violence, but equates this to justifying the commission of terrorist acts by allies.[235]

3.5 African framework

3.5.1 Identification of instruments

86. At this level, the right to freedom of expression is protected by Article 9 ACHPR, which is phrased in the following terms.

> *"1. Every individual shall have the right to receive information.*
> *2. Every individual shall have the right to express and disseminate his opinions within the law."*

87. References to relevant decisions on communications by the African Commission on Human and Peoples' Rights are in order as well. The findings of the ACommHPR are not binding, but they have a serious influence on the national authorities.[236] With regard to the African Court on Human and Peoples' Rights, only its judgment in the case of *Konaté v.*

[232] See *supra*, at 70: prohibition of justification, glorification of terrorism without further specifications.
[233] See *supra*, at 70.
[234] ECtHR, *Belek v. Turkey*, 2012, par. 28; ECtHR, *Belek and Velioğlu v. Turkey*, Application No. 44227/04, 6 October 2015, par. 25: complete adherence to the standard of incitement to violence.
[235] ECtHR, *Gözel and Özer v. Turkey*, 2010, par. 56.
[236] AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, *Impact of the African Charter on domestic human rights in Africa*, available at: http://www.achpr.org/instruments/achpr/impact-on-domestic-human-rights/ [accessed 15/08/2016].

Burkina Faso has proven to be relevant. Finally, the Declaration of Principles on Freedom of Expression in Africa is also to be utilised as a source.[237] Both the ACommHPR and the ACtHPR refer to this Declaration in order to elaborate on the required protection of the freedom of expression by the States Parties to the ACHPR.[238]

3.5.2 Application of the "three-part" test

88. In the context of the prosecution of speech-based terrorist offences, the main focus is on the second paragraph of article 9 ACHPR, the right to express and disseminate one's opinions. This succinctly formulated provision seems to suggest that the presence of a domestic legal basis is sufficient to lawfully restrict the right. The ACommHPR and ACtHPR rightly reject this interpretation.[239] If national laws were able to set aside international norms, the purpose of treaty making would be defeated.[240] Accompanied by references to international human rights standards and the aforementioned Declaration[241], the ACommHPR and ACtHPR reiterate the principles of the ICCPR and the ECHR to determine the permissibility of limitations.[242] Consequently, measures countering speech-based terrorism have to be provided by law, serve a legitimate interest and be necessary in a democratic society.

3.5.2.1 Legal certainty

89. Similarly to its application at the international and European level, this principle requires the legal basis to be sufficiently clear and precise in order to enable a person to adapt his

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[237] ACommHPR Resolution 62(XXXII)02, *Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa*, 17-23 October 2002, ACHPR/Res.62(XXXII)02.

[238] ACommHPR, *Kenneth Good v. Republic of Botswana*, Communication No. 313/05, 26 May 2010, par. 187; ACommHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication No. 323/06, 16 December 2011, par. 245, 248 and 255; ACtHPR, *Konaté v. Burkina Faso*, par. 148 and 151.

[239] DOSWALD-BECK (2011), 73-74.

[240] ACommHPR, *Media Rights Agenda, Constitutional Rights Project v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96, 31 October 1998, par. 66; ACommHPR, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communication Nos. 140/94, 141/94, 145/95, 5 November 1999, par. 40.

[241] More specifically to *Declaration of Principles on Freedom of Expression in Africa*, Principle II. This provision states:

"1. No one shall be subject to arbitrary interference with his or her freedom of expression.

2. Any restriction on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society."

[242] ACommHPR, *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, Communication 250/02, 20 November 2003, par. 59-60; ACommHPR, *Scanlen & Holderness v. Zimbabwe*, Communication No. 297/05, 3 April 2009, par. 112; ACtHPR, *Konaté v. Burkina Faso*, par. 125 and 148.

or her conduct and to put limits on the discretion of the authorities in determining which kinds of expressions should be restricted.[243]

90. In this context, the criminalisation of speech-based terrorist offences in the OAU Convention on the Prevention and Combating of Terrorism[244] has to be noted for its broadness. This flaw is discussed in more depth under the requirement of necessity.

3.5.2.2 Legitimate purpose

91. In order to substantiate this requirement, the ACommHPR and the ACtHPR tend to refer to article 27 (2) ACHPR.[245] Consequently, the Commission and Court inquire whether the reasons for the restrictive measure are based on the protection of the rights of others, collective security, morality or another legitimate public interest.[246] States will be called out if they use the goal of prevention of terrorism as a pretext to suppress dissent.[247]

3.5.2.3 Necessity in a democratic society

92. According to the ACommHPR and ACtHPR, this condition requires that the disadvantages brought by the counterterrorism measure are strictly proportionate to the pursued benefits and are absolutely necessary to attain these benefits.[248] They concretise this further by inquiring whether there are sufficient reasons to justify the measure, whether there is possibly a less restrictive measure and whether the measure erodes the essence of the right to freedom of expression.[249] When performing this balancing exercise in order to determine the legitimate reach of speech-based terrorist offences, it is important to note that political

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[243] ACommHPR, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v. Mauritania*, Communication Nos. 54/91, 61/91, 96/93, 98/93,164/97, 196/97, 210/98, 11 May 2000, par. 102 (reference to international norms); ACtHPR, *Konaté v. Burkina Faso,* par. 131.

[244] See *supra,* at 33-34.

[245] This provision states:

"The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interests."

[246] ACommHPR, *Media Rights Agenda, Constitutional Rights Project v. Nigeria,* par. 68 and 71; ACommHPR, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria,* par. 41 and 43; ACtHPR, *Konaté v. Burkina Faso,* par. 134; DOSWALD-BECK (2011), 72 and 74.

[247] ACommHPR, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria,* par. 43; ACommHPR, *Scanlen & Holderness v. Zimbabwe,* par. 122.

[248] ACommHPR, *Media Rights Agenda, Constitutional Rights Project v. Nigeria,* par. 69; ACtHPR, *Konaté v. Burkina Faso,* par. 149-150.

[249] ACommHPR, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe,* Communication No. 284/03, 3 April 2009, par. 176; ACtHPR, *Konaté v. Burkina Faso,* par. 149.

speech and speech against the government are considered to require a higher degree of tolerance. Free expression of dissenting views forms an essential principle of a democratic society.[250] The ACtHPR has also concretised the application of the proportionality principle to the possible punishments of speech offences. In particular, it has concluded that imprisonment is to be considered as a disproportionate sentence, except in very serious cases such as *"incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality."*[251]

93. The circumscription of speech-based terrorist offences in the OAU Convention[252] can be classified as overbroad. The convention sets a low threshold for the intensity of the impugned expression by targeting *any* promotion, sponsoring, contribution to, incitement and encouragement. It does go on by setting the requirement of an intent to cause the commission of a terrorist act *sensu stricto,* but it fails to specify whether this should be understood as a *mens rea* of purpose. A requirement of an increased chance of the occurrence of a terrorist act *sensu stricto* is completely absent. Furthermore, the convention prescribes a wide range of terrorist conduct potentially targeted by the contested speech. To illustrate the broadness of these descriptions, the OAU Convention calls for the criminalisation of an expression which carries a promoting tone towards acts which may cause damage to property or to cultural heritage and which are intended to disrupt the public service. The promoting tone can be the result of reckless disregard and it is not required that the expression actually causes a danger of the targeted conduct occurring. In conclusion, various elements in article 1 (3) OAU Convention show too much ambiguity.[253] States can take advantage of this and impede disproportionately upon the right to disseminate one's opinions. They can legitimately criminalise the expression of peaceful political dissent as a terrorist act of the highest degree, since the OAU Convention does not require any connection to acts of violence.[254] In particular, the dissemination of

[250] ACommHPR, *Kenneth Good v. Botswana,* par. 198-199.
[251] ACtHPR, *Konaté v. Burkina Faso,* par. 165.
[252] Article 1 (3) OAU Convention on the Prevention and Combating of Terrorism. For the complete circumscription, see *supra,* at 33-34.
[253] DOSWALD-BECK (2011), 135-136.
[254] Ibid.

journalistic publications can be targeted, which have the aim of providing neutral information about terrorist activities to the public.[255]

94. The OAU Convention does assign the States Parties the duty to implement the prescribed offences in accordance with the guarantees under (article 9) ACHPR.[256] This provision, and the guarantees under article 19 ICCPR, provide the African States with a legal basis to diminish the broadness in their national circumscriptions of speech-based terrorist offences.

[255] The AU's 2002 Plan of Action on the Prevention and Combating of Terrorism (see *supra,* at 36), which was drafted to provide concretisation of the provisions in the OAU Convention, provides further motivation for States to repress a range of unfavourable opinions. With regard to journalistic publications, it prescribes that States Parties should *"take adequate measures to prevent and outlaw the printing, publication and dissemination by one or several persons residing on the territory of any Member State, of news items and press releases initiated by apologists of terrorist acts which are prejudicial to the interests and security of any other Member State."* It should be noted that the elements of "apologists of terrorism" and "prejudicial to the interests and security" can be interpreted broadly. The subtle suggestion in the African model anti-terrorism law of tolerance for peacefully intended dissent, protest and advocacy (see *supra*, at 37) is completely contradicted by the other instruments.

[256] Article 22 (1) OAU Convention on the Prevention and Combating of Terrorism, which prescribes the following: *"Nothing in this Convention shall be interpreted as derogating from… the African Charter on Human and Peoples' Rights."*

Chapter 4 National counterterrorism policies: realisation of the balance?

4.1 United Kingdom

4.1.1 Implementation of the international and regional frameworks

95. The United Kingdom is an active participant to the global counterterrorism instruments. These certainly include the relevant UNSC resolutions, since the UK is a permanent member of said Council. The situation is different at the European level. The UK has not ratified the CoE Convention on the Prevention of Terrorism.[257] Furthermore, the EU Framework Decisions on combating terrorism have ceased to apply to the UK as from 1 December 2014 due to the country's opt-out from the pre-Lisbon third pillar acts.[258] Considering the victory of the campaign to leave the EU in the recent referendum, it is fairly certain that the UK will not opt into the proposed Directive on combating terrorism. On the other hand, the UK is bound to prosecute speech-based terrorist offences in conformity with the ICCPR and the ECHR. It should be noted that only the ECHR has been transposed into the national legal sphere.[259] Furthermore, the UK is not a State Party of the First Optional Protocol to the ICCPR,[260] which prescribes the individual complaints mechanism before the HRC.

96. An important feature of the British system is the Independent Reviewer of Terrorism Legislation. The task of this Reviewer is to report on the operation of the UK's anti-terrorism laws, and recommend necessary changes. Particular attention is paid to potential conflicts between the State's counterterrorism powers and the fundamental freedoms of citizens. The Reviewer stands completely independent from the government and his access

[257] CoE, *Chart of signatures and ratifications of Treaty 196: Council of Europe Convention on the Prevention of Terrorism*, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196/signatures?p_auth=09kNe7FQ [accessed 15/08/2016].

[258] List of Union acts adopted before the entry into of the Lisbon Treaty in the field of police cooperation and judicial cooperation in criminal matters which cease to apply to the United Kingdom as from 1 December 2014 pursuant to Article 10(4), second sentence, of the Protocol (No 36) on transitional provisions, *O.J.C.* 1 December 2014, vol. 430, 19; S. PEERS, *The UK opts back in to the European Arrest Warrant – and other EU criminal law*, 1 December 2014, available at: http://eulawanalysis.blogspot.be/2014/12/the-uk-opts-back-in-to-european-arrest.html [accessed 15/08/2016].

[259] This was done by the Human Rights Act of 1998. Section 1 declares that the "Convention rights" have effect in the national legal sphere. Schedule 1 reproduces the relevant provisions of the ECHR, including article 10. See annex 1 for the provisions of the Human Rights Act in full.

