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The proportionality of limitations of freedom of expression in the context of suppression of terrorism under the Council of Europe Convention on the Prevention of Terrorism

MASTER'S THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

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ABSTRACT

The aim of this thesis is to evaluate the equilibrium between the suppression of incitement of terrorism and the rights of freedom of expression, established by the Council of Europe. Freedom of expression is an important element for a democratic society. Nevertheless, states are under an obligation to ensure the right to life of people within their jurisdiction. Recognising the devastating effect of violent terrorist attacks, the Council of Europe in 2005 adopted the Convention on the Prevention of Terrorism, which was the first legal instrument imposing an obligation on the State Parties to penalise incitement (provocation) of terrorism. The paramount importance in the Convention is devoted to the establishment of an equilibrium between the suppression of incitement of terrorism and freedom of expression. However, considering the evolution and changes of terrorism threats in recent years, it is important to evaluate the relevance of the Convention 16 years following its adoption. After comprehensive analyses of applicable international law, relevant scholarly literature and state practice, it is certain that the legal regulation established by the Convention is relevant to address the challenges of incitement of terrorism in a democratic and proportional manner. Thus, the employment of excessive measures to suppress the incitement of terrorism that do not correspond with the states' obligations under International Human Rights Law cannot be justified in a democratic society.

SUMMARY

This thesis is devoted to the exploration of the legal obligations of States Parties to the Council of Europe Convention on the Prevention of Terrorism towards freedom of expression, and their proportionality. The Convention constitutes an additional legal tool for states to navigate through three main human rights, i.e. the right to life, the right to due process of law and the right to freedom of expression. This thesis provides a doctrinal and scholarly consideration and analysis of obligations of states arising from International Human Rights Law and contains an analysis of national legal provisions in implementing those obligations.

The Council of Europe Convention is not an autonomous instrument. The obligations arising from the Convention must be interpreted in a manner coherent with the obligations of states under International Human Rights Law. Therefore, it is pivotal to international obligations of states under international law to ensure the proportionality of restrictions to freedom of expression adopting measures to prevent terrorism. Moreover, taking into consideration that the Convention was adopted by Member States of the Council of Europe, it is important to analyse the compatibility of the obligations imposed by it with the obligations imposed by the Convention on Human Rights and Fundamental Freedoms, as they are interpreted by the Case Law of the European Court of Human Rights. Having considered the place of the Convention of the Council of Europe among other international public law instruments, it is evident that the obligations arising from the Convention must be applied in a coherent manner with International Human Rights Law.

The provisions of the Councils of Europe Convention correlate with human rights obligations of states under International Human Rights Law, emphasising that all measures of prevention and suppression of incitement of terrorism must comply with the latter. Particularly important to ensure this equilibrium is with regard to the penalisation of incitement to the financing of terrorism, because the financing of terrorism by its nature is not a violent crime. Furthermore, to have a comprehensive assessment of the relevance of the Convention, the application of it to contemporary challenges, i.e. radicalisation and violent extremism must be assessed. The approaches implemented by different countries in domestic legislation reveal the effectiveness of the Convention.

To evaluate the effectiveness of measures established by the Convention, it is important to analyse the counterterrorism policies and legislation of the States Parties of the Convention. Assessing profiled countries, the social – historical context of each country must be taken into consideration towards freedom of expression. To have a diverse and comprehensive analysis, I have explored counterterrorism policies and legislation related to prevention of incitement to terrorism of France, Latvia, Russia, and Sweden and interpretation given to the legislation by their national courts.

Evaluating and comparing the provided analyses, this thesis reveals an answer to the question whether oppressive measures to prevent incitement of terrorism can be justifiable restrictions on human rights and thus to democracy. After survey of applicable international law, relevant scholarly literature and state practice, it is certain that to preserve democracy, state should respect human rights, and oppressive restrictions to combat incitement of terrorism can unjustifiably harm freedom of expression and thus democracy.

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TABLE OF ABBREVIATIONS

CECPT - The Council of Europe of Convention on the Prevention of Terrorism

CoE - The Council of Europe

ECHR - The Convention on the Protection of Human Rights and Fundamental Freedoms

ECtHR - The European Court of Human Rights

EU – The European Union

Genocide Convention - Convention on the Prevention and Punishment of the Crime of Genocide

UNHRC – The United Nations Human Rights Committee

ICCPR – The International Covenant on Civil and Political rights

ICERD – The International Convention on the Elimination of All Forms of Racial Discrimination

ICSFT - The International Convention of the Suppression of the Financing of Terrorism

IHRL - International Human Rights Law

HRC- Human Rights Committee

ISIS – The Islamic State of Iraq and al-Sham

OSCE - The Organisation for Security and Co-operation in Europe

UN – The United Nations

UNGA - The General Assembly of the United Nations

UNSC – the Security Council of the United Nations

VCLT – The Vienna Convention on the Law of Treaties

1. INTRODUCTION

The international community has entered into the modern area of terrorism¹ and thus the threats of terrorism must be addressed in a corresponding manner. The availability of technologies has shaped this phenomenon in the 21st century. A distinguishing feature of modern terrorism has been related to sweeping political or ideological concepts and increasing levels of terrorist activity internationally.² In modern area terrorism, instead of focusing on prevention and penalisation of the results of violent terrorism, more attention is paid to prevention of ancillary offences of terrorism, such as incitement or provocation that might lead to the commission of violent terrorism:

In view to characteristics of modern terrorism, the criminalisation of incitement to terrorism has been justified as an early prevention measure against the materialisation of the particular severe human and social costs which terrorism produce.³

This change of focus in the struggle against terrorism and actors that are involved in the commission of terrorism can be considered as a phase of post-modern terrorism. This changed the perception of terrorist threats by governments and also terrorists *modus operandi* to achieve their goals.

Furthermore, to establish an effective terrorism prevention mechanism, it is important to understand the motives that motivated people to engage in terrorist activities. One of them is a misinterpretation of religion (for example Islam) has incited and provoked people to engage in terrorist activities. The misinterpretation of Islam and the Quran has also political reasoning, therefore the manipulation of religion to a large extent is considered as a pretext to achieve political aims. Moreover, the message conveyed in religious terms and justified by religious motives has a much greater impact on the consciousness of people than it would have been in case of pure political propaganda. Therefore, the relation between religion and terrorism had never been so close as it is in the 21st century.

Unlike traditional terrorism which strives to achieve political or social goals such as political independence or a new social order, modern terrorism is employed in the pursuit of extremist ideology that are often, but not exclusively, religious or quasi-religious.⁴

¹ Walter Laquere, "Post Modern terrorism: New Rules for an Old Game", *Foreign Affairs* 75(5)(1996), p 24, accessed September 29, 2020, doi: 10.2307/20047741.

² Audrey Kurth Cronin, "Behind the Curve: Globalization and International Terrorism", *International Security* Vol. 27, No. 3 (Winter, 2002-2003), p.34, accessed September 29, 2020, <https://www.jstor.org/stable/3092113>.

³ Ben Saul, "Criminality and Terrorism" (2012), In *Counter-Terrorism: International Law and Practice*, edited by A Salinas de Frias, K Samuel and N White, p. 149, Oxford, United Kingdom: Oxford University Press, doi:10.4324/9781315259147. Accessed: 10 March 2021.

⁴ Bruce Hoffman, rev. edit. *Inside terrorism*, pp.90-91, New York, Columbia university press, 2006, Accessed: 10 March 2021, doi: 10.1080/17419160801891095.

A necessity to have a balanced approach tackling a new form of terrorism and respect for human rights has been underlined also by several international organisations:

In order to fulfil their obligations under human rights law to protect the life and security of individuals under their jurisdiction, States have a right and a duty to take effective counterterrorism measures, to prevent and deter future terrorist attacks and to prosecute those responsible for carrying out such acts. At the same time, the countering of terrorism poses grave challenges to the protection and promotion of human rights. As part of States' duty to protect individuals within their jurisdiction, all measures taken to combat terrorism must themselves also comply with States' obligations under international law, in particular international human rights, refugee and humanitarian law.⁵

Initial intent of terrorists is to spread fear among people and to punish a state for executing certain policy of foreign or domestic policy has not changed, however, methods applied have changed substantially.

Regardless of the change of terrorist methods, the government has the primary obligation to protect its nationals from violent attacks and thus ensure the possibility to exercise the full range of human rights within its jurisdiction. The fundamental values of democratic societies such as rule of law, freedom of thought and also freedom of expression cannot be sacrificed in the name of the struggle against terrorism. Nevertheless, to secure a democratic society, human rights that are not absolute can be restricted. To ensure democratic control over those restrictions an effective and rules-based mechanism to suppress terrorism is of a predominant importance.

Effective action against terrorism and the protection of human rights are not mutually exclusive. On contrary, human rights, democracy and social justice are the best weapons against all forms of violence, and the rule of law will provide the most efficient means to combat terrorism in all its guises.⁶

In addition to the states' obligations under IHRL to respect human rights, states must ensure that they are not abused by another person. This obligation of the state *per se* is encapsulated in criminal laws. However, the recent events have revealed that the guarantees provided by criminal law are not sufficient to secure the lives of those who are expressing their opinion. The international law approach to suppression of terrorism considering it more than a criminal law phenomenon has changed after the attacks of 11th September 2001. Those abhorrent attacks allowed the UNSC to unanimously adopt under Chapter VII of UN resolution 1373/2001, making it a legal obligation for all member states of the UN to penalise the financing of terrorism (that otherwise would be considered an ancillary offence of terrorism). Following the attacks on a Danish daily broadsheet newspaper *Jyllands-Posten* in 2006 and French satirical magazine *Charlie Hebdo* in 2015 triggered the necessity to strengthen the measures to protect and preserve freedom of expression for journalists expressing opinion on controversial matters and thus democratically exercise freedom of expression.

⁵ Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter Terrorism, Fact Sheet No. 32*, Geneva, September 2006 pp 8-9. Available on at: <https://www.refworld.org/docid/48733ebc2.html>. Accessed February 4, 2021.

⁶ Council of Europe, "*Appologie du terrorisme* and incitement to terrorism" (Strasbourg, Council of Europe) p 7.

My work is an attempt to find the equilibrium between the measures to suppress and prevent the incitement of terrorism and the rights of freedom of expression that is fundamental to preserve a democratic society.

2. OVERALL ASSESSMENT OF THE PROPORTIONALITY OF RESTRICTIONS PLACED ON FREEDOM OF EXPRESSION TO PREVENT TERRORISM

Freedom of expression constitutes a stepping-stone for every a free and a democratic society.⁷ This principle is encapsulated in Article 19 of the ICCPR⁸, requiring any state party to ensure that every person within its jurisdiction can express their opinion freely without interference. However, this freedom is not absolute and Paragraph 3 of the Article establishes the possible limitations. Moreover, the Genocide Convention⁹ and ICERD¹⁰ also stipulate that freedom of expression is not absolute and it may be limited. These limitations can be provided only by law in cases if exercise of freedom of expression directly endanger other people. However, those instruments do not provide that freedom of expression can be restricted in any other circumstance.