[260] Office of the United Nations High Commissioner for Human Rights, *Interactive dashboard on the ratification of 18 international human rights treaties*, available at: http://indicators.ohchr.org/ [accessed 15/08/2016].

to classified documents and national security personnel is practically unlimited. The Reviewer's reports have to be presented to Parliament.[261]

4.1.2 Case study: *David Miranda*

4.1.2.1 Factual background

97. This case is to be situated in the context of the Snowden leak. Edward Snowden, a former intelligence analyst of the National Security Agency of the United States, contacted journalists Laura Poitras and Glenn Greenwald in late 2012. Several months later, they met in person. Mr Snowden provided Ms Poitras and Mr Greenwald with classified material originating from the NSA, which included a substantial amount of UK intelligence documents.[262] This material unveiled that the intelligence agencies of the US and the UK – the NSA and the Government Communications Headquarters – conducted mass surveillance programmes without any legal basis. These files constituted the source of multiple articles in the Guardian, starting from early June 2013.[263] It is important to note that the Guardian maintained regular consultations with the DA Notice Secretariat[264], Downing Street, the White House and all intelligence agencies, in order to address the potential security risks. On the basis of these consultations, the Guardian was selective about what to publish. Furthermore, it redacted all names and sensitive operational

[261] ANDERSON, *The Terrorism Acts in 2013*, July 2014, par. 1.1-1.3; D. ANDERSON, *The Independent Reviewer writes…,* 11 April 2013, available at: https://terrorismlegislationreviewer.independent.gov.uk/message-from-the-independent-reviewer/#more-50 [accessed 15/08/2016].

[262] *David Miranda v. the Secretary of State for the Home Department and the Commissioner of the Police of the Metropolis* [2014] EWHC 255, [2014] 1 WLR 3140, par. 8; *David Miranda v. Secretary of State for the Home Department and the Commissioner of the Police of the Metropolis* [2016] EWCA Civ 6, [2016] 1 WLR 1505, par. 6.

[263] A selection: G. GREENWALD, "NSA collecting phone records of millions of Verizon customers daily", *The Guardian*, 6 June 2013, available at: https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order [accessed 15/08/2016]; G. GREENWALD and E. MACASKILL, "NSA Prism program taps in to user data of Apple, Google and others", *The Guardian*, 7 June 2013, available at: https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data [accessed 15/08/2016]; E. MACASKILL, J. BORGER, N. HOPKINS, N. DAVIES and J. BALL, "Mastering the internet: how GCHQ set out to spy on the world wide web", *The Guardian*, 21 June 2013, available at: https://www.theguardian.com/uk/2013/jun/21/gchq-mastering-the-internet [accessed 15/08/2016].

[264] The Defence Advisory (DA) Notice System, which now has the title of Defence and Security Media Advisory (DSMA) Notice System, has as its purpose to warn journalists against inadvertent public disclosures of information that would threaten the national security of the UK. Source: X, *Introduction of the Defence and Security Media Advisory (DSMA) Notice System*, available at: http://www.dsma.uk/ [accessed 15/08/2016].

details.[265] This responsible approach[266] was underlined by the statement of Alan Rusbridger, editor of the Guardian, before the Home Affairs Select Committee of the UK Parliament on 3 December 2013, that approximately one percent of the Snowden documents in the newspaper's possession had been published.[267]

98. On 12 August 2013, David Miranda travelled to Ms Poitras in Berlin. He was carrying encrypted material derived from the Snowden documents. The purpose of this trip was to collect computer drives containing more of such material. Mr Miranda was doing this in order to assist his spouse Mr Greenwald, who was at the time working for the Guardian. On 18 August 2013, Mr Miranda was stopped at Heathrow airport on his way back to Rio de Janeiro.[268] The British authorities invoked Schedule 7 of Terrorism Act 2000 to stop Mr Miranda, detain, question and search him. They also confiscated various items, amongst which the computer drives with the encrypted data. The data included about 58,000 UK intelligence documents. [269]

4.1.2.2 Summary of the proceedings and the verdicts

99. Both the Divisional Court and the Court of Appeal[270] started with setting out the relevant provisions of the Terrorism Act 2000. Paragraph 2 of schedule 7 provides the legal basis to stop a person at an airport[271] and to question him *"for the purpose of determining whether he appears to be a person who is or has been concerned in the commission,*

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[265] C. ELLIOT, "Terror in the press: how the U.K.'s threatened criminalization of the Guardian under the Terrorism Act 2000 would violate article 10 of the European Convention on Human Rights, *American University International Law Review* 2015, Vol. 30(1), 109; A. FAIOLA, "Q&A with Alan Rusbridger, editor of the Guardian", *Washington Post*, 30 November 2013, available at: https://www.washingtonpost.com/world/q-and-a-with-alan-rusbridger-editor-of-the-guardian/2013/11/29/11b36798-5821-11e3-bdbf-097ab2a3dc2b_story.html [accessed 15/08/2016]. In the latter source, Mr Rusbridger emphasises that the DA Notice Secretary was of the opinion that nothing in the Guardian's publications put anybody's life at risk. Furthermore, multiple senior administration officials considered the approach of the newspaper responsible.

[266] It does have to be noted that the Guardian sent unredacted copies of the documents to other news agencies abroad. Source: D. BARRETT, "Guardian journalists could face criminal charges over Edward Snowden leaks", *The Telegraph*, 3 December 2013, available at: http://www.telegraph.co.uk/news/uknews/crime/10492749/Guardian-journalists-could-face-criminal-charges-over-Edward-Snowden-leaks.html [accessed 15/08/2016].

[267] X, "Only 1% of Snowden files published – Guardian editor", *BBC News*, 3 December 2013, available at: http://www.bbc.com/news/uk-25205846 [accessed 15/08/2016].

[268] *Miranda v. SSHD* [2014], par. 8; *Miranda v. SSHD* [2016], par. 6.

[269] *Miranda v. SSHD* [2014], par. 13; *Miranda v. SSHD* [2016], par. 20.

[270] No appeal was made to the Supreme Court. Source: UNITED KINGDOM SUPREME COURT, *Permission to Appeal*, available at: https://www.supremecourt.uk/news/permission-to-appeal.html [accessed 15/08/2016].

[271] And other kinds of ports and in border areas. See annex 2 for the complete provision.

preparation or instigation of acts of terrorism."[272] The examining officer is given an extensive amount of discretion since he does not need to have grounds for suspecting that the targeted person is involved in terrorist acts.[273] In the case of Mr Miranda, the power to stop and question was supplemented with the powers to claim certain objects from the person under questioning[274] and to detain that person for up to nine hours.[275]

100. Even though the powers in schedule 7 are essentially about ascertaining the *possibility* that a travelling person might be involved in terrorism,[276] it is still important to delve more into the notion of terrorist acts as defined by section 1 of the Terrorism Act. The examining officers are told by their codes of practices that schedule 7 powers are not to be exercised randomly or arbitrarily. The decision to stop a person and initiate the powers has to be informed by specific intelligence or other factors indicating involvement in terrorism.[277] The officers in the current case implemented these regulations by refusing to initiate schedule 7 powers until the instructions of the Security Service connected the activities of Mr Miranda to the notion of terrorism in section 1.[278]

101. In the judicial proceedings, an essential point of dispute became whether the (threatened) publication of the classified GCHQ and NSA material could amount to an act of terrorism, on the basis that it was politically motivated and that it could lead to endangerment of lives and threat to public safety.[279] The Divisional Court answered in the affirmative: *"the s.1 definition is 'capable of covering the publication or threatened publication [for the purpose of advancing a political, religious, racial or ideological cause] of stolen classified information which, if published, would reveal personal details of members of the armed*

[272] Schedule 7 par. 2 (1) refers to section 40 par. 1 (b). See annex 2.
[273] Schedule 7 par. 2 (4) Terrorism Act 2000. See annex 2 for the full provision.
[274] Schedule 7 par. 5, par. 8, par. 9 and par. 11 Terrorism Act 2000: powers to order persons under questioning to hand over documents, to search persons under questioning, to examine goods, and to retain property. See annex 2 for the provisions in full.
[275] Schedule 7 par. 6 (1) (b) and (4) Terrorism Act 2000. See annex 2 for the complete provisions.This was the provision in effect at the time of Mr Miranda's detention. In July 2014, the maximum period of detention was brought to six hours. Source: ANDERSON, *The Terrorism Acts in 2013,* July 2014, par. 7.18 and 7.21.
[276] *Miranda v. SSHD* [2014], par. 32; *Miranda v. SSHD* [2016], par. 58.
[277] D. ANDERSON, *The Terrorism Acts in 2012: Report of the Independent Reviewer on the operation of the Terrorism Act 2000 and part 1 of the Terrorism Act 2006,* July 2013, par. 10.15: refers to the Code of Practice of 2013; Home Office, *Examining Officers and Review Officers under Schedule 7 to the Terrorism Act: Code of Practice,* March 2015, par. 19.
[278] *Miranda v. SSHD* [2014], par. 12 and 13; *Miranda v. SSHD* [2016], par. 16-17.
[279] Material acts of section 1 par. 2 (c) and (d), in combination with the motives of section 1 par. 1 (b) and (c).

forces or security and intelligence agencies, thereby endangering their lives, where that publication or threatened publication is designed to influence government policy on the activities of the security and intelligence agencies'."[280] Thereto, the Court followed a literal approach to section 1 of the Act, by stipulating that journalists and other persons involved in the publication did not need to show intention or recklessness with regard to the endangerment of lives or the threatening of public safety.[281] It was also concluded that the exercise of the schedule 7 powers in this case was proportionate because of the overriding importance to protect national security.[282] Under the principle of legal certainty, the claims that schedule 7 was overbroad and that it contained insufficient safeguards against abuse were rejected.[283]

102. The Court of Appeal stepped away from the literal interpretation of terrorism by requiring that a mental element had to be read into section 1 paragraph 2 (c) and (d).[284] It decreed that *"if (i) the material that is published endangers a person's life (other than that of the person committing the action) or creates a serious risk to the health or safety of the public or a section of the public; and (ii) the person publishing the material intends it to have that effect (or is reckless as to whether or not it has that effect), then the publication is an act of terrorism, provided, of course, that the conditions stated in section 1(1)(b) and (c)[285] are satisfied."*[286] Consequently, it was found that the activities of Mr Miranda were rightly connected to possible involvement in terrorism.[287] Under the principle of proportionality, the Court concluded that in light of the risks that were highly likely to materialise, national security interests outweighed Mr Miranda's rights under article 10 ECHR.[288] With regard to the condition of legal certainty, the appeal judgment started by emphasising the importance of confidentiality of journalistic material in combating a chilling effect on the

[280] *Miranda v. SSHD* [2014], par. 33.
[281] Ibid, par. 29. Referring to section 1 paragraph 2 (c) and (d) Terrorism Act.
[282] Ibid, par. 72-73.
[283] Ibid, par. 82 and 88.
[284] *Miranda v. SSHD* [2016], par. 53-54.
[285] Referring to the motive of *"influencing the government or intimidating the public or a section of the public"* and the purpose of *"advancing a political, religious or ideological cause".* See annex 2.
[286] *Miranda v. SSHD* [2016], par.55.
[287] Ibid, par. 58.
[288] Ibid, par. 82-84.

debate of issues of public interest.[289] Subsequently, the Appeal Court differed from first instance by declaring schedule 7 incompatible with article 10 ECHR, in the sense that no adequate safeguards were present against the abusive disclosure of journalistic material.[290] It suggested to Parliament to implement prior – or in urgent cases, immediately after the handing over of the material and before the access to its contents by the authorities – judicial or other independent and impartial scrutiny.[291]

4.1.2.3 Analysis

103. The interference which is created in this context consists of the application of the extensive schedule 7 powers to a broad category of persons, including persons involved in investigative journalism. In particular, the confidentiality of journalistic material and sources is at stake.[292] If States pass laws that too readily compel the disclosure of journalistic material and sources, people will hold back from providing sensitive information of public interest to the press. This phenomenon harms the media significantly in their vital work as a "public watchdog", namely the provision of reliable information and a forum for the public debate.[293]

104. The Court of Appeal concluded that no adequate safeguards existed to protect journalistic material and its required confidentiality against the arbitrary exercise of schedule 7 powers.[294] In response to this, the British authorities referred to the new instruction in the code of practice of 2015, stipulating that examining officers should refrain from examining journalistic material.[295]

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[289] Ibid, par. 107 and 113. In this regard, it emphasised that there is no distinction between disclosure of journalistic material in general and disclosure of journalistic material which may lead to the identification of a confidential source.