After the heinous attacks of 11th September of 2001, the international community have attempted to elaborate the international law instruments that could diminish the risks of terrorism. The immediate reaction of the UNSC was to the adoption in a legally binding manner the obligation of states to criminalise the financing of terrorism.¹¹ This was an important step to reduce the availability of financial resources to terrorists and thus reduce the risk of the commission of further terrorist attacks. Furthermore, to minimise the spread of terrorist propaganda and to diminish peoples' access to information that could incite terrorism required the adoption of a legal instrument particularly combating of incitement of terrorism. To address this issue the UNSC acting under Chapter IV of the UN Charter in 2004 adopted Resolution 1566¹² to promote cooperation among states in prevention of terrorism. The Resolution particularly emphasised that terrorism impairs the enjoyment of human rights and threatens the

⁷ HRC, General Comment No. 34, CCPR/C/GC/34. Available on <https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>. Accessed 4 February 2021.

⁸ International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 Mar. 1976 [the provisions of article 41 (Human Rights Committee) entered into force 28 Mar. 1979).

⁹ Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 Dec. 1948) 78 U.N.T.S. 277, entered into force 12 Jan. 1951.

¹⁰ International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 Mar. 1966) 660 U.N.T.S. 195, 5 I.L.M. 352 (1966), entered into force 4 January 1969, Article 4.

¹¹ UNSC, Resolution 1373(2001), S/RES/1373 (2001). Available on [https://undocs.org/s/res/1373\(2001\)](https://undocs.org/s/res/1373(2001)). Accessed 4 February 2021.

¹² UNSC, Resolution 1566 (2004), S/RES/1566 (2004). Available on [unscr.com/en/resolutions/1566](https://www.un.org/News/Press/docs/2004/0404_1566.html). Accessed 4 February 2021.

social and economic development of all States. However, it was emphasised that the limitations applied to freedom of expression must be proportional and should achieve the goals mentioned in Paragraph 3 of Article 19 of the ICCPR.¹³ Moreover, Article 20 of the ICCPR¹⁴ establishes per se limitations of freedom of expression. Considering that none of the Articles of the ICCPR contains an explicit to terrorism, to apply them properly they must be interpreted to address the contemporary challenges. The application of Article 19 and 20 of the ICCPR allows states to limit freedom of expression, if this freedom is employed with a purpose to harm people or state interests. Evaluating the intent of incitement of terrorism in the context of the provided permissible limitations of freedom of expression, it is obvious that it corresponds with the provisions of the ICCPR.

However, in the case of prohibition of glorification and justification (indirect incitement) of terrorism, this link with permissible limitations is not so obvious. The restrictions posed on glorification and justification are closely related to the rights of people to express themselves. Therefore, they must strictly comply with the requirements for a legitimate limitation of rights and freedoms.¹⁵ The limitation of freedom of expression to prevent incitement to terrorism is permitted on grounds of national security, public order and the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence¹⁶. To comply with those requirements, it is important to ensure that the restrictions correspond to the aim of them and the possibility to achieve it.¹⁷

The concept of national security was difficult to apprehend and seldom achieved any consensus. Since the 11 September terrorist attacks, many states had attempted to restrict the freedom of the press. Most had limited public access to information by classifying more data as state secrets; public access had been blocked to official websites and even to some private ones, containing thousands of documents that had previously been accessible. Other measures had been taken to censor the independent press: Al-Jazeera, for instance, had been expelled from Iraq. These were legitimate restrictions that had been introduced for national security reasons. However, they had to meet extremely strict criteria.¹⁸

To properly address the dangers coming from the glorification or incitement of terrorism, states must act in accordance with IHRL. Nevertheless, they are under an obligation to ensure that everyone without interference has right to life, that is closely related to states obligation to ensure security for their people.

To ensure free and democratic development, countries have internationally agreed to apply certain standards of permissible limitations of freedom of speech. However, taking into account that terrorism can take different forms, there is no clause in the IHRL treaties *stricto*

¹³ ICCPR, *supra* note 8, para 3 of Article 19.

¹⁴ ICCPR, *supra* note 8, Article 20.

¹⁵ Hoffman, *supra* note 4, p. 43.

¹⁶ UNSC, Resolution 1624 (2005), adopted by the Security Council at its 5261st meeting, on 14 September 2005, S/RES/1624 (2005). Available on [https://undocs.org/en/S/RES/1624\(2005\)](https://undocs.org/en/S/RES/1624(2005)). Accessed 11 March 2021.

¹⁷ HRC, *Delgado Páez v Colombia*, UNHRC, CCPR/C/39/D/195/1985, IHRL 1701 (UNHRC 1990), Paragraph 5.5. Available on: <https://juris.ohchr.org/Search/Details/300>. Accessed 4 February 2021.

¹⁸ Committee on Culture, Science and Education, *Media and terrorism Report*, Rapporteur: Mr Josef Jařab, Czech Republic, Liberal, Democratic and Reformers' Group, Available: <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10914&lang=EN>. Accessed 11 March 2021.

sensu permitting states to limit freedom of expression to prevent incitement/provocation to terrorism. However, in provisions of the Genocide Convention, the ICCPR, ICERD and the ECHR contain possibility to restrict freedom of expression, if it endangers the state security, right to life and wellbeing of other people.

2.1. Right to life

To determine the proportionality of the restrictions of freedom of expression, it is important to analyse this freedom in the context of the right to life as it is established by Article 6 of the ICCPR.¹⁹ UNHRC has indicated in its General Comment 36 on the interpretation of Article 6 of the ICCPR:

Paragraph 1 of Article 6 of the Covenant provides that no one shall be arbitrarily deprived of life and that this right shall be protected by law. It lays the foundation for the obligation of States parties to respect and ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life.²⁰

Furthermore, the ECtHR has expressed its considerations regarding rights established by on Article 2 of the ECHR:

Article 2 [of the ECHR] contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life, delimited by a list of exceptions.²¹

Both international institutions have reached similar conclusions regarding rights to life, states have not only negative obligations to refrain from depraving of life, but also positive obligations, to take measures to ensure that people within its jurisdiction can enjoy the right to life.

Terrorism by its nature is a threat to life, therefore states are under a positive obligation to establish mechanisms to secure the enjoyment of it by all people within its jurisdiction.

Article 6 [of the ICCPR] recognizes and protects the right to life of all human beings. The right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation.²²

Therefore, the elaboration of international instruments that establishes a balance between the right to life and all other human rights and could be agreed by states, is a tremendously complicated task. Under IHRL states must take measures to ensure that everyone has the right to life and take measures to prohibit all manifestations of incitement to violence.²³ Therefore, states are under obligation to prevent foreseeable threats to life originating from other persons and

¹⁹ ICCPR, *supra* note 8, Article 6.

²⁰ HRC, General Comment No. 36, CCPR/C/GC/36. Available on: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H115979OVGGB%2bWPAXhNI9e0rX3cJImWwe%2fGBLmVrGmT01On6KBQgqmxPNlJrLLdefuuQjN19BgOr%2fS93rKPWbCbgOJ4dRgDoh%2fXgwn>. Para 4. Accessed 4 February 2021.

²¹ ECtHR, Guide on Article 2 of the European Convention on Human Rights - Right to life. Updated on 31 December 2020, p.6. Available: on https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf. Accessed 14 March 2021.

²² General Comment 36, *supra* note 20, paragraph 2.

²³ *Ibid.*, paragraph 20.

entities which conduct cannot be attributable to the State.²⁴ Thus, states are under an obligation to take an active measure to diminish threats coming outside its jurisdiction to its nationals. On one hand, the incitement of terrorism causes a threat that violent terrorism might be committed, thus endangering rights to life of others, but on other restrictions to freedom of expression to prevent incitement to any criminal activity, shall be proportional to rights preserved.

To evaluate the proportionality of measures, it is important to emphasise that human rights do not have any hierarchy (apart from *jus cogens* norms), thus no human rights have a prevailing effect over other.²⁵ However, some lawyers and scholars consider the right to life and freedom from torture are rights more important than other human rights²⁶ and thus must be considered as *jus cogens*.²⁷ Therefore, the International Law Commission has addressed this question in its report to the UNGA in 2019. In it the International Law Commission emphasises that it does not consider the right to life as *jus cogens* unless the deprivation of life is committed in some particular circumstances.²⁸ Moreover, there are scholarly considerations that the right to life as listed in treaties is restrictively defined, which deeply questions its *jus cogens* status.²⁹ Considering the above mentioned, any subordinate hierarchy between the right to life and freedom of expression cannot be established and states are under the obligations to preserve the life of people within its jurisdiction, while respecting their freedom of expression.

However, the ECtHR has underlined that the right to life contains also a positive obligation:

[T]he first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.³⁰

The implementation of those obligations is implemented through national legislation and effective law enforcement. One of the important elements of state positive obligation arising from the right to life is to prevent violent abuses that endanger the life of people in its jurisdiction. However, the incitement to terrorism is not directly related to endangerment of the right to life. Therefore, it must be emphasised that to have legitim, proportional limitations to freedom of

²⁴ HRC, Communication No. 1862/2009, *Peiris v Sri Lanka*, Views adopted on 26 Oct. 2011, para. 7.2. Available on http://www.worldcourts.com/hrc/eng/decisions/2011.10.26_Peiris_v_Sri_Lanka.pdf. Accessed February 4 of 2021.

²⁵ UN, A/CN.4/SER.A/2005/Add.1 (Part 2), "Yearbook of the International Law Commission 2005", *Discussion of the Preliminary Report entitled "Hierarchy in international law: jus cogens, obligations erga omnes, Article 103 of the Charter of the United Nations, as conflict rules"*, pp 89 – 91 paras 482-493 Available on: https://legal.un.org/ilc/publications/yearbooks/english/ilc_2006_v2_p2.pdf. Accessed 11 March 2021.

²⁶ Theodore Meron, "On a Hierarchy of International Human Rights", *The American Journal of International Law* 80 (1)(1986), Vol. 80, pp 1-53 No. accessed 11 March 2021. Available on <https://www.jstor.org/stable/2202481>.

²⁷ Predrag Zenović, Human rights enforcement via peremptory norms – a challenge to state sovereignty, RGSL Research Paper No 6, 2012, p 34. Available on: <https://www.rgsl.edu.lv/uploads/research-papers-list/17/rp-6-zenovic-final.pdf>. Accessed 11 March 2021.

²⁸ UN, Report of International Law Commission 74 UNGA, "Chapter V: Peremptory norms of general international law (*jus cogens*) and commentaries thereto", pp 147-148. Available <https://legal.un.org/ilc/reports/2019/>. Accessed 11 March 2021.

²⁹ Nihal Jayawickrama, *The Judicial Application of Human Rights Law, National, Regional and International Jurisprudence*, Cambridge University Press, New York, 2002, p. 183.

³⁰ ECtHR, *L.C.B. v. the United Kingdom* judgment, 9 June 1998, 14/1997/798/1001, §36.

expression, it must be established that the incitement has increased the risk that terrorism may be committed.