[290] Ibid, par. 113-114 and 119. Such a declaration of incompatibility does not affect the validity of the law in question (section 4 of the British Human Rights Act, see annex 1). Only the Parliament has the ability to change the laws. However, it does have to be noted that there is an obligation to interpret legislation in a manner that is compatible with the ECHR (section 3 of the British Human Rights Act, see annex 1). See also OEHMICHEN (2009), 367.

[291] *Miranda v. SSHD* [2016], par. 100, 114 and 119.

[292] *Miranda v. SSHD* [2016], par. 113.

[293] ECtHR, *Financial Times Ltd and Others v. United Kingdom,* 2009, par. 59; ECtHR, *Sanoma Uitgevers BV v. Netherlands,* 2010, par. 70; DOSWALD-BECK (2011), 423-424.

[294] *Miranda v. SSHD* [2016], par. 115 and 119. Aspect of the condition of legal certainty, see *supra,* at 56 and 77.

[295] Home Office, *Schedule 7 to the Terrorism Act: Code of Practice,* March 2015, par. 40 and 75.

105. This is a welcome change for the protection of journalistic freedom of expression. However, there is another element that cannot be forgotten, and that probably stands even closer to the core of the issue. This element is the interpretation by both courts of the notion of terrorism in section 1 Terrorism Act 2000 as to include an act of speech, namely the publication of words. The characterisation of an act as "terrorism" has a bigger role than triggering schedule 7 powers. It brings about the application of a whole apparatus of criminal sanctions and powers for the authorities.[296] It should be emphasised that the British authorities consciously phrased the definition in section 1 in broad terms.[297]Subsequently, the breadth of the definition has been attacked multiple times by other authoritative actors in the British legal order, including the Independent Reviewer[298] and the Supreme Court[299]. The Supreme Court further underlined the danger that this broad definition constitutes the access port to wide and substantially intrusive powers for all persons charged with the execution of the counterterrorism law, including Ministers and police officers.[300] There is no evidence to suggest that these actors exercise their powers irresponsibly. However, the existence of such a broad definition of terrorism and its corresponding measures brings along a chilling effect for an overbroad category of persons.[301]

106. The literal interpretation maintained by the Divisional Court highlighted the potential broadness of the definition in section 1. This interpretation allows the publication of any material – the terms of section 1 do not require the material to be classified or stolen[302] – which is designed to influence the government, has as its purpose the furtherance of a political, racial, religious, racial or ideological cause and inadvertently endangers lives or causes a serious risk to public health or safety, to be characterised as a terrorist action. The subsequent impact on the right to freedom of expression is unjustifiable. This definition can realistically capture all kinds of publications which aim to criticise the government on

[296] MELIÁ and PETZSCHE (2013), 94-95. Examples in the UK legal order: the criminalisation in section 57 Terrorism Act of possession of objects for a purpose connected with the commission, preparation or instigation of an act of terrorism; application of the schedule 5 power: search powers in terrorist investigations (requires judicial warrant). See also *supra*, section 3.2, for a more detailed explanation of this kind of systematics.
[297] OEHMICHEN (2009), 162.
[298] ANDERSON, *The Terrorism Acts in 2012*, July 2013, par. 4.3.
[299] *R v. Gul* [2013] UKSC 64, [2013] 3 WLR 1207, par. 33-34 and 63-64.
[300] Ibid, par. 63-64.
[301] ANDERSON, *The Terrorism Acts in 2013*, July 2014, par. 10.16. In violation of the principle of necessity, see *supra*, at 68.
[302] Ibid, par. 4.18.

their policy choices.[303] For instance, a newspaper article which argues for a reduction of the public expenses for national defence, could be seen as creating a serious risk for public safety.[304] The chilling effect is enlarged by the existence of many ancillary terrorist offences. The mere possession of a newspaper containing the aforementioned article could be punishable by up to ten years in prison.[305]

107. The Court of Appeal's judgment represents a notable attempt to restrict the broadness of the definition of terrorism by requiring intention or recklessness with regard to the endangerment of lives and/or the creation of a serious risk to public safety. However, the literal interpretation of the Divisional Court cannot be considered as entirely overruled, since the Appeal Court's ruling on this point did not set a binding precedent, and the case was not taken to the Supreme Court.[306]

108. In the context of this dissertation, it should be analysed in further detail whether the Appeal Court's interpretation of terrorism represents an appropriate balance between national security interests and freedom of expression. The inclusion of a mental element ensures that publications which dissent, even in a controversial manner, from the government's policies are not captured by the definition. When the content of the reports reaches a certain sensitivity, it becomes more difficult. In cases involving publications in the area of national security and using classified documents as a source, the degree of sensitivity is at its highest. In these cases, the standard of recklessness becomes particularly essential. It can be concluded that the British authorities maintain a standard of subjective recklessness, which is reached when the person concerned *"foresees a risk and nonetheless goes on to take it unreasonably"*.[307]

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[303] As put forward in HRC, *Concluding Observations regarding the United Kingdom*, 21 July 2015, par. 14, this is *"unduly restrictive of political expression"*.

[304] *Miranda v. SSHD* [2016], par. 46 provides a further example illustrating the breadth of the literal interpretation of "terrorism": junior doctors of the National Health Service erect a sign to protest the government's policy with regard to public health. This sign accidentally endangers the life of a passer-by. These actions can realistically be considered as "terrorism" under section 1 Terrorism Act 2000.

[305] ANDERSON, *The Terrorism Acts in 2013*, July 2014, par. 4.20. Referral to section 57 Terrorism Act 2000.

[306] C. GARDNER, "Miranda: the Court of Appeal's interpretation of 'terrorism'", *Head of Legal: Independent legal comment and analysis*, 19 January 2016, available at: http://www.headoflegal.com/2016/01/19/miranda-the-court-of-appeals-interpretation-of-terrorism/ [accessed 15/08/2016].

[307] D. IBBETSON, "Recklessness restored", *The Cambridge Law Journal* 2004, Vol. 63(1), 13; Joint Committee on Human Rights, *The CoE Convention on the Prevention of Terrorism*, January 2007, 13.

109. In the particular case of Mr Miranda, the Appeal Court characterised (implicitly) the continued publication of the classified documents by the Guardian as an act of terrorism.[308] This is of significant importance in the light of the earlier described efforts of the newspaper to avoid recklessness. Furthermore, it cannot be forgotten that the publication of the Snowden documents set in motion the fundamentally important debate about government surveillance.[309] It is understandable that 58,000 intelligence documents being at large is perceived as a security risk, even when one considers that the Snowden documents in general and the documents carried by Mr Miranda in particular were secured with heavy encryption.[310] Article 10 ECHR explicitly provides a legal basis for States to limit freedom of expression in the interest of protecting confidential information.[311] However, including investigative journalism under the notion of terrorist activity, which carries along a specific connotation and sets in motion a particular legal apparatus, cannot be considered proportionate.[312] In terms of less intrusive measures, the aforementioned Defence and Security Media Advisory Notice System can be put forward.[313]

4.2 France

4.2.1 Implementation of the international and regional frameworks

110. The global counterterrorism instruments are of significant importance for France, another permanent member of the UN Security Council. At the European level, the French authorities have ratified the CoE Convention on the Prevention of Terrorism.[314] France must also, as a Member State of the EU, abide by the Framework Decisions and in the future the Directive on combating terrorism. With regard to the free speech frameworks, the State has to comply with the ICCPR and the ECHR. At the national level, the

[308] *Miranda v. SSHD* [2016], par. 55 and 58.
[309] A true example of the exercise of the "public watchdog" function.
[310] *Miranda v. SSHD* [2014], par. 51: Z.M. SEWARD, "How Edward's Snowden's encrypted insurance file might work", *Quartz*, 25 June 2013, available at: http://qz.com/97885/how-edward-snowdens-encrypted-insurance-file-might-work/ [accessed 15/08/2016].
[311] See *supra*, at 73, for the fully cited article.
[312] ANDERSON, *The Terrorism Acts in 2013*, July 2014, par. 4.15: *"The true issue is whether it was lawful to use counter-terrorism law for that purpose"*; Ibid, par. 4.22: *"To bring activities such as journalism and blogging within the ambit of "terrorism" (even if only when they are practised irresponsibly) encourages the 'chilling effect' that can deter even legitimate enquiry and expression in related fields."* See also the global principle of necessity, at 68: in the Miranda case, there was no specific identification of a threat to national security posed by the publication. In any case, the characterisation as terrorism cannot be considered a proportionate reaction.
[313] See *supra*, at 97 (in particular footnote 264).
[314] CoE, *Chart of signatures and ratifications of Treaty 196.*

Declaration of Human and Civic Rights[315] provides constitutional status[316] to the freedoms of opinion and expression.[317] Furthermore, it is explicitly stipulated in the Constitution that ratified treaties supersede Acts of Parliament in the French legal order.[318]

4.2.2 Case study: *Dieudonné M'bala M'bala*

4.2.2.1 Factual background

111. This case is to be situated in the context of the multiple terrorists attacks that struck Paris and its surrounding regions at the beginning of 2015. On 7 January, two men identified as the Kouachi brothers perpetrated the assassinations at the Charlie Hebdo office in Paris. The next day, a policewoman was shot dead in the suburb Montrouge by Ahmedy Coulibaly. On 9 January, the Kouachi brothers were cornered by the police in a printing firm in Dammartin-en-Goele. The siege ended with the deaths of both men. Around the same time as the siege in Dammartin, Coulibaly commenced a hostage-taking in a supermarket in Paris. He killed four people, all of which were of the Jewish faith. The hostage-taking ended with special forces storming in and killing Coulibaly.[319] Naturally, these events naturally sparked a lot of emotion within the general public. On the internet, the phrase *"Je suis Charlie"* became widespread. Furthermore, a march was held on 11 January, which counted more than 1,5 million participants and 40 foreign representatives.[320]

112. This case concerns Dieudonné M'bala M'bala, a French comedian. It has to be noted that Mr M'bala M'bala is notorious for controversial speech which has led to convictions for

[315] Déclaration des Droits de l'Homme et du Citoyen de 26 août 1789.

[316] The preamble of the French Constitution explicitly "proclaims attachment" to the Declaration. See annex 4 for the complete text. An English translation of the Constitution has been used, which can be found on the official website of the French Constitutional Council: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/presentation/basics-texts/basics-texts.137216.html. Furthermore, the constitutional status of the Declaration can be derived from practice: it is directly applied by the judges and it is respected by the legislators (under the supervision of the constitutional judge). Source: X, *La Constitution,* available at: https://www.legifrance.gouv.fr/Droit-francais/Constitution [accessed 15/08/2016].

[317] Articles 10 and 11 of the Declaration. See annex 3 for the complete provisions. An English translation of the Declaration has been used, which can be found on the official website of the French Constitutional Council.

[318] Article 55 of the Constitution. See annex 4 for the complete provision.

[319] Tribunal de Grande Instance de Paris (16e chambre correctionnelle), 18 mars 2015, *JurisData* n° 2015-005323, 5-6; X, "Charlie Hebdo attack: Three days of terror", *BBC News,* 14 January 2015, available: http://www.bbc.com/news/world-europe-30708237 [accessed 15/08/2016].

[320] TGI de Paris, 18 mars 2015, 6.

inter alia defamation, anti-Semitism and incitement to hatred and racial discrimination.[321] In the night of the 10th of January, the lawyers of Mr M'bala M'bala sent a message to the Minister of Interior Affairs asking about a place where he could join the march in secure circumstances. This message was left unanswered. A few hours after the march, Mr M'bala M'bala expressed his feelings on his Facebook page with the following message.[322]

> *"After this historic, I mean… legendary march! A magical moment equal to the Big Bang which created the Universe! … Or, in a smaller (more local) way comparable to the crowning of Vercingétorix* [323]*, I am going home. Know that this evening, I feel like Charlie Coulibaly."*[324]

113. This statement provoked outrage, including from the fans of the Facebook page. It was erased an hour after its publication.[325] Subsequently, Mr M'bala M'bala was charged with the offence of *apologie du terrorisme.*[326]

4.2.2.2 Summary of the proceedings and the verdicts

114. At the hearing of the case, Mr M'bala M'bala emphasised that he did condemn the attacks. He explained that he wanted to participate in the march of 11 January, but because of the lack of response by the Minister to his message, he felt like he was not welcome. Furthermore, he put forward that the impugned statement was fuelled by his longstanding frustration of being treated "like a terrorist whose freedom of expression is denied".[327]

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[321] Ibid, 8; M. BOUCHAUD, "Controversial French Comedian Convicted of 'Glorifying Terrorism" in Facebook Post", *VICE News*, 18 March 2015, available at: https://news.vice.com/article/controversial-french-comedian-convicted-of-glorifying-terrorism-in-facebook-post [accessed 15/08/2016].

[322] Ibid, 6; M. BOUCHAUD, "Controversial French Comedian Convicted of 'Glorifying Terrorism" in Facebook Post", March 2015.

[323] An ancient Gaulish King.

[324] Original statement: *'après cette marche historique, que dis-je …. légendaire ! Instant magique égal au Big Bang qui créa l'Univers!... ou dans une moindre mésure (plus locale) comparable au couronnement de Vercingétorix, je rentre enfin chez moi. Sachez que ce soir, je me sens Charlie Coulibaly'*

[325] J. LICHFIELD, "Dieudonné claims he has 'been denied freedom of speech like Charlie Hebdo' as he is investigated over 'apology for terrorism'", *Independent*, 13 January 2015, available at: http://www.independent.co.uk/news/people/quenelle-comedian-dioeudonne-faces-charges-for-apology-for-terrorism-9975084.html [accessed 15/08/2016].

[326] Article 421-2-5 Penal Code. See annex 5 for the provision in full. Since the official sources do not provide an up-to-date English translation of the French Penal Code, the original French provision is used.

[327] TGI de Paris, 18 mars 2015, 6.

115. The introduction of the judgment remarkably refers to two definitions of *"apologie"* in the dictionary.[328] The concept is described as *"the praise or justification of somebody, something, presented in a writing or an act of speech"* and *"an act of speech or writing glorifying an act which is explicitly forbidden by criminal law".*[329] Turning to the facts, the Court pointed out that Mr M'bala M'bala addressed his request to the Minister only several hours before the start of the march, at a time when the organisation of said march was taking up all the attention. Therefore, Mr M'bala M'bala was wrong to assume that the lack of response was motivated by an agenda to exclude him from the march.[330]

116. With regard to the contested message, the Court in particular highlighted that Mr M'bala M'bala had identified himself with a perpetrator of grave terrorist acts. Furthermore, he had provocatively mixed the name of the symbol of freedom of expression with the name of said perpetrator. This message was placed on the internet at a time when the general public was still in shock and the victims were not even buried yet. In the view of the Court, this context accorded the message an impact which transcended satiric purposes.[331] Another contextual element that was accorded significant importance was the fact that Mr M'bala M'bala made his message known to a large public, to which he was largely known for his anti-Semitic speech in the past. The Court concluded that Mr M'bala M'bala could not have been unaware of the impact of his actions and convicted him for *apologie du terrorisme.*[332] His punishment consisted of a suspended prison sentence of two months and a 30,000 euro fine.[333] Mr M'bala M'bala took his case to the Court of Appeal, which confirmed his conviction and the prison sentence of two months. The fine was lowered to 10,000 euro.[334]

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[328] P. MBONGO, "L'apologie du terrorisme: un cas-limite", *La Semaine Juridique: Edition Générale* 2015, No. 13, 363 : emphasises that the judgment does not employ definitions of *"apologie"* and *"terrorisme"* which have a sound basis in law.

[329] TGI de Paris, 18 mars 2015, 5.

[330] Ibid, 7.

[331] Ibid.

[332] Ibid, 8.

[333] Ibid; M. BOUCHAUD, "Controversial French Comedian Convicted of 'Glorifying Terrorism" in Facebook Post", March 2015.

[334] X, "Charlie Coulibaly: Dieudonné condamné en appel", *Le Figaro,* 21 June 2016, available at : http://www.lefigaro.fr/flash-actu/2016/06/21/97001-20160621FILWWW00178-charlie-coulibaly-dieudonne-condamne-en-appel.php [accessed 15/08/2016]. Unfortunately, the appeal judgment itself (or a reliable case note) has not yet been published.

4.2.2.3 Analysis

117. On the 12th of January 2015, the French Minister of Justice issued a circular in which she instructed the French prosecutors to pay particular attention to incidents amounting to speech offences.[335] These included instances of *apologie du terrorisme*, which the circular further defined as *"presenting or commenting on acts of terrorism with a favourable judgment"*. From the outset, it should be noted that the approaches to the offence in the circular and in the case of Mr M'bala M'bala digress from the jurisprudence on *apologie* of a non-terrorist offence, which requires *"the glorification of an illegal act which implies the invitation to repeat said act."*[336]

118. The criminalisation of *apologie du terrorisme* in article 421-2-5 of the French Penal Code forms a significant interference with freedom of expression. The sentences can go up to five years in prison and a fine of 75,000 euro. If the message is published online, the possible sentences are elevated to imprisonment of seven years and fines of 100,000 euro.[337]

119. The legal basis of the interference, article 421-2-5 Penal Code, shows extensive flaws in the light of the conditions of legal certainty and necessity. Its vague terms, the known attitude of the judiciary to not require inciting elements and the gravity of the sentences are all factors which intimidate an overbroad category of persons into silence.[338] The prosecutions under *apologie du terrorisme* after the terrorist attacks counted a significant amount of cases involving intoxicated and psychologically impaired persons.[339] This trend underlines that the criminalisation overshoots its purpose.[340] The core lesson to be learned from the French situation and the particular case of Mr M'bala M'bala is that it is not

[335] Circulaire n° 2015/0213/A13 du 12 janvier 2015 concernant infractions commises à la suite des attentats terroristes commis les 7, 8, 9 janvier 2015.
[336] Cour de Cassation (Chambre Criminelle), 22 août 1912, *Bull. crim. 1912* n° 464 ; MBONGO, "L'apologie du terrorisme: un cas-limite", 2015, 363.
[337] See annex 5 for the provision in full.
[338] HRC, *Concluding Observations regarding France*, 21 July 2015, par. 10: echoes these concerns. See also *supra*, at 56 and 68.
[339] C. RASTELLO, "Apologie du terrorisme: les juges vont-ils trop loin?", *L'Obs,* 21 janvier 2015, available at : http://tempsreel.nouvelobs.com/societe/20150120.OBS0379/apologie-du-terrorisme-les-juges-vont-ils-trop-loin.html [accessed 15/08/2016]; X, "Vrijheid van meningsuiting valt moeilijk te temmen", *De Standaard+*, 28 July 2016, available at: http://www.standaard.be/cnt/dmf20160727_02401765 [accessed 15/08/2016].
[340] V. BRENGARTH, "L'apologie et la provocation au terrorism dans le Code penal – Étude critique et premier bilan", *La Semaine Juridique* 2015, No. 39, par. 24.

justified – even in the aftermath of terrorist attacks – to criminalise a speech-based terrorist offence which does not require elements of incitement to violence. The offence of *apologie du terrorisme* encompasses acts of speech which are remote from the occurrence of actual terrorist violence.[341] As the case of Mr M'bala M'bala illustrates, the impugned expressions are essentially judged on their offensiveness in the particular context. This constitutes a notion without any objective boundaries. This overbroadness cannot be justified by calling for the need to defend democratic values. Democracy thrives on an environment conducive to a broad range of political speech.[342] The flaws of article 421-2-5 Penal Code can be remedied to a significant extent if the approach under *apologie* of non-terrorist offences – the requirement of indirectly inciting elements – is copied in a consistent manner. It has to be noted that this approach would complement the offence of direct provocation to terrorism, which is criminalised in the same article.

4.3 Ethiopia

4.3.1 Implementation of the international and regional frameworks

120. With regard to the counterterrorism instruments, it has to be noted that Ethiopia is a member of the UN and it has ratified the OAU Convention on the Prevention and Combating of Terrorism.[343] On the other side of the balance, Ethiopia is a State Party to the ICCPR and the ACHPR.[344] At the national level, the right to freedom of opinion and expression is extensively protected by article 29 of the Constitution.[345] This fundamental right has to be interpreted in conformity with the international human rights conventions – *in casu* the ICCPR and the ACHPR – and other international instruments – *in casu* the global counterterrorism instruments and the OAU Convention – adopted by Ethiopia.[346] Furthermore, the Ethiopian Constitution explicitly transposes all ratified international treaties into the national legal sphere.[347]

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[341] Ibid, par. 14

[342] Ibid, par. 24; BARENDT (2010), 452-453.

[343] AU, *OAU Convention on the Prevention and Combating of Terrorism: Status List*, available at: http://www.au.int/en/treaties/oau-convention-prevention-and-combating-terrorism [accessed 15/08/2016].

[344] ACommHPR, *Ratification Table: African Charter on Human and Peoples' Rights,* available at: http://www.achpr.org/instruments/achpr/ratification/ [accessed 15/08/2016]

[345] Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia No. 1/1995, *Federal Negarit Gazeta* 21 August 1995, 1. See annex 6 for the provision in full.

[346] Article 13 (2) of the Ethiopian Constitution. See annex 6 for the provision in full.

[347] Article 9 (4) of the Ethiopian Constitution. See annex 6 for the provision in full.

4.3.2 Case study: *Eskinder Nega*

4.3.2.1 Factual background

121. Dissenting voices are confronted with a particularly hostile climate in Ethiopia. The Ethiopian People's Revolutionary Democratic Front, the country's ruling party since 1991,[348] pursues an unrelenting crackdown on opposition party members, peaceful protesters and critical media.[349] The Anti-Terrorism Proclamation is a heavily featured instrument in the prosecutions of these people.[350] Furthermore, independence and impartiality is absent in the investigative branch of the police and the judiciary, to the extent that it is impossible for political dissenters under prosecution to receive a fair hearing.[351]

122. Eskinder Nega is a critical journalist who has been targeted by the Ethiopian authorities many times throughout his career. He was jailed eight different times over the last twenty years.[352] At the beginning of 2011, Mr Nega started writing about the Arab Spring protests in Egypt, Tunisia and Yemen – with an emphasis on the absence of violence – and the possible parallels with Ethiopian society.[353] After the publication of a column in which he called for the Ethiopian army to follow the Egyptian example and not shoot unarmed

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[348] African Peer Review Mechanism, *Country Review Report No. 14: Federal Democratic Republic of Ethiopia*, January 2011, par. XI. In the latest general election, in May 2015, the EPRDF won all parliamentary seats. This election period was marred by undue restrictions on civil society, journalists and political opposition. Source: AMNESTY INTERNATIONAL, *Report 2015/16: The state of the world's human rights,* 23 February 2016, 155-156, available at: https://www.amnesty.org/en/documents/pol10/2552/2016/en/ [accessed 15/08/2016].

[349] AMNESTY INTERNATIONAL, *Report 2015/2016,* 155-156.