To comply with the IHRL obligations to states apply legitim and proportional measures to ensure the right to life of a person, states can determine the most convenient means that comply with their other obligations under international law. However, the requirement of proportionality must be evaluated in the context of no subordinate hierarchy among human rights. Thus, all human rights shall be respected and protected by state, without sacrificing freedom of expression *per se* to the right to life.

2.2. The correlation between freedom of expression and the right to life in suppression of the incitement of terrorism

To have the efficient prevention of terrorism, it is to address two important elements increasing the risk of terrorism – eliminate available funding and to prevent terrorist propaganda. Both elements are related to possible violations of IHRL, i.e. right to property and freedom of expression, if they are not applied properly. Taking into consideration that the CoE has an incomparable experience dealing with the application and the interpretation of human rights in 2005, it adopted CECPT.³¹

CECPT is an attempt to establish an international framework for states for the prevention of terrorism. Important to emphasise that CECPT is opened for accession not only to the Member States of the CoE or states that have participated in its elaboration. In accordance with Article 24 of CECPT, the Committee of Ministers of the CoE, obtaining unanimous support from the State Parties to CECPT may invite any state to access to CECPT.³² By this provision CECPT shall be regarded as a first Global legal instrument to address the challenges of prevention of incitement to terrorism.

As a first Global instrument, CECPT attempts to address a perpetual problem of any new restriction aimed to enhance the suppression of terrorism, i.e. the respect for human rights *versus* the application of effective counterterrorism measures. The prevention of the incitement of terrorism is a collision of two important branches of law, i.e. freedom of expression and the right to life.³³ Any measures taken to suppress the incitement of terrorism must be proportional, i.e. to secure the highest security of people, with as little as possible limitations of freedom of expression. The legality of limitations to freedom of expression are stipulated by Paragraph 3 of Article 19, Article 20 of the ICCPR and Paragraph 2 of Article 10 of the ECHR. Therefore, a causal link must be established between provocation/ incitement and violent terrorism. However, CECPT contains a specific article, Article 8 providing that:

For an act to constitute an offence as set forth in Articles 5 to 7 of this Convention, it shall not be necessary that a terrorist offence be actually committed.” In this context the wording of Article 5 is important, putting emphasis on risks that that the terrorist offence might occur due to particular provocation.

³¹ Council of Europe Convention on the Prevention of Terrorism (Warsaw, 16 May, 2003), E.T.S.196.

³² *Ibid.*, Article 24.

³³ Ben Saul, *Research Handbook on International Law and Terrorism*, Edward Elgar Publishing Limited, Cheltenham, 2014 p.439.

This provision might enhance the effectiveness of measures taken to prevent terrorism, at the same time these articles increase a possibility to commit the violations of right of expression. Moreover, these provisions emphasise the importance of a precise evaluation of the possible consequences of each public of expression and also the perception of auditory to characterise it as the incitement of terrorism.

Furthermore, the application of the provisions of Article 8 with regard to offences penalised by the ICSFT, creates the ambiguity of the scope and nature of the offences penalised by Article 5 of CECPT. As it is elaborated below, the financing of terrorism is not a violent offence, however, it is an offence that increases the risk that violent terrorism might be committed. Consequently, this range of criminalisation undermines the requirements of proportionality regarding the restrictions of freedom of expression. To understand the correlation between human rights and the suppression of terrorism, the approach of the UN regarding this matter must be further evaluated.

2.3. The universal counterterrorism measures taken by the UN

For the time being, there is no agreed legal definition at international level of terrorism. The negotiations among UN Member States to elaborate the Comprehensive Convention on International Terrorism has been launched back in 1995³⁴. However, until 2020 the draft text of the Comprehensive Convention has not been proposed because the negotiations on its elaboration is still undergoing.³⁵ Considering the lack of the definition, the international community defining offences that shall be considered terroristic refers to 13 universal antiterrorism international law instruments.³⁶

The drafters of the Comprehensive Convention emphasising the importance of the prevention of the incitement of terrorism, have agreed to include in the draft of the Comprehensive Convention an obliging of state parties to penalise the encouragement and instigation of terrorism.³⁷ To guide the negotiations on elaboration of the Comprehensive Convention, the UNGA has paid particular attention to the proportionality of measures to eliminate terrorism to states obligations under international law, as it is emphasised in UNGA Resolution 60/158.³⁸ The Resolution requires states to penalise not only terrorism as such, but also ancillary offences that could lead to the commission of violent terrorism. However, the resolution does not particularly require to criminalise incitement to terrorism, nor it creates legal obligations.³⁹ The necessity to have an international law regulation that could guide states how to deal with this matter came after terrorist offences in London in 2005, when the UNSC

³⁴ UNGA, Resolution adopted by the General Assembly, A/RES/49/60 of 17 February 1995. Available on <https://undocs.org/en/A/RES/49/60>. Accessed 11 March 2021.

³⁵ UNGA, Resolution adopted by the General Assembly on 18 December 2019, A/RES/74/194. Accessed 11 March 2021.

³⁶ Fact Sheet No. 32, *supra* note 5, p.13.

³⁷ UNGA, *Draft Comprehensive Convention on International Terrorism*, A/C.6/55/1, Article 2(3) and Article 8. Available on <https://undocs.org/en/A/C.6/55/1>. Accessed 11 March 2021.

³⁸ UNGA, Resolution adopted by the General Assembly on 16 December 2005, A/RES/60/158, Paragraph 1. Available on: <https://undocs.org/en/A/RES/60/158>. Accessed 11 March 2021.

³⁹ *Ibid.*

unanimously adopted Resolution 1624(2005).⁴⁰ This was the first time when the UNSC formally recognised the threats arising from incitement to terrorism and requested states to take measures to prevent it. However, States could not have agreed to adopt this resolution under Chapter VI of the UN Charter⁴¹. Nevertheless, states unanimously expressed the common understanding that all measures, including the prevention of incitement of terrorism, must be taken in compliance with human rights obligations. In particular, the Resolution emphasises that all measures to suppress the incitement of terrorism taken by states must comply with the provisions of Paragraph 3 of Article 19 of the ICCPR. Besides calling upon states to take necessary measures to prevent incitement of terrorism, the UNSC underlined the necessity to enhance further dialogue among civilisations and states’ obligation to prevent indiscriminate targeting of different religions and cultures.⁴² However, taking into consideration UNSC Resolution 2395(2017)⁴³, renewing the mandate of the Counter-Terrorism Committee, it is emphasised that the Committee shall closely collaborate with States in enforcement of all mentioned resolutions, including 1624(2005).

The Resolution 1624(2005) does not contain a definition of incitement of terrorism, however simultaneously it clearly distinguishes it from glorification or justification of terrorist attacks, which might not have any further consequences. Moreover, the UN Secretary General’s Guidelines recommends that incitement to terrorism can only be understood as a “direct call to engage in terrorism”.⁴⁴ The Guidelines rejects the criminalisation of indirect incitement, because this has an ambiguous legal definition to correspond with permissible limitations under Paragraph 3 of Article 19 of the ICCPR.⁴⁵

3. THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM

Recognising deteriorating Global security considering increasing threats of terrorism in 2003, the CoE re-evaluated its legal framework in this regard. The Report of the Committee of Ministers defined the priority areas of further action of the CoE, among the priority areas was a request to conduct further research on the on the possible application of the concept of “*apologie du terrorisme*”⁴⁶ and “incitement to terrorism”. As part of further elaboration was the determination of a criminal liability of a person who provides expert advice and assistance, as well as of a person who publicly “supports” conducts that might lead to commission of terrorism.

To address those challenges, the Committee of Ministers in 2003 established an intergovernmental working party that was entrusted to elaborate the most appropriate solution to

⁴⁰ Saul, *supra* note 33, p 437.

⁴¹ UNSC, *supra* note 16.

⁴² *Ibid.*, para. 3.

⁴³ UNSC, Resolution 2395 (2017), on 21 December 2017, S/RES/2395 (2017), preamble. Available on [https://undocs.org/S/RES/2395\(2017\)](https://undocs.org/S/RES/2395(2017)). Accessed 11 March 2021.

⁴⁴ UN, *Report of the Secretary-General, The protection of human rights and fundamental freedoms, while countering terrorism*, A/63/337, para. 61. Available on <https://www.undocs.org/A/63/337>. Accessed 11 March 2021.

⁴⁵ *Ibid.*, para 62.

⁴⁶ Apology, excuses, justification of terrorism

address the existing lacunas in an international legal framework in combating terrorism.⁴⁷ During its work in 2004, the working party concluded that the main encumbrance to have effective prevention of terrorism is the lack of legal provisions, penalising “*apologie du terrorism*” or “incitement to terrorism”. To address the challenge in the most effective and comprehensive manner, the working party elaborated a new convention purely devoted to prevention of terrorism. CECPT remains the main international public law instrument legally obliging states to criminalise the incitement/provocation of terrorism.⁴⁸ With regard to its uniqueness, the equilibrium with IHRL is established in its preamble, providing a direct reference to the obligation to respect for human rights. Moreover, in the operative articles of CECPT contain many of safeguard measures to prevent the possible misuse of it by governmental authorities.

It is of paramount importance to have the balance between the rights of individuals and restrictions imposed by governmental authorities to preserve the values of a democratic society. Important to emphasise that the incitement of terrorism might be a strategy employed by terrorist organisations to further support their aims and to engage new persons in their activities. However, direct incitement must be distinguished from indirect. Regarding the direct incitement, the language employed indicates that the person is willing to incite the risk of commission of a terrorist attack. If the indirect incitement is criminalised, a person might commit an offence if a person spreads a message expressing dissatisfaction with the existing course of government, without a further intent to commit of violent terrorism. The latter could lead to application of broad restrictions of freedom of expression and thus not meeting the standards of a democratic society. Moreover, to have a proportional restriction of freedom of expression, mental element (*mens rea*) of the incitement to terrorism must be evaluated. Thus, taking into considerations the particular motives of the person. In this regard, additional safeguards are included in Article 5 of CECPT requiring to penalise the incitement to terrorism, if it creates a risk that one or more terrorist offences might be committed.⁴⁹

Important to emphasise that none of terrorism related sectoral 13 legal instruments that define terrorism, explicitly require the penalisation of the incitement or provocation of offences criminalised by them. Therefore, CECPT was elaborated to oblige the States Parties to criminalise the unlawful and intentional public provocation to commit a terrorist offence,

⁴⁷ CoE, 109th Session on 8 November 2001, the Committee of Ministers "agreed to take steps rapidly to increase the effectiveness of the existing international instruments within the Council of Europe on the fight against terrorism by, (...)". Available on https://www.coe.int/en/web/cm/session-files/-/asset_publisher/iAKxd1YpI3T3/content/cm109-session-of-the-committee-of-ministers?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcm%2Fsession-files%3Fp_p_id%3D101_INSTANCE_iAKxd1YpI3T3%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D1. Accessed 26 February 2021.