[350] HUMAN RIGHTS WATCH, *World Report 2016: Events of 2015,* 238-243, available at: https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf [accessed 15/08/2016]; ENVIRONMENTAL DEFENDER LAW CENTER and THE OAKLAND INSTITUTE, *Ethiopia's Anti-Terrorism Law: A tool to stifle dissent,* January 2016, 6-8 (Examples of Ethiopia's Misuse of Its Terrorism Law), available at: http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Ethiopia_Legal_Brief_final_web.pdf [accessed 15/08/2016].

[351] AMNESTY INTERNATIONAL, *Report 2014/15: The state of the world's human rights,* 25 February 2015, 148, available at: https://www.amnesty.org/en/documents/pol10/0001/2015/en/ [accessed 15/08/2016]; ENVIRONMENTAL DEFENDER LAW CENTER and THE OAKLAND INSTITUTE (2016), 14-18.

[352] Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its sixty-firth session: No. 62/2012 (The Federal Democratic Republic of Ethiopia)*, adopted on 21 November 2012, *UN Doc.* A/HRC/WGAD/2012/62, par. 4-5; X, *Free Eskinder Nega: life of a banned journalist*, available at: http://www.freeeskindernega.com/www.FreeEskinderNega.com/Home.html [accessed 15/08/2016].

[353] E. NEGA, "As Egypt and Yemen protest, wither Ethiopia's opposition?", *Ethiomedia*, 28 January 2011, available at: http://www.ethiomedia.com/above/2049.html [accessed 15/08/2016].

protesters in the event that protests did spread to Ethiopia, Mr Nega was detained briefly.[354] He was warned by the police that he would be arrested and convicted if he kept "trying to incite an Egyptian-like protest in Ethiopia".[355] Mr Nega continued writing, about protests in Tunisia and Egypt, the overthrowing of Gadhafi in Libya and the longing in Ethiopia for peaceful political reform.[356] His last column before his arrest, in September 2011, depicted Mr Nega's criticism of the Anti-Terrorism Proclamation and his hopes for peaceful political reform.[357] Mr Nega was charged under multiple provisions of the Ethiopian Criminal Code[358] and the Anti-Terrorism Proclamation.[359]

4.3.2.2 Summary of the proceedings and the verdicts

123. It serves the purposes of this thesis to focus on the charges against Mr Nega under the Anti-Terrorism Proclamation. In particular, the prosecutions against him were based on articles 3 (2), 3 (3), 3 (4), 4, 6 and 7 (2)[360] of this Proclamation.[361] It has to be noted that the charge sheet contains little to no factual allegations in support of these charges. In particular, the only part of the document that seems relevant in this regard is to be cited as following.[362]

> *"Since 2003 E.C. [September 2010], at a time that is not known, by using as cover his constitutional right to freedom of expression, in order to put an end to the Constitution*

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[354] X, *Free Eskinder Nega: life of a banned journalist*; E. NEGA, "Egypt's and General Tsadkan's lesson to Ethiopian Generals", *Ethiomedia*, 4 February 2011, available at: http://www.ethiomedia.com/above/2092.html [accessed 15/08/2016]. See annex 8 for the full text of the column.

[355] WGAD, *Opinion concerning Eskinder Nega*, par. 6.

[356] X, *Free Eskinder Nega: Eskinder's work: Excerpts of Eskinder's columns,* available at: http://www.freeeskindernega.com/www.FreeEskinderNega.com/Eskinders_Work.html [accessed 15/08/2016]; E. NEGA, "Gadhafi's fall and Meles Zenawi", *Abugidainfo*, 26 August 2011, available at: http://www.abugidainfo.com/index.php/18713/ [accessed 15/08/2016]. See annex 9 for the full text of the column.

[357] X, *Free Eskinder Nega: life of a banned journalist*; E. NEGA, "Debebe Eshetu's arrest and New Year", *Abugidainfo*, 9 September 2011, available at: http://www.abugidainfo.com/index.php/18798/ [accessed 15/08/2016]. See annex 10 for the full text of the column.

[358] Proclamation of the Criminal Code of the Federal Democratic Republic of Ethiopia No. 414/2004, *Federal Negarit Gazeta* 9 May 2005, 1.

[359] WGAD, *Opinion concerning Eskinder Nega*, par. 10.

[360] Respectively the criminalisations of terrorist acts (involving the creation of a serious risk to the safety or health of the public or a section of the public; kidnapping or hostage-taking; causing serious damage to property); the planning, preparation, conspiracy, incitement and attempt of terrorist acts; the encouragement of terrorism and the leadership of a terrorist organisation. See annex 7 for the provisions in full. Articles 3, 4 and 6 will be analysed more extensively later on.

[361] The charge sheet and the national judgments in the case of Mr Nega are not public. Consequently, this dissertation has to refer to the WGAD Opinion concerning his case, which contains a summary of the charge sheet and the proceedings in first instance.

[362] WGAD, *Opinion concerning Eskinder Nega*, par. 11.

and the constitutional system through an organised terrorist act, [Mr Nega]served as a local agent of the terrorist organisation Ginbot 7; accepted terrorist mission; in collaboration with the terrorist organisation organised in secret in the country, made terrorist plans, and coordinated the planned terrorism with members of the terrorist organisation that are in the country and abroad; disseminated calls for terrorism and violence; disseminated mobilising materials in different ways; collected information that he directly passed on to Ginbot 7 and indirectly to the enemy of the Eritrean Government and other terrorist organisation; called meetings that had terrorist mission and took decisions on different terrorist actions.

124. The evidence that the prosecution put forward consisted of a collection of Mr Nega's articles and interviews, and video material of his speeches at events of several opposition parties in Ethiopia. This video evidence showed that Mr Nega talked about the possibility of Arab Spring-type protests in Ethiopia, but also stressed that these protests should occur peacefully and legally.[363]

125. Mr Nega was found guilty on all charges by the Lideta Federal High Court.[364] The Court accused Mr Nega – and his co-defendants[365] – of *"under the guise of freedom of speech and gathering… attempting to incite violence and overthrow the constitutional order."*[366] Furthermore, in the view of the Court, Mr Nega had written *"articles that incited the public to bring the North African and Arab uprising to Ethiopia"*.[367] The Court concluded that *"freedom of speech can be limited when it is used to undermine security and not used for the public interest"*[368] and that *"there is no way other than democratic elections to attain power in the country, and what [the defendants] said is clearly against the constitution"*.[369] Consequently, the High Court pronounced a prison sentence of eighteen years for Mr

[363] Ibid, par. 13-14; C. HUNTER-GAULT, "The dangerous case of Eskinder Nega", *The New Yorker*, 17 July 2012, available at: http://www.newyorker.com/news/news-desk/the-dangerous-case-of-eskinder-nega [accessed 15/08/2016]. Furthermore, the defence had to show the full video of Mr Nega's address to the Unity for Democracy and Justice opposition, after the prosecution had been selective in showing clips in order to further its case against Mr Nega.
[364] WGAD, *Opinion concerning Eskinder Nega*, par. 16.
[365] Next to Mr Nega, 23 other persons were charged before the Lideta Federal High Court. (Source: Ibid, par. 10).
[366] Ibid, par. 17.
[367] Ibid.
[368] Ibid.
[369] Ibid.

Nega.[370] The case was taken to the Supreme Court, which dropped the charge of leadership of a terrorist organisation[371] but struck down the remaining part of the appeal. Furthermore, it refused to reduce Mr Nega's prison sentence.[372]

4.3.2.3 Analysis

126. From the outset, it has to be emphasised that the conviction of Mr Nega on terrorism charges was based solely on his writings and speeches containing criticism of the Ethiopian authorities and calling for peaceful protests. The allegations that Mr Nega was involved in plans and conspiracies for terrorist attacks together with members of a terrorist organisation[373] were completely fabricated, with no material evidence put forward during the proceedings. Consequently, the interference with Mr Nega's right to freedom of expression is comprised of the following elements: the characterisation of his writings and speeches as terrorist offences, the tendency of the Ethiopian authorities to fabricate charges of involvement with terrorism, and the conviction to eighteen years of imprisonment.

127. With regard to the condition of legal certainty, the Ethiopian Anti-Terrorism Proclamation clearly fails to stipulate terrorist offences with enough precision to enable individuals to regulate their conduct.[374] The vagueness of the Proclamation and the corresponding chilling effect for dissenting voices have been pointed out by multiple international actors, at the level of the UN and the ACommHPR.[375] The Ethiopian government has outright

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[370] Ibid, par. 19.

[371] Article 7 (2) Anti-Terrorism Proclamation.

[372] As was mentioned before, the judgment of the Ethiopian Supreme Court is also not public. Therefore, the respectable source of the Committee to Protect Journalists was used (CPJ, *In Eskinder case, politicised verdict undermines Ethiopia*, available at: https://cpj.org/2013/05/in-eskinder-case-politicized-verdict-undermines-et.php [accessed 15/08/2016]), which referred to the more detailed account in X, "Ethiopia confirms jail terms for blogger, opposition figure", *Agence France-Presse*, 2 May 2013, available at: http://www.globalpost.com/dispatch/news/afp/130502/ethiopia-confirms-jail-terms-blogger-opposition-figure [accessed 15/08/2016].

[373] Allegations which can logically be connected to the charges under articles 3 (2), 3 (3) and 3 (4). See annex 7 for the provisions in full.

[374] An important element of the principle of legal certainty, prescribed in the global (see *supra*, at 56) and the African (see *supra*, at 89) free speech frameworks.

[375] HRC, *Concluding Observations regarding Ethiopia*, 25 July 2011, par. 15; WGAD, *Opinion concerning Eskinder Nega*, par. 34 – 37; United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review of Ethiopia*, 7 July 2014, *UN Doc.* A/HRC/27/14, par. 158.50-158.53; ACommHPR Resolution 218, *Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia*, 2 May 2012.

refused to act upon these calls for review.[376] In order to acquire a more complete understanding of the legal climate in Ethiopia for critics of the government like Mr Nega, one has to take a look at more provisions of the Anti-Terrorism Proclamation than the ones invoked against him in this case. During the analysis of these provisions, it has to be kept in mind that there is no guarantee on the part of the Ethiopian judiciary with regard to independent scrutiny[377] on vague criminalisations with the goal of avoiding abusive restrictions of the rights of political dissenters.

128. The analysis has to start with the broad scope of the prohibition of "terrorist acts" in article 3 of the Proclamation.[378] This provision decouples the notion of terrorism from the presence of serious violence by criminalising, inter alia, acts with a peaceful but political motivation which result in "disruption of any public service". Consequently, peaceful public protests have a realistic chance to be qualified as terrorist acts, even when no harm has been caused to any member of the public.[379] All persons who express their desire for such protests can be placed on an equivalent footing on the terrorist scale.[380] When one reads Article 3 together with articles 5 and 6, it is obvious that the Proclamation creates terrorist offences without boundaries.[381] Article 5 criminalises the "rendering of support to terrorism". The kind of support is essentially unlimited – moral support, advice, instruction,…[382] – and the requirements of intent to cause terrorist acts and a causal link with the potential occurrence of a terrorist act are virtually absent.[383] Similar ambiguities are present in article 6, which targets all published statements which *"are likely to be understood… as direct or indirect encouragement or other inducement"* to terrorism.[384] In combination with article 3, articles 5 and 6 can respectively criminalise persons who have offered food, drinks or directions to a political protester and persons who have made a

[376] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review of Ethiopia,* 7 July 2014, par. 152 and 158.50-158.53.
[377] Another element of the principle of legal certainty: see *supra* at 56 and 89.
[378] See annex 7 for the provision in full.
[379] ENVIRONMENTAL DEFENDER LAW CENTER and THE OAKLAND INSTITUTE (2016), 9.
[380] Article 3 (7) Anti-Terrorism Proclamation: threat to commit a terrorist act; Article 4 Anti-Terrorism Proclamation: planning, conspiring and inciting terrorist acts, refers to the punishments of article 3. See annex 7 for the complete provisions.
[381] T. SKJERDAL, "Why the Arab Spring never came to Ethiopia" in Mutsvairo, B. (ed.), *Participatory Politics and Citizen Journalism in a Networked Africa: A Connected Continent*, Basingstoke, Palgrave Macmillan, 2016, 79.
[382] See annex 7 for the complete provision.
[383] Relevant part of the provision: *"Having reason to know that his deed has the effect of supporting the commission of a terrorist act or a terrorist organisation".*
[384] See annex 7 for the complete provision.