⁴⁸ Saul, *supra* note 33, pp.443-445.

⁴⁹ *Supra* note 31, Article 5 – Public provocation to commit a terrorist offence

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

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

regardless of the commission of a terrorist offence.⁵⁰ The provisions of Article 5 of CECPT stipulate the disposition of an offence that shall be criminalised– the public distribution of a message with a particular intent to incite the commission of terrorism. To criminalise an offence, the causation between the particular incitement and the risks that the terrorist offence might be committed.⁵¹ The last requirement separates incitement to terrorism from justification and glorification of terrorism.⁵² However, if the intent to commit further acts of terrorism is established both in cases of justification or glorification, they shall be considered as incitement/provocation to terrorism. Nevertheless, experts on freedom of expression have emphasised:

[I]ncitement should be understood as a direct call to engage in terrorism, with the intention that this [incitement] should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.⁵³

Therefore, to estimate the precise range of criminalisation intended under CECPT, the concept of direct and indirect intent of incitement shall be evaluated. From the provisions of Article 5, it is difficult to estimate the intentions of the drafters of CECPT regarding penalisation of indirect incitement; therefore, explanations provided by the Explanatory Report⁵⁴ of CECPT are indispensable for interpretation of the provisions of CECPT.

The Explanatory Report particularly emphasises that this question was carefully examined during the negotiations. This was articulated by several delegations that the prevention of indirect incitement could enhance the prevention of terrorism. Simultaneously other delegations emphasised that the criminalisation of an indirect incitement of terrorism in some instances are inter related to legitimate critics of government. Therefore, particular attention during the negotiations was devoted to analyse the penalisation of dissemination of information glorifying or justifying acts of terrorism. The Explanatory Report emphasises that CECPT requests the criminalisation of incitement if the casual link with the danger that the commission of terrorist offence is established.⁵⁵ After lengthy negotiations states agreed, that that the requirement of intention has a paramount importance to ensure the equilibrium between suppression of terrorism and respect of freedom of expression. The Explanatory Report particularly emphasises that the public escalation of ethnic and religious disagreements could be a fruitful ground to incite the risk of further commission of terrorism. However, as it is underlined by the ECtHR in its judgement in case *Habdisyde v UK*, reaffirmed by the judgement in case *Lingens v. Austria*:

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Fact Sheet No. 32, *Supra* note 5, p.44.

⁵³ OSCE. *Joint declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression "International mechanisms for promoting freedom of expression.* Available at: <https://www.osce.org/files/f/documents/5/d/27455.pdf>. Accessed 14 March 2021

⁵⁴ Official source of interpretation of the Convention. The text of it is also negotiated among states that participated in the elaboration of the Convention.

⁵⁵ Explanatory report to E.T.S 196, paras 96-100.

the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without them there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalisation" imposed in this sphere must be proportionate to the legitimate aim pursued.⁵⁶

Therefore, since the penalisation of indirect incitement could lead to overburden the Convention with all necessary safeguard measures, the states agreed to leave it up to domestic legislation to determine what is considered intentional provocation (incitement).⁵⁷

To meet the standards established by the ECtHR, the exact wording of CECPT requires two conditions for the criminalisation of the incitement of terrorism: first, it has been committed with a particular intent; second, the offence must be committed unlawfully. The second requirement excludes satire and humour from the criminalisation under CECPT. Furthermore, to comply with the safeguards of CECPT, a direct link between the particular incitement and a danger that terrorism might be carried out must be established. However, to prosecute incitement of terrorism, the occurrence of violent terrorism is not required.⁵⁸

CECPT, in addition to requirement to establishment of a particular intent, requires the element of public dissemination of the particular message, by that excluding private communication from the scope of the application of CECPT. The public incitement includes public speeches, using mass media or the internet and other electronic means.

This principle is of particular importance for the press. While the press must not overstep the bounds set, [...], it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.⁵⁹

Ensuring the transposition of the criminalisation established by CECPT, the offences agreed by states must be criminalised by domestic legislation of the State Parties in a legally unambiguous manner. To secure that, the safeguards established by CECPT must be simultaneously transposed into domestic legislation. Important to emphasise that the safeguards established by CECPT are minimum requirements to ensure that the criminalisation is established in a manner corresponding with IHRL. If those safeguards are not applied by state imposing criminalisation of the incitement of terrorism, this criminalisation might a weapon in suppression of democratic opposition.⁶⁰

Predominantly, the State Parties of CECPT must determine the nature of public expression requested to be penalised by CECPT, taking into account the safeguards established by it. The State Parties are requested to criminalise incitement of terrorism only if the direct intent is established. It does not require the penalisation of expressions without particular intent –

⁵⁶ *Handyside v. the United Kingdom*, Application no. 5493/72, §49 and *Lingens v. Austria*, Application no. 9815/82 para 41.

⁵⁷ Explanatory report, *supra* note 55, para 85.

⁵⁸ CECPT, *supra* note 31, Article 8.

⁵⁹ *The Sunday Time v. the United Kingdom*, Application no. 6538/74, para 65.

⁶⁰ Explanatory report, *supra* note 55, para 103, para 104.

to provoke terrorism. Moreover, the message that provokes a person to commit a terror attack must be distributed publicly. The penalisation of the distribution of the information through channels of private communication might have positive effect on the prevention of terrorism, nevertheless this extensively interferes in people private life and might be used by states to suppress democratic opposition. The possibility to criminalise the indirect incitement is included by words: “[...] whether or not directly advocating terrorist offences [...]”.⁶¹

As was above elaborated, if the indirect incitement of terrorism is penalised by the Criminal Code of the State Party, it must comply with the safeguards of CECPT, i.e. the particular intent must to be proven. CECPT requests State Parties to criminalise the incitement, only case, if there is a risk, that one or more violent terrorist offences might be carried out. Only if all those requirements are met, the State Parties of CECPT shall penalise the incitement to terrorism. If one of the above-mentioned conditions is missing, the State might be accused of the violation of freedom of expression protected by the ECHR and thus might face a litigation in the ECtHR. Therefore, considering effective mechanisms for protection of human rights existing in under auspices of the CoE, CECPT is an effective instrument to prevent violent terrorism.

3.1. Has the incitement to terrorism characteristic of the incitement to violent crime after the inclusion of the financing of terrorism in the definition of terrorism?

During the negotiations on the adoption of CECPT, the states agreed on inclusion of the ICSFT⁶², in the definition of acts incitement constitute an offence under CECPT⁶³. Some states expressed concerns that the application of CECPT to offences of the financing of terrorism could lead to the unjustifiable endangerment of freedom of expression,⁶⁴ thus, endangering the enjoyment of human rights. However, other states insisted on inclusion of the ICSFT because this will improve the prevention of terrorism, hence its adverse effects on the civilian population. Furthermore, the ICSFT was considered as one of the 13 universal instruments defining terrorism, thus the constitution of universal definition of terrorism. This legal challenge created a particular problem regarding the application of the criminalisation of the incitement of the financing of terrorism. This certainly could diminish the risk that some financial resources are collected for the purpose of terrorism and thus prevent violent terrorism that could have human casualties. However, the criminalisation of the incitement to commit a preparatory offence to a violent offence could be extensively far reaching and thus not complying with criteria of the proportionality and legality established by the ICCPR and the ECHR.

The ICSFT provides that each State Party, in accordance with its domestic legal principles, shall take the necessary measures to hold liable a person within its jurisdiction for providing and collecting, funds knowing that they should be utilised to commit terrorist attacks. Moreover, the ICSFT requests to establish a liability of a legal entity located in its territory or

⁶¹ CECPT, *supra* note 49.

⁶² International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, UN Doc. A/RES/54/109, entered into force 10 April 2002.

⁶³ Explanatory report, *supra* note 55, para 28.

⁶⁴ *Ibid.*, para 49.

organised under its laws, they are involved in the financing of terrorism. Such liability may be criminal, civil or administrative.⁶⁵ However, the criminalisation of the offences of the financing of terrorism is important to underline that the incitement to the financing of terrorism could lead to the commission of violent terrorism, still this prospect is remote.⁶⁶ In the suppression of terrorism, including financing of it, it is crucial to preserve democracy and to ensure that people are protected against possible terrorist attacks, and can fully enjoy their human rights. In addition to the danger imposed to each individual, terrorism can destabilise governments, undermine civil society, jeopardise peace and security, and threaten social and economic development.⁶⁷ At the same time, this is an obligation of a state to ensure that human rights are respected, enacting counterterrorism policy. Therefore, it is important for the Member State to take measures to prevent offences that could lead to the commission of violent terrorism. However, an act of terrorism is typically understood as a violent act targeted against civilians. Nevertheless, the risk that the financing of terrorism has on the financial interests of people and states because its closely related to money laundering, drug trafficking, as well as illegal transfers of nuclear, chemical and biological materials. The adoption of the ICSFT was a commendable move taken by the UN. The ICSFT defines common standards that are important to struggle against terrorism. The ICSFT imposes an obligation to its State Parties to criminalise the collecting funds with the intention to carry out one of the terrorist offences. It also contains particularly provisions setting out that the act of the financing of terrorism shall be considered completed if a person has the intent to commit that, regardless direct or indirect.⁶⁸ Moreover, the ICSFT requires its Member States to establish the financing of terrorism as a separate offence in order to enable state to prosecute an alleged offender regardless of the commission of violent terrorist attack.⁶⁹ Thus, full range of ancillary offences apply to the financing of terrorism.

The inclusion of the financing of terrorism in the definition of terrorism had improved the Global suppression of terrorism enabling, states to take effective measures at early stage to prevent negative consequences of terrorism on their nationals. At the same time this created a legal ambiguity regarding the penalisation of incitement to commit the financing of terrorism. The IHRL provisions allow the penalisation of incitement of severe international crimes (such as genocide, propaganda of war). However, the financing of terrorism cannot be considered a violent crime. In a classical criminal law theory, this is considered as a preparatory offence to another offence. Regardless to the worldwide condemnation of terrorism as serious threat to humanity and human rights, there is no agreement among states to regard terrorism as crime with the same gravity as genocide, war crimes or crimes against humanity. Considering the severity of impact that terrorism has on the wellbeing of the international community, there are continued discussion to include crimes of terrorism within the jurisdiction of the International Criminal Court.⁷⁰ As it is emphasised by the United Nations Global Counter-Terrorism Strategy, states have the central role in suppression of terrorism and all measures to suppress terrorism must be

⁶⁵ ICSFT, *supra note 62* Article 5.

⁶⁶ Explanatory Report, *supra note 55*, para101.

⁶⁷ Fact Sheet No. 32, *supra note 5*, p 1.

⁶⁸ ICSFT, *supra note 62*, Article 2.