neutral public statement about protests,[385] even if those protests took place abroad. Furthermore, articles 5 and 6 can certainly be invoked against neutral reporting about groups designated as terrorist organisations by the Ethiopian government.[386]

129. With regard to the condition that interferences serve a legitimate interest, the Ethiopian authorities invoke the protection of national security, in particular the combat against terrorist violence, in the Anti-Terrorism Proclamation[387] and in the case against Mr Nega.[388] Considering the overbroadness of the Proclamation and the government's systematic use of it to repress criticism and calls for peaceful reform,[389] the genuineness of the invoked objective has to be seriously doubted.[390] In particular, the situation does not respect the views of the HRC in *Mukong v. Cameroon*, in which it stipulated that *"attempts to muzzle advocacy of multi-party democracy, democratic tenets, or human rights"* could not be connected to the legitimate aims of national security and public order.[391]

130. Under the condition of necessity in a democratic society, the overbroadness of the Anti-Terrorism Proclamation is again a cause for concern. The HRC explicitly cautioned the Ethiopian authorities in 2011 to *"ensure that its legislation is limited to crimes that deserve to attract the grave consequences associated with terrorism".*[392] The Anti-Terrorism Proclamation was not amended. As was already explained, the Proclamation criminalises a wide range of legitimate acts of speech, which do not represent a threat to national

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[385] ENVIRONMENTAL DEFENDER LAW CENTER and THE OAKLAND INSTITUTE (2016), 9-10.

[386] SKJERDAL (2016), 79-80.

[387] Preamble of the Anti-Terrorism Proclamation. See annex 7 for the relevant paragraphs.

[388] See *supra*, at 125, the reasoning of the High Court.

[389] ENVIRONMENTAL DEFENDER LAW CENTER and THE OAKLAND INSTITUTE (2016), 6-8; HUMAN RIGHTS WATCH, *Journalism is not a crime: violations of media freedom in Ethiopia*, 21 January 2015, 13-24, available at: https://www.hrw.org/report/2015/01/21/journalism-not-crime/violations-media-freedoms-ethiopia [accessed 15/08/2016]. Another example is the prosecution of Pastor Omot Agwa, who served as an interpreter for a World Bank Inspection Panel investigating allegations of serious human rights violations by the Ethiopian authorities in connection with a World Bank project. Pastor Omot was arrested in March 2015 at the airport of Addis Ababa under the claim that he was travelling to a terrorist meeting in Nairobi. In fact, he was going to a workshop about food security issues. The charges against him stipulate that he is the co-founder and leader of Gambella People's Liberation Movement, a group which is not designated as a terrorist organisation by the Parliament. Latest update on this case: HUMAN RIGHTS WATCH, *Ethiopian pastor pays the penalty for speaking out*, 15 March 2016, available at: https://www.hrw.org/news/2016/03/15/dispatches-ethiopian-pastor-pays-penalty-speaking-out [accessed 15/08/2016].

[390] The global and African free speech frameworks warn against the use of legitimate interests as pretexts. See *supra*, at 62, 65, and 91.

[391] HRC, *Mukong v. Cameroon*, par. 9.7. See also *supra*, at 62 (in particular footnote 175).

[392] HRC, *Concluding Observations regarding Ethiopia*, 25 July 2011, par. 15.

security. Moreover, the broad criminalisations carry along punishments of the harshest degree, ranging from ten years of imprisonment to the death penalty.[393] This goes directly against the determination of the ACtHPR that imprisonment is only proportionate the cases of *"incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality"*[394]

131. The application of the Proclamation in the specific case of Mr Nega must be reviewed under the necessity test as well. In this context, the tendency of the authorities to fabricate charges of Mr Nega being an agent of a terrorist organisation is a first point to notice. This has to be connected with the fact that the government has tried to intimidate Mr Nega into silence throughout his journalistic career.[395] In February 2011, he was arrested briefly as a warning to stop writing about the Arab Spring protests.[396] Mr Nega did not heed this warning, which led to the criminal proceedings under discussion. Such a kind of bias against political dissenters, which drives prosecutors to put forward vague factual allegations in order to trump up the charges, is not justified.

132. In the verdict of Mr Nega's case, the High Court rightly points out that the right to freedom of speech can be limited for the sake of national security.[397] However, the restrictions posed by this verdict essentially erode that right of Mr Nega.[398] The writings and speeches of Mr Nega did not represent a threat to national security.[399] Moreover, as the expressions of legitimate political concerns, they warranted careful protection under the free speech frameworks.[400] Mr Nega advocated and theorised about Arab Spring-type protests spreading to Ethiopia, but he emphasised regularly that protests and political reform

[393] Articles 3 (terrorist acts) and 4 (planning, preparation, conspiracy, incitement and attempt) stipulate the death penalty as a possible punishment.
[394] See *supra,* at 92.
[395] WGAD, *Opinion concerning Eskinder Nega,* par. 4-7; X, *Free Eskinder Nega: life of a banned journalist*.
[396] WGAD, *Opinion concerning Eskinder Nega,* par. 7; see *supra,* at 122.
[397] See *supra,* at 125, the reasoning of the High Court.
[398] Important warning signal under the condition of necessity in the global and African free speech frameworks. See *supra,* at 68 and 92.
[399] An element of the necessity principle in the global free speech framework. See *supra,* at 68.
[400] Explicitly stipulated in the African free speech framework. See *supra,* at 92.

needed to happen peacefully.[401] Contrary to what the verdict states,[402] there was no incitement to violence. The characterisation of calls for peaceful protests and political reform as terrorist offences has to be equated with an overly broad and disproportionate invocation of national security concerns. The subsequent conviction of Mr Nega to a prison sentence of eighteen years raises the degree of disproportionality even higher.

[401] Excerpt from "Egypt's and General Tsadkan's lesson to Ethiopian Generals" (See annex 8 for the full text): *"Perhaps it is too early to expect a radical shift of attitudes and loyalties in Ethiopia right now. But if the protests do spread to Ethiopia, as the EPRDF fears, the least that history demands from Ethiopian Generals, particularly with the examples of Tunisia and Egypt in the picture, is a no repeat of the wanton, random, excessive shootings to the head and heart of unarmed protesters---even stone throwing ones!!---as in 2005.";* Excerpt from "Gadhafi's fall and Meles Zenawi" (see annex 9 for the full text): *"There will be no African Spring without Ethiopia… Ethiopia must and should avoid violence. If Ethiopia shuns violence so will most of sub-sahara Africa. And only then will the advent of the African Spring be even better news than that of the Arab Spring;* Excerpt from "Debebe Eshetu's arrest and New Year" (see annex 10 for the full text): *"2004 could be the year when we will finally stop killing each other for political reasons… Inevitably, freedom will overwhelm Ethiopia."*

[402] See *supra*, at 125.

Conclusion

133. This dissertation centred around the phenomenon of increased application of antiterrorism legislation to acts of speech. In this context, it endeavoured to draw the balance that a State should make between its obligations to counter terrorism and to respect freedom of expression. This balancing exercise was first performed at the global, European and African levels. Subsequently, the standards of these frameworks were applied concretely to cases in the British, French and Ethiopian legal orders.

134. It should be noted that the global, European and African frameworks grant States a certain margin of appreciation in cases involving speech-based terrorist offences. However, it is still apparent that the circumscription of a speech-based terrorist offence should pay attention to the elements of (i) the required intensity of the impugned expression, (ii) the presence of an intent to incite terrorist violence and, (iii) the presence of a causal link between the impugned expression and the potential occurrence of terrorist violence.

135. The research also leads to the conclusion that the circumscription of the terrorist conduct targeted by the expression should be limited to acts of serious violence. This limitation makes sure that public demonstrations – including the ones that entailed minor acts of violence – are excluded from the mark of terrorist activity.

136. Turning back to the three elements of an ideally circumscribed speech-based terrorist offence, it should be noted that the first element – the intensity of the expression – poses little controversy. On the other hand, the second and third elements are often minimalised or even absent in national criminalisations of speech-based terrorist offences. After the research set out in this dissertation, it has to be concluded that this practice does not represent consistent application of the free speech standards. In order to represent legitimate restrictions of the right to freedom of expression, the circumscriptions of speech-based terrorist offences have to set thresholds of intent and causality of a certain height. Otherwise, the criminalisation runs a serious risk of being overbroad, which is a significant flaw in the light of the particular and far-reaching characteristics of counterterrorism legislation. The discussed cases provide a powerful picture of this. The British Terrorism Act targeted responsible journalism which exposed serious wrong-doing on the part of the government. The French legal order showed the prosecution of speech under antiterrorism

legislation on the basis of the notion of offensiveness. Lastly, the Ethiopian Anti-Terrorism Proclamation presented systematic criminalisation of calls for peaceful reform. Next to their overbroadness silencing persons with legitimate opinions, these low threshold-criminalisations fall short of effectively countering radicalisation. Instead, the potentially dangerous speech moves to an underground environment, in the case of ISIS the encrypted app Telegram. There, they are virtually impossible to monitor and they can easily attract legitimacy and evolve into actual recourse to violence. [403]

137. The spread of solid counter-narrative content represents a solution with more potential. In this context, the work of the International Center for the Study of Violent Extremism has to be considered of significant importance. Their aim is to break the appealing "brand" of ISIS, by using interviews with ISIS defectors.[404] The interviews that Ms Speckhard and Mr Yayla – the former being highly qualified in the area of psychiatry, the latter in law enforcement – have conducted so far, are extensively described in a recently published book.[405] Moreover, clips of the interviews and memes of specific statements by the interviewees have been spread on ISIS chatrooms and under ISIS hashtags. The clips are given names which make them seemingly blend in with the ISIS propaganda.[406] In essence, this material discredits the allure of ISIS in a credible manner and it is placed at the heart of the recruiting efforts.

138. The power of the material lies first of all in depicting the interviewees' disgust with the group. In this regard, I find the interview with the fifteen-year-old defector Ibn Omar[407] very compelling. He describes, inter alia, how ISIS indoctrinates young children and convinces them to become suicide-bombers. Furthermore, he makes the following statement to young people over the world: *"I would tell them not to join this regime, they [ISIS] are not Muslims. They are infidels. They kill innocents. They aren't there for jihad.*

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[403] R. TORFS, "Stilte kan moordend zijn", *De Standaard+*, 29 juli 2016, available at: http://www.standaard.be/cnt/dmf20160728_02403174 [accessed 15/08/2016];CHOUDHURY (2010), 481-482 and 486-487.

[404] INTERNATIONAL CENTER FOR THE STUDY OF VIOLENT EXTREMISM, *How ISIS Defectors can help us beat terror*, 5 August 2016, available at: http://www.icsve.org/brief-reports/how-isis-defectors-can-help-us-beat-terror/ [accessed 15/08/2016].

[405] A. SPECKHARD and A.S. YAYLA, *ISIS Defectors: Inside Stories of the Terrorist Caliphate*, McLean, Advances Press, 2016, 372 p.

[406] Ibid, 6139 [e-book version]; INTERNATIONAL CENTER FOR THE STUDY OF VIOLENT EXTREMISM, *Projects*, available at: http://www.icsve.org/projects/ [accessed 15/08/2016].

[407] The names of the interviewees have been anonymised.

They are only there for money. Those who join them cannot get out easily. They portray themselves as Muslims, but teach students how to carry out explosions and they say you'll go to Paradise. This is all lies."[408] The interviews have also brought forward substantial evidence which discredits the "core beliefs" of ISIS: they make deals with their "sworn enemy" Assad, they deliberately use half of the verses in the Quran and spin their meaning, etc.