⁶⁹ *Ibid.*

⁷⁰ Cónan Kenny, Prosecuting Crimes of International Concern: Islamic State at the ICC?. *Utrecht Journal of International and European Law*, 33(84) 2017, pp.120–145. DOI: <http://doi.org/10.5334/ujiel.364>.

taken in compliance with international law obligations binding upon them.⁷¹ By this strategy, the UN has underlined that the primary obligation to prevent terrorism is upon states, which they must exercise in full cooperation with other states. Moreover, the strategy underlines that international organisations shall assist states in complying with this obligation. However, it does not include any intention to establish the possible complementarity of international tribunals if a state is not able or willing to prosecute a terrorist or terrorist organisation.

This reluctance of states to establish the complementarity of international tribunals for prosecution of terrorism could be explained by concerns that it would unduly politicise the International Criminal Court⁷² because terrorism in its nature is a form of political struggle. therefore, the suppression of it, especially in the prevention of the incitement of terrorism always has a political connotation. The penalisation of incitement of terrorism to some extent restricts the ability of a person to express their considerations and convictions, and the proportionality of restrictions must be assessed by domestic courts of states. Therefore, any prohibition must comply with the requirements of legitimate limitations of rights and freedoms provided by the ICCPR and the ECHR. Article 19 of the ICCPR permits the limitations of freedom of expression only to the extent that they are necessary to secure public safety or public order. Thus, the legal provisions and the manner of application of any restrictions must be proportional to the importance of freedom of expression for a democratic society and proportional to the objective of their introduction.⁷³ Thus, restriction of freedom of expression must be assessed in the context of the purpose of its application and to extent the restrictions imposed can enhance the achievement of legitimate aims. Assessing the impact of a counterterrorism measure on rights and freedoms, the evaluation must be done on a case-by- case basis of limitations permitted under IHRL.⁷⁴ Important to emphasise that the ICCPR contains particular provisions on conditions for states to derogate from obligations under the ICCPR⁷⁵.

States can apply those derogations only in the case of exceptional public emergency that could endanger the entire nation. Terrorism to certain extent complies with those requirements because the main feature of terrorism is indiscriminate killing of the civilian population of a particular country. However, the ICCPR further requires that for the application of derogations, the emergency must be temporary. This might be applied to violent terrorist offences, but this temporary element cannot be applied to financing of or incitement to terrorism.⁷⁶ However, states are under obligation to secure the rights and freedoms of a whole society. Thus, the measures to suppress the financing or the incitement of terrorism must be taken in line with the responsibilities of states to prevent criminal offences. In 2004 the UNSC adopted resolution 1566 (2004) calling on all states to cooperate fully in the suppression of terrorism and, *inter alia*, prevent and penalise criminal acts that have following three characteristics, irrespective if they

⁷¹ UNGA. Resolution 60/288 of 8 September 2006 , A/RES/60/288, p7. Available on <https://undocs.org/A/RES/60/288>. Accessed 26 February 2021.

⁷² Kenny, *supra* note 70, p130.

⁷³ Fact Sheet No. 32, *supra* note 5, p. 42.

⁷⁴ *Ibid.*

⁷⁵ ICCPR, *supra* note 8, Article 4.

⁷⁶ HRC, General Comment No. 29, CCPR/C/21/Rev.1/Add.11. Available on <https://undocs.org/CCPR/C/21/Rev.1/Add.11>. Accessed 4 February 2021.

were motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature:

- Committed, including against civilians, with the intent to cause death or serious bodily injury, or taking of hostages; and
- Committed 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 organization to do or to abstain from doing any act; and
- Constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.⁷⁷

In this regard, it is important to emphasise that the general requirements are that limitation of human rights must be determined only by law to pursue a legitimate purpose, necessary and proportional. Prevention of the incitement of terrorism is integral to the protection of national security and public order, which are both considered to be legitimate grounds for limiting freedom of expression in paragraph 3 of Article 19 of the ICCPR. Moreover, Paragraph 2 of Article 20 requires states to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Diligent care must be taken to ensure that any restrictions on the right to freedom of expression are necessary and proportional. This is particularly important regarding freedom of expression, that is a crucial element in the foundation of a democratic society. Its enjoyment is linked with the implementation of other human rights, including freedom of thought, conscience and religion, belief and opinion.

After intense discussions, it was agreed among negotiating states to include the ICSFT in the Annex of CECPT as a terrorist offence. This permitted Member States to take a wide range of measures to suppress terrorism, at the same time it creating legal ambiguity and possibility to utilise the compliance with CECPT as a pretext for violation of freedom of expression.

3.2. The application of the Council of Europe Convention on the Prevention of terrorism to the International Convention on Suppression of the Financing of Terrorism

To comply with permissible limitations of freedom of expression, Article 5 of CECPT ensures the respect for freedom of expression and prevention of incitement to terrorism. It defines what amounts to “public provocation to commit a terrorist offence” with reference to three elements. First, there must be an act of communication (objective element) (“the distribution, or otherwise making available, of a message to the public(...”). Secondly, the particular intention of the person to incite terrorism (subjective element) (“...with the intent to incite the commission of a terrorist offence (...) whether or not directly advocating terrorist offences (...”). Thirdly, there must be established another important safeguard – a danger that the person’s conduct will incite terrorism (“(...) where such conduct (...) causes a danger that one or more such offences may be committed”). This last element requirement distinguishes offences criminalised by CECPT from the acts of glorification or justification of terrorism. The requirement to establish the particular

⁷⁷ Resolution 1566, *supra* note 12, paras. 1-3.

intention indicated in Paragraph 2 of Article 5 reaffirms the subjective element within the definition of public provocation to commit a terrorist offence and requires the act of communication also to be intentional.

Moreover, the possible criminalisation of the incitement of terrorism was also considered by mass media experts. A joint declaration of experts on freedom of expression explains that:

[I]ncitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.⁷⁸

Any act that has an impact on a person's right of freedom of expression must be lawful, i.e., it must be determined by law and necessary for a democratic society.⁷⁹ Keeping in mind the concerns expressed by also by NGOs and Civil Society regarding the possible penalisation of the financing of terrorism, it must be noticed that this by nature is not a violent crime, as all other offences are considered to be terrorism. The criminalisation of the incitement to terrorism is also legally ambiguous because in CECPR, in the same manner as the ICSFT requires the penalisation of the preparatory offences that by their nature are not violent and thus do not endanger society or state. However, both offences create the endangerment of society, if they increase the risk of commission of violent terrorism. One of the safeguards that contains Article 5 of CECPT is the requirement to have a direct causal link that the particular incitement has raised the risk that terrorism might occur. The same requirement applies to the criminalisation of the incitement to the financing of terrorism, thus to prosecute a person the causal relations between the incitement and the increase of risk that more funds will be allocated for the purpose of the commission of violent terrorism. Since the ICSFT requires that its Member States to establish the financing of terrorism as a separate offence, there is no legal problem to apply the penalisation of incitement to the financing of terrorism.⁸⁰ However, this chain of criminalisation is not corresponding to the requirements of the IHRL instruments, thus not meeting the requirements of proportionality. To criminalise the financing of terrorism as a separate offence, the important is to establish the particular intent to collect money for terroristic purposes:

(...) [R]equires to predict terroristic offence in addition to the financing of the said offence, or the commission of any other offence against the person as long as aforementioned special intent (*dolus specialis*) is present (...).⁸¹

However, some scholars have emphasised:

This was indeed a radical development, but its implementation was rather fluid and vague. No doubt, the idea was that the Security Council would step up new sanctions committee to identify terroristic organisations and terrorist suspects, there after transmitting this information to national authorities with the aim of freezing assets fund in their territory.⁸²

⁷⁸ OSCE, Representative on Freedom of the Media, *International mechanisms for promoting freedom of expression*, joint declaration of the UN Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur on Freedom of Expression, 2005. Available on: <https://www.osce.org/files/f/documents/5/d/27455.pdf>. Accessed 14 March 2021.

⁷⁹ ICCPR, *supra* note 8, Article 21, ECHR, *Infra* note 85, para. 2 Article 10.

⁸⁰ ICCPR, *supra* note 8, Paragraph 3 of Article 4.

⁸¹ Saul, *supra* note 33, p. 134.

⁸² Saul, *supra* note 33, p. 123.

Thus, emphasising the direct responsibility of the states effectively suppress the financing of terrorism.

Both IHRL instruments (the ICCPR and the ECHR) require that the limitations of freedom of expression are legally established and proportional, i.e. they shall not exceed the benefit that a democratic society could obtain from such restrictions. Therefore, the application of criminalisation of the preparatory offences to the preparatory offence to commit violent terrorism does not meet the requirements of the proportionality. The particular concerns were raised regarding the implementation of the provisions of Paragraph 3 of Article 2 of the ICSFT to establish an offence the collection of funds for the commission of terrorism, even they have not been utilised to carry out the terrorist offence.⁸³ This requirement created the possibility for states to penalise preparation to preparation to commit a terrorist offence might be an important instrument to prevent terrorism because of necessity of funds and financial resources are necessary to organise terrorist attacks.⁸⁴ However, taking into consideration that modern terrorism is more ideological than purely organised crime, numerous people could be persuaded to join a terrorist group caused by their ideological conviction. This would not necessarily create the risk of the financing of terrorism because, regardless of ideological reasons because terrorism was generally funded by organised criminal groups.

Considering the dependency of terrorist groups and organisations from the financing coming from organised criminal groups, the criminalisation of the incitement of terrorism does not comply with the requirements of proportionality. First, the terrorist organisations usually in overwhelming majority cases are funded by criminal groups and organisations and not expressed publicly, thus excluding the application of CECPT. Secondly, the funding raised because of incitement, considering above mentioned, would be insignificant, compared with financing coming from organised criminal groups. Thirdly, the penalisation of a preparation to a preparation, could lead to misapplication of this provision and this could be employed to suppress democratic opposition.

Article 5 CECPT contains several effective remedies to ensure the application of CECPT in a democratic manner, even if it applies to penalisation of the offences criminalised the ICSFP. Nevertheless, the criminalisation of an indirect incitement that increases the risk of the financing of terrorism, is legally ambiguous creating the risk of extensive criminalisation of otherwise lawful acts permitted by freedom of expression. However, a significant element of the application of CECPT to the financing of terrorism is that European states recognise the financing of terrorism is as equally harmful as violent terrorism.

3.3. The Case Law of the European Court of Human Rights regarding the incitement of terrorism and freedom of expression

The CoE is established to enhance an effective human rights protection mechanism in Europe through the effective application of the ECHR⁸⁵ and cooperation among its member states. The

⁸³ ICSFT, *supra* 62, Paragraph 3 of Article 2.

⁸⁴ Saul, *supra* note 33 p. 1359.

⁸⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), E.T.S. 005, entered into force 3 September 1953.

significant achievement of the CoE is the establishment of the ECtHR that is considered to be the main judicial institution in Europe that can uphold person's human rights if they are violated by the Member State of the ECHR. The ECtHR also has powers to litigate cases, if the Member State has not prevented abuses of human rights guaranteed by the ECHR.

The ECtHR has a jurisdiction only over the violations or abuses of rights encapsulated only in the ECHR, therefore, it has no power to adjust the cases arising from the application of any other treaty concluded under the auspices of the CoE. This apparently might create a problem that the ECtHR has no powers to adjudicate cases that arise from the violation of CECPT. To a certain extent, this assumption is correct, however, in the cases of human rights restriction, and in particular freedom of expression, it has power granted by the ECHR. Therefore, the considerations and judgements of the ECtHR regarding the restriction of freedom of expression must be taken into consideration. Paragraph 2 Article 10 of the ECHR, particularly emphasises that freedom of expression is not an absolute one and it can be a subject to restrictions established by law. Therefore, the measures taken by states to restrict freedom of expression to prevent violent criminal offences, as long as they are provided by law, are in line with the provisions of states international obligations.⁸⁶ As generally agreed by states concluding any international treaty stipulating the restrictions of human rights, also the ECHR requests: "[Restrictions] are necessary in a democratic society".⁸⁷ Freedom of expression has paramount importance for a democratic process and the realisation of other human rights. Therefore, to assess the applicability of those words, it is important to review relevant ECtHR case-law in this regard.

The ECtHR has established that incitement to racial hatred is not permitted on the grounds of freedom of expression.⁸⁸ The ECtHR has emphasised that freedom of expression also includes the dissemination of information and ideas that can offend, shock or disturb and that the right to express and openly debate controversial and sensitive views constitutes one of the fundamental aspects of freedom of expression, distinguishing a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime.⁸⁹ Therefore, the ECtHR in several cases has emphasised that law enforcement authorities of states shall be vigilant and take measures to prevent acts that could cause additional violence and to prevent disorder or crimes.⁹⁰ However, the ECtHR expressed an opinion that measures taken by law enforcement authorities to suppress terrorism shall not be considered a legitimate reason to limit the rights of people under Article 10 of the ECHR.⁹¹ Significant that the ECtHR has considered that the publications by mass media are capable of inciting further violence because they might provide an impression that the violence is necessary and justifiable in self-defence facing external and aggressive force and only possibility to resist is by violent means.⁹²

The ECtHR acknowledging the importance of free media for democratic society has taken Mass Media friendly approach towards possible limitations imposed to it by states. However, the

⁸⁶ ICCPR, *supra* note 8, para. 3 of Article 19.

⁸⁷ ECHR, *supra* note 85, para. 2 of Article 10.

⁸⁸ *Hogefeld v. Germany*, Application No. 35402/97, 20 January 2000.

⁸⁹ *Lingens v. Austria*, *supra* note 56.

⁹⁰ *Gözel and Özer v. Turkey*, Judgment 6.7.2010, § 55; *Karataş v. Turkey*, Application no. 63315/00, 2010 § 51.

⁹¹ *Döner and Others v. Turkey*, Application no. 29994/02, 2017 § 102.

⁹² *Sürek v. Turkey*, Application no. 34686/97, 2001 § 40-41.

ECtHR has always emphasised in its judgements that freedom of expression of neither people nor media is absolute, emphasising the element of responsibility of a person who exercises freedom of expression to do that with necessary respect towards dignity of other people. In one case, the French cartoonist submitted a claim to the ECtHR because he has been detained and further convicted for complicity in incitement of terrorism. He had published cartoons ridiculing the attacks of 11th September 2001, two days after them. The ECtHR held that the cartoonist should have taken into consideration the specific circumstances and the time he published his cartoons, further noting that:

The drawing had assumed special significance in the circumstances of the case, as the applicant must have realised. It was published two days after of the attacks, with no precautions as to language, at a time when the entire world was still in a state of shock at the news. The timing of the publication could only increase the applicant's responsibility. In addition, the impact of such a message in a politically sensitive region was not to be overlooked; the publication of the drawing had provoked a reaction that could have stirred up violence and indicated that it may well have affected public order in the politically sensitive region in which it was published. Thus, it held that the moderate sanction imposed on the applicant had been based on relevant and sufficient grounds. In the circumstances, regard being had in particular to context in which the caricature had been published, the measure imposed on the applicant had not been disproportionate to the legitimate aim pursued.⁹³

To better evaluate the considerations of the ECtHR regarding indirect incitement to violent crimes, the case-law of the ECtHR regarding limitations of freedom of expression *versus* incitement of War Crimes must be analysed. Regarding the incitement of War Crimes, the ECtHR attached significance to whether the speech contributed to a debate of general interest. In a case regarding a book which author, a member of the French armed forces, described the torture practice during the Algerian War, the ECtHR held that the impugned text was of significant importance. The ECtHR has emphasised that the book is important element for the collective memory by informing the public not only that such practices existed, but, moreover, with the consent of the French authorities.⁹⁴ The limits of permissible criticism are more inclusive with regard to the Government than in relation to a private citizen or even a politician. According to the ECtHR in a democratic society based on the rule of law, political ideas challenging the existing order and whose realisation is advocated by peaceful means must be afforded a fair opportunity of expression.⁹⁵

Evaluating the arguments provided by the ECtHR regarding peaceful expression, it is obvious that it considers freedom of expression depends on circumstances in which this freedom is exercised. The case law of the ECtHR shows that in case related to realisation of freedom of expression regarding aspects of severe crimes, the person that is entitled to execute freedom of expression is also under the obligations to respect the perception and associations of other people. This assumption corresponds with the wording of Paragraph 2 Article 10 of the ECHR, emphasising that this freedom is not absolute and might be subject to formal restrictions. At the

⁹³ *Leroy v. France*, Application no. 36109/03, 2009 § 45-46.

⁹⁴ *Orban and Others v. France*, Application no.20985/05 § 49.

⁹⁵ *Faruk Temel v. Turkey*, § 55; *Incal v. Turkey*, § 54; *Han v. Turkey*, § 29; *Yalçın v. Turkey*, § 43, *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, § 70.

same time the ECtHR has emphasised that a person shall determine, is it appropriate to exercise this freedom in particular circumstances.

4. DE-CENTRALISED CONCEPT OF TERRORISM

In recent years the world has faced terrorism that in its nature differs from classical or even modern terrorism because it has no motive to compel a state. The main motive behind attacks is to terrorise people and to intimidate exercising their human rights and, in particular, freedom of expression, thus undermining the values of democracy. The provisions of CECPT and other international instruments are targeted to ensure the equilibrium between the measures taken by states to suppress terrorism and human rights of those who are alleged to be terrorists.

With terrorist attacks on Danish magazine *Jyllands-Posten* in 2006, French magazine *Charlie Hebdo*, Jewish *Hyper* kosher supermarket in January 2015, and following the next month attack in Denmark in February 2015, the paradigm of terrorism has changed. And even the beheading of a French history teacher in 2020 by his pupils shows a significant shift in the concept of terrorism.⁹⁶ Consequently, the *modus operandi* of terrorism and profile of people involved in the commission of terrorism have changed. Those terrorist attacks were committed to target simultaneously both - freedom of expression and tolerance towards other races. Thus, those attacks evidently demonstrated the interconnection between terrorism as religiously grounded hatred against those “guilty” of blasphemy.⁹⁷ Those attacks also have showed that ISIS has a worldwide scope, and response to the challenges posed by it must be carefully approached considering the links between terrorism and religion beliefs. The violence might be triggered not only by direct insult but also irony, sarcasm or anecdote, expressed in an informal atmosphere (in an environment that under no circumstances cannot be considered as serious). The attacks showed the correlation among those elements – religion, violence and freedom of expression. As it is mentioned above, the world recognised the notion of “modern terrorism” in 1996,⁹⁸ understanding the link between religion, preparatory acts to terrorism and violent terrorism.⁹⁹

Some scholars argue that this trichotomy of the motivations of terrorism has always been in place. From a legal point of view, the governments have intensified their programmes on the suppression of violent extremisms and inspecting any religious speech for incitement to extreme violence. However, the understanding of the term incitement of terrorism has changed in recent years. As previously mentioned, the provocation of an attack could be a publication of a controversial opinion that might be considered as offensive by some groups, particularly regarding religious beliefs or interpretation of historical events. This is closely related to violent

⁹⁶ BBC, *France teacher attack: Four pupils held over beheading*. Available: <https://www.bbc.com/news/world-europe-54598546>. Accessed 14 March 2021.

⁹⁷ Agnes Callamard, *Religion, Terrorism and Speech in a 'Post-Charlie Hebdo' World*, RELIGION AND HUMAN RIGHTS 10, Columbia University, New York, USA, 2015, p. 208, doi. 10.1163/18710328-12341288.

⁹⁸ Laquere, *supra* note 1.

⁹⁹ Martha Crenshaw, “The Debate over “New” vs. “Old” Terrorism”, *the American Political Science Association*, Chicago, 2007, accessed 13 March 2021. Available on: www.start.umd.edu/start/publications/New_vs_Old_Terrorism.pdf.

extremism because one typical sign of it is the violent oppression of people who hold different opinion.

4.1. Links among incitement to terrorism, radicalisation and violent extremism

The suppression of all forms of terrorism has it be a classical, modern, and especially post-modern terrorism has risen a lot of concerns about the respect for human rights. This is especially relevant in the context of countering the incitement of terrorism or the expression of violent extremism. There are scholarly considerations that “extremism” shall be considered to be beliefs, behaviour and actions or all combined.¹⁰⁰ With regard to the above mentioned, addressing the incitement of terrorism, or violent extremism, it is necessary in laws (international or national) to establish the equilibrium between restrictions of freedom and the benefit that is obtained by society.

As a new form of terrorism has emerged, it is necessary not only to prevent possible incitement to violence, but also to ensure that every people can exercise their freedom of expression without fears of being attacked by terrorists. Moreover, UNHRC in General Comment No.34 has reached the same conclusions as the ECtHR that only the public (governmental) figures are subjects to criticism:

Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, *desacato*¹⁰¹, disrespect for authority disrespect for flags and symbols, defamation of the head of state and the protection of the honour of the public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.¹⁰²

Article 20 of the ICCPR clearly indicated that the absolute prohibition of freedom of expression could be applied to the propaganda of war or advocacy of that constitutes the incitement to discrimination, hostility or violence shall be prohibited.¹⁰³ The same prohibition in a more elaborated manner is established by Article 4 ICERD¹⁰⁴. However, it is crucial to determine a line that differs incitement of terrorism and execution of freedom of expression.

To secure the democratic standards in applying limitations to freedom of expression, it is necessary to establish the particular intent to deliberately provoke discrimination. In the case law mentioned in the previous section, freedom of expression was exercised without particular intent to provoke terrorism. However, it was received by some as blasphemy, and thus, it triggered a violent terroristic response thus causing a threat to the security of country and its nationals. Moreover, there is a common understanding that if freedom of expression contradicts the interests of national security, to the extent that it incites violence and there is a direct connection

¹⁰⁰ Callamard, *supra* note 97, p 212.

¹⁰¹ Disrespect.

¹⁰² General Comment No. 34, *supra* note 7, para 38.

¹⁰³ ICCPR, *supra* note 8, Article 20.