139. States claim regularly that the introduction of broad speech-based terrorist offences combats terrorism "at it roots". In the light of the research set out in this dissertation, and the described activities of the International Center for the Study of Violent Extremism, it is necessary to question that claim.

[408] SPECKHARD and YAYLA (2016), 1292 [e-book version]. For the youtube clip connected to this interview (entitled "the Glorious Cubs of the Caliphate"), see https://www.youtube.com/watch?v=tpwnWdpS2-o .

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Annexes

Annex 1 Extracts from the British Human Rights Act 1998

INTRODUCTION

1. The Convention Rights

(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in –

(a) Articles 2 to 12 and 14 of the Convention,

(b) …

(c) …

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15)

(3) The Articles are set out in Schedule 1.

(…)

2. …

LEGISLATION

3. Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights

(2) …

4. Declaration of incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section "court" means

(a) …

(b) …

(c) …

(d) in England and Wales or Northern Ireland, the High Court or the Court of Appeal

(6) A declaration under this section ("a declaration of incompatibility")

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

Annex 2 Extracts from the British Terrorism Act 2000

PART I INTRODUCTORY

1. Terrorism: interpretation

(1) In this Act "terrorism" means the use or threat of action where

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

PART V COUNTER-TERRORIST POWERS

SUSPECTED TERRORISTS

40. Terrorist: interpretation

(1) In this Part "terrorist" means a person who

(a) ...

(b) is or has been concerned in the commission, preparation or instigation of acts of terrorism

(2) The reference in subsection (1)(b) to a person who has been concerned in the commission, preparation or instigation of acts of terrorism includes a reference to a person who has been, whether before or after the passing of this Act, concerned in the commission, preparation or instigation of acts of terrorism within the meaning given by section 1.

SCHEDULE 7 PORT AND BORDER CONTROLS

POWER TO STOP, QUESTION AND DETAIN

2.

(1) An examining officer may question a person to whom this paragraph applies for the purpose of determining whether he appears to be a person falling within section 40(1)(b).

(2) This paragraph applies to a person if

(a) he is at a port or in the border area, and

(b) the examining officer believes that the person's presence at the port or in the area is connected with his entering or leaving Great Britain or Northern Ireland.

(3) This paragraph also applies to a person on a ship or aircraft which has arrived in Great Britain or Northern Ireland.

(4) An examining officer may exercise his powers under this paragraph whether or not he has grounds for suspecting that a person falls within section 40(1)(b).

3. An examining officer may question a person who is in the border area for the purpose of determining whether his presence in the area is connected with his entering or leaving Northern Ireland

4. …

5. A person who is questioned under paragraph 2 or 3 must

(a) give the examining officer any information in his possession which the officer requests;

(b) …

(c) declare whether he has with him documents of a kind specified by the examining officer;

(d) give the examining officer on request any document which he has with him and which is of a kind specified by the officer.

6.

(1) For the purposes of exercising a power under paragraph 2 or 3 an examining officer may

(a) stop a person or vehicle;

(b) detain a person

(2) …

(3) …

(4) A person detained under this paragraph shall (unless detained under any other power) be released not later than the end of the period of nine hours beginning with the time when his examination begins.

8.

(1) An examining officer who questions a person under paragraph 2 may, for the purpose of determining whether he falls within section 40(1)(b)

(a) Search the person

(b) …

(c) …

(d) …

(2) …

9.

(1) An examining officer may examine goods to which this paragraph applies for the purpose of determining whether they have been used in the commission, preparation or instigation of acts of terrorism.

(2) This paragraph applies to goods which have arrived in or are about to leave Great Britain or Northern Ireland on a ship, aircraft or vehicle.

11. **Detention of property**

(1) This paragraph applies to anything which

(a) is given to an examining officer in accordance with paragraph 5(d),

(b) is searched or found on a search under paragraph 8, or

(c) is examined under paragraph 9.

(2) An examining officer may detain the thing

(a) for the purpose of examination, for a period not exceeding seven days beginning with the day on which the detention commences,

(b) while he believes that it may be needed for use as evidence in criminal proceedings, or

(c) …

18.

(1) A person commits an offence if he

(a) wilfully fails to comply with a duty imposed under or by virtue of this Schedule

Annex 3 Extracts from the French Declaration of Human and Civic Rights 1789 (English translation)

Art. 10. No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.

Art. 11. The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law.

Annex 4 Extracts from the French Constitution (English translation)

Preamble The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration [of Human and Civic Rights] of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004. (…)

TITLE VI – ON TREATIES AND INTERNATIONAL AGREEMENTS

Art. 55. Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.

Annex 5 Extracts from the French Penal Code

Art. 421-2-5. Le fait de provoquer directement à des actes de terrorisme ou de faire publiquement l'apologie de ces actes est puni de cinq ans d'emprisonnement et de 75 000 € d'amende.

Les peines sont portées à sept ans d'emprisonnement et à 100 000 € d'amende lorsque les faits ont été commis en utilisant un service de communication au public en ligne.

Annex 6 Extracts from the Ethiopian Constitution 1995

CHAPTER TWO: FUNDAMENTAL PRINCIPLES OF THE CONSTITUTION

Art. 9. Supremacy of the Constitution

1. …

2. …

3. …

4. All international agreements ratified by Ethiopia are an integral part of the law of the land.

CHAPTER THREE: FUNDAMENTAL RIGHTS AND FREEDOMS

Art. 13. Scope of Application and Interpretation

1. …

2. The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.

PART ONE: HUMAN RIGHTS

(…)

PART TWO: DEMOCRATIC RIGHTS

Art. 29. Right of Thought, Opinion and Expression

1. Everyone has the right to hold opinions without interference.
2. Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.
3. Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements:
   (a) Prohibition of any form of censorship.

(b) Access to information of public interest.

4. In the interest of the free flow of information, ideas and opinions which are essential to the functioning of a democratic order, the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions.
5. Any media financed by or under the control of the State shall be operated in a manner ensuring its capacity to entertain diversity in the expression of opinion.
6. These rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honour and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.
7. Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.

Annex 7 Extracts from the Ethiopian Anti-Terrorism Proclamation 2009

(…)

WHEREAS, it has become necessary to legislate adequate legal provisions since the laws presently in force in the country are not sufficient to prevent and control terrorism;

WHEREAS, it has become necessary to incorporate new legal mechanisms and procedures to prevent, control and foil terrorism, to gather and compile sufficient information and evidences in order to bring to justice suspected individuals and organizations for acts of terrorism by setting up enhanced investigation and prosecution systems;

(…)

PART TWO: TERRORISM AND RELATED CRIMES

Art. 3. Terrorist Acts

Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or

destroying the fundamental political, constitutional or, economic or social institutions of the country:

1. causes a person's death or serious bodily injury;
2. creates serious risk to the safety or health of the public or section of the public;
3. commits kidnapping or hostage taking;
4. causes serious damage to property;
5. causes damage to natural resource, environment, historical or cultural heritages;
6. endangers, seizes or puts under control, causes serious interference or disruption of any public service; or
7. threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article;

is punishable with rigorous imprisonment from 15 years to life or with death.

Art. 4. Planning, Preparation, Conspiracy, Incitement and Attempt of Terrorist Act

Whosoever plans, prepares, conspires, incites or attempts to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation is punishable in accordance with the penalty provided for under the same Article.

Art. 5. Rendering Support to Terrorism

1. Whosoever, knowingly or having reason to know that his deed has the effect of supporting the commission of a terrorist act or a terrorist organization:
    a. …
    b. provides a skill, expertise or moral support or gives advice;
    c. provides, collects or makes available any property in any manner;
    d. …
    e. …
    f. provides any training or instruction or directive;

    is punishable with rigorous imprisonment from 10 to 15 years.

2. …

Art. 6. Encouragement of Terrorism

Whosoever publishes or causes the publication of a statement that is 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 stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years.

Art. 7. Participation in a Terrorist Organisation

1. …
2. Whosoever serves as a leader or decision-maker in a terrorist organisation is punishable with rigorous imprisonment from 20 years to life.

Annex 8 ESKINDER NEGA, "Egypt's and General Tsadkan's lesson to Ethiopian Generals", *Ethiomedia,* 4 February 2011.

What the world did not see was how hard Mubarak fought Egypt's youthful protesters before they attained critical mass last Friday. Arrayed against them in the first few days of the protests were a remarkably huge and mostly invisible complex of police and security agencies; 1.4 million strong, according to Wikileaks' leaked US diplomatic cables. Clad partly in civilian clothes, partly in the official uniform of the despised police, they were Mubarak's measure of first resort to quell the protests. Veterans of the fierce Islamic revolt of the 1990s, where the origin of their famed brutality lies, Mubarak had every reason to believe in their infallibility.

But it is exactly their feted brutality, long the perfect deterrent to mass dissent, which was to undo them in the space of less than a week. The sight of uniformed police or their civilian counterparts became magnets for hysterically fearless protesters brandishing rocks and sticks. Naturally, the police and security agencies fought back. But with the momentum on the side of the protesters, they rarely prevailed; promoting, not on few occasions, some of the rank and file to switch sides in the midst of pitched battles.

In some battles, however, the police did prevail. And when that happened, the reaction of the protesters has intrigued the world. "Where is the army?" cried one protester to foreign journalists. "Come and see what the police are doing to us. We want the army. We want the army." Hardly the sentiment one would expect from citizens of a bona fide police-state.

Now imagine a hypothetical scenario in Ethiopia where protesters and the Federal Police (Ethiopia's riot police) clash, and protesters, overwhelmed by the police's superior fire-power, intuitively turn to the army for protection.

Plausible?....Of course not!

But in the event that protests erupt in Ethiopia, too((Sudan is teetering on the verge of an explosion), here is a perfect opportunity for the Ethiopian military to endear itself to the public the way the Egyptian military has endeared itself to the Egyptian people.

The Egyptian military staged a coup and overthrew the monarchy in 1952. In the person of the leader of the coup, Gamal Abdul Nasser, the Egyptian military inadvertently produced not only a populist in the mode of Argentina's Peron, but even better, one with wide pan-Arabic appeal. And swiftly, many throughout the Arab world dared to dream about the possibility of a resurrected Caliphate; one that would stretch from the Atlantic in the West to the Indian Ocean in the East. Since then, the Egyptian military has thrived on the windfalls of its association with Nasser; hero and champion of not only Egyptians but of all Arabs. Both subsequent leaders of Egypt after Nasser, Sadat and Mubarak, the former a captain in the army, the latter a General in the Air Force, inevitably came from the institution with the most prestige in the country.

Buttressed by billions of dollars of aid, first from the Soviet Union and then the US, the Egyptian military has over the decades grown in to a state within a state. But this is not the Egyptian example that Ethiopian Generals should be fancying. On the contrary, it is a cautionary tale of what should be avoided. Rather, it is the sensitivity of the Egyptian military to its place in the people's heart that should inspire Ethiopian Generals "to be more than they could be," as the American Marines would put it.

By Monday, February 1, 2010, Mubarak's ruling party, NDF, had tired to insignificance; the hated police had collapsed; but, predictably, the military was still standing tall and intact. With some effort, perhaps akin to something like an Egyptian version of Tiananmen Square, it could have put an end to the protests. But neither the possibility of saving one of its sons, Mubarak, nor the unsettling prospect of losing its privileged economic and political status if the protesters prevail compelled it to turn against the public.

Its first statement, issued as the crisis escalated to new heights at the beginning of the week, clearly placed it on the side of the public: "The armed forces will not resort to use of force against our great people. Your armed forces, which are aware of the legitimacy of your

demands, are keen to assume their responsibility in protecting the nation and the citizens; and affirm that freedom of expression through peaceful means is guaranteed to every body." And thus, at the expense of its short term interest, it has opted for its historical integrity; a record untainted by the blood of the very people it is supposed to protect.