¹⁰⁴ ICERD, *supra* note 10, Article 4.

between them it can be restricted. The UN Special Rapporteur on Freedom of Opinion and Expression¹⁰⁵ and the ECtHR¹⁰⁶ have endorsed this understanding. As the US American Civil Liberties Union of Massachusetts has stated, the usage of the term “support” is a clear endangerment for freedoms, and in particular of freedom of beliefs and expression:

By focusing not only on actions but *beliefs*, this definition casts a broad net, encompassing many who will never commit violence and may in fact abhor violence. Moreover, “extremist” is a subjective label highly vulnerable to politicization. An example from recent history—the inclusion and subsequent removal in 2008 of Nelson Mandela and other members of the African National Congress from the terrorist watch list illustrates the potential for labels based on associations and ideology, including ideology accepting of certain political violence, to be applied in ways that undermine respect for human rights and opportunities for conflict resolution.¹⁰⁷

Moreover, the international treaties also contain some contradictions in providing the possible restrictions to freedom of expression, i.e. a contradiction between Article 20 of the ICCPR establishing prohibition incitement to hatred and Article 4 of ICERD¹⁰⁸. The latest, in addition, imposes the limitations of freedom of expression to incite discrimination based on racial superiority. This is not directly applicable to speeches that instigate religious hatred, therefore the Committee in charge of the interpretation of ICERD has emphasised that “(...) the specific characteristics of ethnic, cultural and religious groups be taken into consideration.”¹⁰⁹

In order to address this contradiction, the methods of interpretation of treaties provided by the VCLT¹¹⁰ must be applied. The application interpretation methods of international treaties as codified by the VCLT also do not give a certain result. Article 31 of VCLT¹¹¹ provides for a priority of a prior treaty in interpreting the latter treaty, which is the ICCPR containing a narrower list of excuses to limit freedom of expression.

The review concluded that across jurisdictions there was little, or perhaps even a reduced, focus on the intention or motivation of the accused-of the “speaker”, resulting in the extensive nature of the speeches perceived as threatening national security.¹¹²

Some scholars have indicated that the main problem of interpretation of the provisions of the ICCPR is a lack of agreed definition of and substance of the term “endangerment of national security.”¹¹³

¹⁰⁵ OSCE. *Joint Declaration on defamation of religions, and anti-terrorism, and anti-extremism legislation*. Available on: <https://www.osce.org/fom/35639>, accessed 12 March 2021.

¹⁰⁶ *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, Para. 50–52.

¹⁰⁷ Muslim Justice League, American Civil Liberties Union of Massachusetts, Black and Pink – Boston, Chapter Jewish Voice for Peace Boston, National Lawyers Guild, Massachusetts Chapter The Real Cost of Prisons Project, communication, available <https://www.brennancenter.org/sites/default/files/analysis/Boston%20>. Accessed 11 March 2021.

¹⁰⁸ ICERD, *supra* note 104.

¹⁰⁹ UN, Report of the Committee on the Elimination of Racial Discrimination, 2005, A/60/18. Available on [https://undocs.org/en/A/60/18\(Supp\)](https://undocs.org/en/A/60/18(Supp)). Accessed 14 March 2021.

¹¹⁰ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. 331, entered into force 27 January 1980.

¹¹¹ *Ibid.*, Article 31.

¹¹² Callamard, *supra* note 97, p. 207.

¹¹³ Dr. Agnes Callamard, “Global Trends in Freedom of Expression Jurisprudence in 2014”, *Justice and Freedom of Expression in 2014*, Columbia University, March 2015, available:

In the same manner the controversial French comic *Dieudonne* was found guilty of glorification of terrorism for a tweet which he posted after the attacks on *Charlie Hebdo* stating: “I feel like Charlie Coulibaly”. Regardless of the fact that *Dieudonne* removed the controversial tweet afterwards and had declared that he condemns the attacks and detests the nature of terrorism, the judges declined his explanation. Judges mainly considered the contextual significance of the expression (the immediate *post-Charlie Hebdo* attack) and substance of it, taking into considerations declared by *Dieudonne* ironic nature of this tweet. The judges emphasised that *Dieudonne’s* provocative nature of the tweet or any expression must be evaluated against the impact it has on victims and society.¹¹⁴

The comprehension that a person must exercise freedom of expression must be exercised with respect to the interests of other people is encapsulated by the ICCPR and the ECHR. However, these legal instruments are designed to address the proportionality of restrictions imposed by states to freedom of expression, simultaneously obliging states to secure people within its jurisdiction from violent attacks arising from criminal activities. This duple obligation becomes more relevant addressing threats of post-modern terrorism, where arbitrary justice is executed by other people who felt offended by particular expression, due to its religious or cultural differences. Therefore, post-modern terrorism simultaneously has a characteristic of an organised crime and desperate ideological- religious struggle.

Considering that states have a lot of measures to suppress terrorism as a phenomenon as an organised crime¹¹⁵, the question of violent extremism and terrorists acting alone are still neither nationally nor internationally adequately legally addressed. Concerns regarding this insufficient regulation were expressed by several international organisations, however, taking into consideration that criminal activities are not performed on a large scale, it is more complicated to elaborate equilibrate international law regulation addressing this phenomenon. However, it is important to emphasise that the damages and impact caused by those attacks remain quite relevant, nevertheless it cannot be compared with the devastating effect that had the attacks of 11 September of 2001. Moreover, these attacks have achieved their purpose – to intimidate the pollution and by that punish foreign government for performing certain activities in foreign policy. This lack of certain definition of state security and thus the permissible restrictions of freedom of expression complicated the struggle against the incitement of post-modern terrorism. To secure the right to life states have adopted various measures to address this matter. However, these measures do not always comply with obligations to secure freedom of expression remains.

Some states have taken more severe measures against suspects for incitement to terrorism for plots against the nation, inspired but not necessarily orchestrated by ISIS.¹¹⁶ To this regard, Michael Steinbach, the Executive Assistant Director of the National Security Branch of the Federal Bureau of Investigation stated:

<https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2015/06/A-Callamard-Global-Trends-FoE-Jurisprudence-June-2015.pdf> , accessed 13 March 2021.

¹¹⁴ Callamard, *supra* note 97, p. 221.

¹¹⁵ To some extent, because a terroristic organisation, requests some form of subordination and hierarchy.

¹¹⁶ Julian Hattem, “Feds get aggressive on terror threats”, The Hill, 7 December 2015, Available on <https://thehill.com/policy/national-security/247567-feds-get-aggressive-on-terror-threats>. Accessed 13 March 2021

ISIS's messaging blends both officially endorsed sophisticated propaganda with that of informal peer-to-peer recruitment through digital communication platforms. No matter the format, the message of radicalization spreads faster than we imagined just a few years ago. Like never before, social media allows for overseas terrorists to reach into our local communities to target our citizens as well as to radicalize and recruit.¹¹⁷

To the same extent, the case brought against *Munther Omar Saleh*, who was charged with conspiring to provide material support and resources to ISIS, and to prepare an explosive device in New York. As evidence was brought his tweets including:

Subhan Allah, IS known for their high-end videos, great weaponry and quality fighters, and *Khilafah* orders us to live under the law Allah prescribed for us, if we fear him, we would rush to the land to be governed by it.¹¹⁸

As has been mentioned above, in the contemporary globalised world, the struggle against violent extremism and terrorism are closely related.¹¹⁹ Persons inciting to terrorism or violent extremism is:

(...) using social media to forward their violent and hateful messages around in order to radicalise, recruit and incite youth and others to support their cause” and “how persistent and pervasive online radicalization has become.”¹²⁰

Similarly, the Eastern High Court in Copenhagen found guilty Danish bookseller *Mansour* of publicly condemning Islamic extremism, thus provoking terrorist attack and at the same time expressing anti-Semitic views. The Court did not consider that the radical expressions of the bookshop owner are protected by Article 10 of the ECHR, without proper evaluation of the content of the book, by that failing to provide the proportionality test.¹²¹ Correspondingly, in other case, the ECtHR established that the defendant had “advanced” terrorism through online posting, editing, and publishing three books on theological justifications for extreme *Islamic Jihad* authored by infamous, radical Muslim cleric, *Abu Qatada*:

The judges had no reservations about treating explicit calls for *Jihad* and the more ambiguous and abstract statements identically and found that all of these comments ‘advanced and publicly condoned’ terrorism”.¹²²

The recently adopted legislation by many countries has been criticised by legal experts, academics and civil society for being vague and overbroad.¹²³ However, judges adjudicating the cases have not addressed the main problems of proportionality and necessary to establish a direct link between threats that terrorism might be committed. This new shape of terrorism could

¹¹⁷ US Committee on Homeland Security and Governmental Affairs, *ISIS Online: Countering Terrorist Radicalisation on the Internet and Social Media*, 22-476PDF, 2016, p. available: <https://www.govinfo.gov/content/pkg/CHRG-114shrg22476/html/CHRG-114shrg22476.htm>. Accessed 13 March 2021.

¹¹⁸ Callamard, *supra* note 97, p. 221.

¹¹⁹ Department of Justice, Office of Public Affairs. *Virginia Man Sentenced to More Than 11 Years for Providing Material Support to ISIL*, available no: <https://www.justice.gov/opa/pr/virginia-man-sentenced-more-11-years-providing-material-support-isil>. Accessed 13 March 2021.

¹²⁰ *Ibid.*

¹²¹ *Director of Public Prosecution v. Mansour*, Eastern High Court of Denmark, Full judgement is available only in Danish, summary of case available: <https://globalfreedomofexpression.columbia.edu/cases/mansour-v-director-of-public-prosecution/>. Accessed 14 March 2021.

¹²² Callamard, *supra* note 97, p. 223.

¹²³ Fact Sheet No. 32, *supra* note 5, p.40.

obviously be seen in the recent attacks committed in France – *Charlie Haddo* attacks, in Germany – Christmas market attacks in 2016, Belgium – terrorist attacks on Brussels’ metro 2016 and other terrorist attacks all around Europe. Those attacks have illuminated the importance to have balanced and carefully calibrated measures to suppress the incitement of terrorism.

CECPT is designed to impose an obligation to state to take balanced measures to prevent the incitement of terrorism in context of their obligations under IHRL to secure freedom of expression. However, in recent years, another endangerment of freedom of expression, i.e. endangerment and abuses of freedom of expression, arising from terrorists that are not duty bears in the context of human rights. Important to emphasise that the states are responsible not only for not violating human rights but also for ensuring that the abuses from others are eliminated. Since the decline of organised terrorism, the incitement of terrorism should not be regarded as a part of the solicitation of a person to engage in a terrorist organisation, rather as to incite/persuade a person to commit terrorist offence without establishing permanent relations. This phenomenon of committing terrorist offences through unrelated persons encumber law enforcement authorities to detect the existence of connections between instigator and addressee. To resolve those challenges, the safeguards included in CECPT have a paramount importance because states are under triple obligations. First, State-Parties are responsible to ensure that every person within their jurisdiction can enjoy the right to life and secure that person’s life is not deprived by actions of other individuals within its jurisdiction. Second, State-Parties are under obligations to ensure that all proceeding taken against alleged terrorists are conducted in accordance with fair trial standards. Moreover, every measure of State-Parties to restrict freedom of expression must comply with the principle of the proportionality. Thirdly, as recent attacks have shown, it is tremendously important to protect freedom of expression of persons expressing critics or concerns in a sarcastic, not in a serious manner. In addressing these matters, states are under duple obligation to prevent terrorist attacks and to ensure that measures taken correspond to their obligations under IHRL. Ensuring equilibrium among these elements is important to preserve a democratic society.