Is the Ethiopian Military capable of such heroism? Is it capable of overcoming its debased moral standing; stained by the needless blood it shed of the young and old, of women and men, the very people it is sworn to protect, in the post election riots of 2005?

Well, partially it is. Nothing it could do will bring back the dead; their blood will remain a permanent blemish. But a determination not to repeat this fatal error of judgment could reconcile it with the favor of the public; placing it squarely at the center of a forgiving public's heart.

The EPRDF army which marched into Addis twenty years ago could paradoxically be said to exist and not exist at the same time. Estimated by experts to have been no more 80,000 at its peak, it was more than tripled during the Ethio-Eritrean war of the early 2000s. It now stands somewhere between 150,000 and 200,000. Between the ranks of Private and Captain, significant numbers of ex-EPRDF fighters exist only amongst NCOs. The rest have more or less been fully replaced by new recruits. In this sense, the old EPRDF army has either been phased out or overwhelmed by new recruits.

But above the rank of Captain, the dominance of EPRDF fighters-cum-professional soldiers is evident. At the rank of Colonel and above their presence is virtually absolute. In this sense, the old guard, the veteran leadership which defeated the Derg remains intact. EPRDF leaders assume their loyalty as a given; a certainty that will categorically not fail.

But is that certainty warranted?

To a large extent, it is. But consider that General Tsadkan Gebre-Tesane, chief-of-staff of the armed forces between 1991 and 2001, and General Abebe Tekle-Haimanot, Commander of the Air-Force for the same period, were once ultimate prototypes of this genre, who chose to part ways with the EPRDF over questions of principle, and the possibility of new surprises is palpable.

What undid the two Generals and multitude of lesser officers was their resolve, as is the case with Egyptian Generals now, to maintain strict neutrality when the core EPRDF leadership was ruptured by an unprecedented internal split. But to Meles Zenawi, anyone who was not with

him was against him. This was an implicit ultimatum to the military brass to which the alternative was possible civil war. Horrified by the rapidly unfolding specter, most of them gave in reluctantly. This is the real story. Needless to say, the popular impression of what had happened has been heavily prejudiced by the winning side.

Perhaps it is too early to expect a radical shift of attitudes and loyalties in Ethiopia right now. But if the protests do spread to Ethiopia, as the EPRDF fears, the least that history demands from Ethiopian Generals, particularly with the examples of Tunisia and Egypt in the picture, is a no repeat of the wanton, random, excessive shootings to the head and heart of unarmed protesters---even stone throwing ones!!---as in 2005.

Ethiopian Generals: history is watching; the people are watching; and the world is watching.

Most of all: Don't fight your conscience!

Annex 9 ESKINDER NEGA, "Gadhafi's fall and Meles Zenawi", *Abugidainfo*, 26 August 2011.

Nero was famously eccentric in Roman times. He longed to be remembered for his theatrical abilities rather than leadership of one of the world's greatest empires. But his other quirks were more horrifying than amusing. He imagined, for example, an implausible bed—yes, bed—which would commit murder. And there were the psychotic eccentricities of Russia's Ivan the terrible who, as legend has it, had an elephant killed for refusing to bow to him.

Modern times' eccentrics have generally been less deadly. There is, for instance, Mehran Karimi Nasseri, the Iranian asylum seeker who lived in the departure lounge of Charles de Gaulle's Airport for many years. (He inspired Tom Hank's fictional 2004 movie, The Terminal.)

At the opposite end of the pole, though, the modern age also has Libya's ominous Muammar Gadhafi as a world famous eccentric.

Gadhafi was born in the great Saharan desert in 1942. His parents were Arabized Berbers. Libya was under the inept rule of Fascist Italy back then. But twenty years later, in 1961, with the first wave of decolonization on the verge of sweeping Africa, Libya was hastily transformed into an independent, and hopefully conservative, Kingdom by Western powers. But with next door

revolutionary Egypt exciting passions across the Arab world, a revolution in Libya was only inevitable from the very outset.

Inspired by the success of Egypt's Nasser and his free officers in the mid-fifties, radicalized young Arabs joined their countries' militaries with the hope of eventually using them as revolutionary weapons, too.

And so a Nasser-awed, aspiring revolutionary Gadhafi, one of many like-minded youth in the Middle East, made his way to his nation's military academy, where he was promptly accepted. Eight years later he was unexpectedly running Libya. Even he hadn't planned it this way, though. It was a feat worthy more of fate than earthly being. Gadhafi was only 27.

His eccentricities were not really evident at first. But in retrospect, perhaps there was an early sign at Nasser's funeral. Nasser died of a sudden heart attack only a year after Gadhafi's accession to power in 1969. The Arab world was stunned. He had just presided over a pan-Arabic summit. Tens of thousands poured spontaneously into the streets all over the Arab world wailing in utter grief. On the day of the funeral, five million came out to pay their respects. And while tears rolled down the faces of PLO's Chairman Arafat and Jordan's King Hussein, the Arab world's newest leader, Gadhafi, fainted twice. An unusually passionate man had come to power in Libya.

Over the next forty years he would go on to amuse the world with his all-female bodyguards; his "voluptuous Ukrainian nurses;" his outrageous statements ("HIV is a peace virus;") pitched tents from where he conducted state business; and, of course, his memorably colorful attires.

But there were also his less amusing internal polices and blood-tainted foreign adventures. Though himself one of the Berbers, North Africa's indigenous ethnic groups, he systematically suppressed their languages and cultures. (He called it "poison.")He killed internal dissidents at will; those who escaped to exile were assassinated. His intelligence agents planted bombs on Pan AM flight 103, which blew over Lockerbie, in Scotland, killing hundreds. Obviously, the value of life carried little weight with him.

This reckless disregard for human life was again apparent in the early days of February 2011 when serious protests, inspired by the Arab Spring, against his forty years rule broke out in several cities. He struck with vengeance. And when protests threatened to overwhelm him, he recruited mercenaries to shed more blood. He counted on the potency of mass murder and apathy of the international community to prevail. But he calculated wrong.

Ethiopia's Meles Zenawi, who now leads Africa's largest dictatorship, and who many suspect is calculating as Gaddafi did at first, should take serious note.

Killings enraged Libyans as it did Tunisians and Egyptians before them. Inexplicably and suddenly massacre failed to terrorize the young any more. Despite Gadhafi's assertion that only a drugged youth could have refused to succumb to live bullets, hope is really what had fueled the protests.

Eric Hoffer had famously argued that it was hope not oppression that had made revolutions possible. And indeed neither Egyptians nor Libyans had more reason to rebel in 2011 than they did for decades. Too few were any more capable of imagining life free from the oppressive status-quo. Too many had been co-opted; many more had simply learned how to muddle through. But events in Tunisia changed everything. Change was proved possible. The people mattered, after all. And hope was born in the Arab world. There was then really nothing Gadhafi could have done to fundamentally change the course of events. Even without NATO's involvement he could only have delayed not prevented his regime's eventual demise. Hope is insuppressible. The surprise swift fall of Tripoli into rebel hands, despite numerous predications of a stalemate, underscores this fact.

Hope will come to sub-Sahara's remaining dictatorships, too. The Arab Spring has already brought it to their doorsteps. It will not wait forever to get in. No one knows which sub-Saharan dictatorship will relent first. But that is almost irrelevant. What matters is that its spread will be unavoidable once it begins. The triumph of hope in only one sub-Saharan dictatorship will beget a continent wide African Spring, hopefully all peaceful. And as Egypt, the Arab world's biggest dictatorship during Mubarak's reign, was the Arab Spring's golden prize, so will Ethiopia, sub-Sahara's biggest dictatorship, be the golden prize for an African Spring. There couldn't have been an Arab Spring without Egypt. There will be no African Spring without Ethiopia.

Hopefully, Meles understands this and is willing to do his country and Africa one big favor. When the time arrives, the inevitable must not be futilely resisted. This is the crucial lesson that should be learned from Gadhafi's needlessly destructive finale. Ethiopia must and should avoid violence. If Ethiopia shuns violence so will most of sub-Sahara Africa. And only then will the advent of the African Spring be even better news than that of the Arab Spring.

Annex 10 ESKINDER NEGA, "Debebe Eshetu's arrest and New Year", *Abugidainfo*, 9 September 2011.

Researchers detail ten types of smile. There is the tight-lipped smile which the English particularly fancy. There is the twisted smile of the angered. There is the dealer-smile of the sly. There is the nothing-I-can-do-smile of defeat. And on it goes.

Most people could muster a reasonable mimic of most types of smile. Who, after all, does not occasionally flash a not-understanding-you-smile? But one, the heartfelt-felt-smile, defies feign. It really has to come from the heart.

I needed no telling that Debebe Eshetu, our co-defendant in the Treason Trial, was smiling from the heart when he approached me after a visit to police hospital in 2005. Every muscle on his face was manifestly convulsed. What I did not suspect was the staggering news he had for me.

"Baby Eskinder is on the way," he exclaimed, smiling brilliantly.

It was a smile that dominated the face; an expression of wholesome delight. And before I could recover from the shock, I, too, was overwhelmed with his joy. And so I learned for the first time, in prison, facing treason and genocide charges, I was to become a father.

Debebe's infectious smile sustained prisoners' spirit in those difficult times. Of all the prisoners, his easy smile, authentic and warm, gave us reason to hope against hope. He somehow made the prospect of long prison sentences bearable. There was no gloom where Debebe tread and naturally prisoners clamored for his company.

His physical health could have been better when I met him last. But his spirit was as lively as ever. We mused about the treason trial, lamented the wasted years since, but parted with a note of optimism about the future. There was absolutely nothing to indicate a changed perspective. The commitment to non-violence was as intact as ever.

Much has been said about the improbability of journalists as plausible terrorist suspects, but Debebe's case is really a class unto itself. This is a frail man in his mid-60's; long plagued by chronic back pain; a free man only under a conditional pardon; a prominent dissident who knows he is under close secret-police scrutiny; and a committed family man whose wife and daughters dot on him. How in the world could such a person be involved in terrorism? It simply defies logic.

Even if unbeknownst to the EPRDF, there is such a thing as a world-wide profile of a terrorist. That person is usually male; probably in his 20s; unmarried; and always a fanatic. Zeal and terrorism go hand in hand. Minus the fanaticism the terrorist is not a possibility.

None of the recent detains under the terrorism charges remotely resemble the profile. Debebe is probably the ultimate antithesis of the fanatic, his pragmatism, his easy nature, defines him. Neither do journalists Webesht and Reyot and opposition politician Zerihun Gebre-Egzeabher fit the profile. The same goes for the calm university professor, Bekele Gerba. And of course the list could go on.

Why are Ethiopia's alleged terrorist suspects so unique? The answer is too obvious to merit detailing here. I would rather reflect on what Ethiopian New Year, 2004, only two days into the future, bodes for the nation.

Look at what had happened in the world in 2003, and it's easy to complain about the things we do not have. No freedom. Raging inflation. Rising unemployment. Rampant corruption. A delusional ruling party. An uncertain year ahead of us. And the list could go on.

But consider the exciting prospects:

2004 could be the year when we, too, like the majority of our fellow Africans, will have a government by the people, for the people.

2004 could be the year when we will finally stop killing each other for political reasons.

2004 could be the year when there will no more be tortures in our prisons.

2004 could be the year when Ethiopians will no more be incarcerated for their political convictions.

2004 could be the year when Ethiopians will no more have reasons to flee to exile.

2004 could be the year when freedom of expression and association will be respected.

2004 could be the year when we could take justice for granted.

And again, the list could go on.

The gist of the matter is that there are ample reasons to hope. Tyranny is in retreat everywhere. It has lost one of its two last great bastions, the Arab world. The momentum is now on the side freedom.

Freedom is partial to no race. Freedom has no religion. Freedom favors no ethnicity. Freedom discriminates not between rich and poor countries. Inevitably, freedom will overwhelm Ethiopia.

And with the advent of a new year, we are one step closer to freedom. It’s wonderful to be alive!

Happy New Year!