The recent attacks have illuminated that violent extremism and terrorism have some common features, and there is a necessity not only to ensure freedom of expression, but also to take effective measures to prevent abuses of it. Extremism as such is an expression of considerations by a person towards governmental policy that radically differs from general it, including criticism of it. Moreover, this form of expression is protected by IHRL, if it does not violate the dignity of other or public interests.

4.2. Extremism as a form of expression regarding dissatisfaction with the policies of the State

As has been described in the previous section, “extremism” and “radicalisation” are usually connected with terrorism. However, the UN Human Rights Council has stated:

Another term that is often used is “radicalization”, with a number of States adopting some the policy responses to this phenomenon. The notion of “radicalization” is generally used

to convey the idea of a process through which an individual adopts an increasingly extremist set of beliefs and aspirations.¹²⁴

Therefore, it is important to evaluate in each case whether the particular extremism could be regarded as freedom of expression (expression of dissatisfaction, i.e. opposition) or extremism, inciting further violence and thus prohibited by Paragraph 2 of Article 10 of the ECHR and Paragraph 3 of Article 19 of the ICCPR.

The absence of a careful legal evaluation is apparent in the court case of the Russian Federation regarding a poem inciting Ukrainian patriots to struggle against Putin's secret police and Russia. The court considered that the poem contains hate speech and therefore is classified as extremist. Its author, *Aleksandr Byvshev*, a teacher, was sentenced to 300 hours of correctional work and a two-year ban on all teaching activities.¹²⁵ Furthermore, the lack of democratic assessment of expression of opposition could also be identified in 2015, when the Southern-Sakhalin Court was requested to ban the book "Prayers (Dua) to God: Its Purpose and Place in Islam" on the basis that it contained extremist speech. The prosecutor considered that the quotation from the Quran in this book shall be considered as the incitement to extremism, not only an interpretation of the Quran. Moreover, the book promotes the supremacy of one religious and national group over another, promulgating that *Allah* is the true god and his followers are superior to followers of other religions. Evaluating the book, the court established that despite the fact that it did not contain a specific reference to incite violence, it did express some extremist views that could be appealing to some groups and enhance violent extremism.¹²⁶ However, evaluating the expression of extremism by democratic standards, the courts of other countries had judged that the glorification of terrorist attacks that have been committed should not be penalised. It was particularly underlined that no one should be held criminal liable for expressions based on inferred interpretation rather than explicit statements. Thus, the Eastern High Court of Denmark established that the particular statement constitutes only glorification of the committed terrorist act without the incitement to commit new terroristic offences.¹²⁷

The approach of establishing the equilibrium between prevention of incitement to terrorism and the expression of political considerations that are not intended to incite further terrorism is expressed by UNHRC. It has been expressed by its General Comment 34, underlining that public persons in a democratic society are considered subjects of criticism.¹²⁸ Simultaneously, Paragraph 2 of Article 20 of the ICCPR contains a specific reference to the limits of this criticism and freedom of expression in general.¹²⁹ The same considerations are achieved by the ECtHR in application of the ECHR, regarding the expression of an opinion that might be considered by many as offensive and provocative.

¹²⁴ Human Rights Council, *Report of the United Nations High Commissioner for Human Rights, Report on best practices and lessons learned on how protecting and promoting human rights contribute to preventing and countering violent extremism*. A/HRC/33/29. Available on <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/162/55/PDF/G1616255.pdf?OpenElement>. Accessed 14 March 2021.

¹²⁵ Kromskoj District Court (the full judgment is not available); summary available on: <https://globalfreedomofexpression.columbia.edu/cases/the-case-of-aleksandr-byvshev/>. Accessed 13 March 2021.

¹²⁶ Callamard, *supra* note 97, pp 224-225.

¹²⁷ Jacob Mchangama, "Freedom of Expression and National Security", *Society* 53, pp. 363-367, 2016. doi.org/10.1007/s12115-016-0029-1. Accessed 4th February 2021.

¹²⁸ General comment No. 34, *supra* note 7, para. 38.

¹²⁹ ICCPR, *supra* note 8, Article 20.

In years following the attacks on a Danish daily broadsheet newspaper *Jyllands-Posten* in 2006 scholarly, policy and legal debates focused on prevention and penalisation of incitement religious hatred, that is provoked by behaviour that by some is considered to be blasphemy¹³⁰. After the attack on *Charlie Hebdo*, the focus has shifted to the protection of people from “extremist” religious speeches that is also is not regulated by a treaty law. In a report “Preventing Terrorism and Countering Violent Extremism that may lead to Terrorism: A Community-Policing Approach.” OSCE has emphasised that:

Simply holding views or beliefs that are considered radical or extreme, as well as their peaceful expression, should not be considered crimes. “Radicalization” and “extremism” should not be an object for law enforcement counter-terrorism measures if they are not associated with violence or with another unlawful act (e.g., incitement to hatred), as legally defined in compliance with international human rights law.¹³¹

However, the opposite has been the main characteristic of State policy towards the suppression terrorism. The linkage between extremism and terrorism is arbitrarily established, even if the prior has no violent nor discriminatory consequences. Extremism in democratic society by its nature should be considered to be an expression of beliefs that are deviant and, to some extent, controversial to mainstreamed and accepted social behaviour and standards. The establishment of a permanent link between extremism and terrorism could lead to the results that are not proportional as it is requested by Paragraph 3 of Article 19 of the ICCPR. However, evaluating the practice of states in this regard reveals the general inclination that states by national legislation and case law are intended to establish the permanent link between terrorism and extremism. Important to emphasise that every crime related to expression requires the analysis of the content of the expression, but the methods for content analysis is complex and requires to be balanced with all other elements.¹³² To this regard, important to evaluate the manner of expression, intended addressee, means of distribution shall be taken into considerations to ensure the preservation of a democratic society.

Important for the preservation of democratic societies, is to have a clear distinction between violent extremism and extremism that express opposition or dissatisfaction with official policy of the state. The latter is fundamental characteristic of a democratic society, thus emphasising the importance of diversity. Therefore, it is important to evaluate state practice regarding the prevention of terrorism.

5. MEASURES TAKEN BY VARIOUS STATES/ COUNTRY PROFILES

In my work, I have analysed and compared the profiles of the below mentioned countries to have a relevant and comprehensive comparison on the implementation of CECPT. Important in

¹³⁰ Neville Cox, “Blasphemy, Holocaust Denial, and the Control of Profoundly Unacceptable Speech”, *The American Journal of Comparative Law*, 2014, 62(3) pp. 739-774, Available on: <URL://www.jstor.org/stable/43669517>. Accessed 13 March 2021.

¹³¹ OSCE, *Preventing Terrorism and Countering Violent Extremism and Radicalization that May Lead to Violence: A Community-Policing Approach* (OSCE: 2014), p. 42. Available on: <https://www.osce.org/files/f/documents/1/d/111438.pdf>, Accessed 13 March 2021.

¹³² *Ergin v. Turkey*, case:66/1997/850/1057,1998; *Jersild v. Denmark* (Application no. 15890/89), 1994.

selecting those countries was their attitude towards the suppression and the prevention of terrorism regarding observation of human rights law, in particular freedom of expression. Another crucial element is the country's membership in the EU, because the EU holds high standards of human rights protection and also offers an effective mutual cooperation mechanism to exercise more intense cooperation than other international forums. In addition, the EU has well-established counterterrorism policy that allows EU Member States to take more sophisticated measures to prevent terrorism. Three out of four analysed countries are EU Member States countries, therefore comparing these countries, important to illuminate the existence of effective mutual cooperation in criminal matters.

The EU has ratified CECPT on 26 June 2018¹³³, thus, applying the provisions of CECPT to the mechanisms available within the EU cooperation in criminal matters. With due regard to advanced EU standards, the EU submitted, and the CoE accepted the declaration on the "Disconnection Clause", stating that in the mutual criminal cooperation between EU Member States, the regime established in the EU will apply.¹³⁴ From a treaty law perspective, such a modification of the legal obligations of the State Parties of a treaty are allowed in accordance with Paragraph 4 of Article 30 VCLT.¹³⁵ As it has been above mentioned the implementation of CECPT is related to coherent application of mechanisms of the EU in cooperation in criminal matters, permitting EU Member States to apply the provisions of CECPT in a more efficient manner. Taking into consideration that all four states are Member States of the CoE, it must be assumed that all countries have comparable democratic standards. Moreover, evaluating the measures adopted by states, it is important to take into consideration the historical- legal background with regard to the suppression of terrorism, democracy and respect of freedom of expression of these states.

1. France – has a long history of the suppression of violent terrorism and, therefore has elaborated in its Penal Code the equilibrium between the respect for human rights and suppression of terrorism. France is engaged in a struggle to secure freedom of expression of its citizens (journalists, but not only) against violent attacks undertaken by some radical/extreme/terrorist movements.
2. Latvia – has no experience with violent terrorism. However, it strongly believes in the respect for human rights. Moreover, Latvia has strongly underlined its willingness to engage in international efforts to strengthen the international struggle against terrorism.
3. Russian Federation – has a long experience dealing with violent terrorism. The Russian Federation has implemented repressions towards minorities and democratic opposition, thus limiting human rights and, in particular, their freedom of expression. Therefore, the Russian Federation is criticised by the international community that laws

¹³³ Council of Europe. Treaty Office, available on: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196/signatures?p_auth=JopAqkyD. Accessed 26 February 2021.

¹³⁴ CECPT, *supra* note 31, Note by the Secretariat to Article 26.

¹³⁵ VCLT, *supra* note 110, Paragraph 4 of Article 31. "When the parties to the later treaty do not include all the parties to the earlier one:

- (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
- (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

and measures taken by the Russian Federation to suppress terrorism are not in line with IHRL.¹³⁶

4. Sweden – has limited experience dealing with terrorism, however, it has a long tradition of democracy, the rule of law and respect for freedom of expression.

These countries have different legal-political traditions. Thus, their comparison could reveal an answer to the question whether measures to struggle against the incitement of terrorism can be disproportionately restrictive and, thus endanger democracy.

5.1. France

France ratified CECPT on the 24th of April 2008, without making a reservation¹³⁷. The legal framework of measures taken by France is encapsulated in its “Law on Struggle against Terrorism”¹³⁸ and this law has been amended several times to address the new challenges of terrorism. The respect for human rights is considered the founding element of the French legal system, and the suppression terrorism should not affect respect for human rights.

The freedoms of speech and expression are one of the most important elements of the French legal system, as it has been underlined by Article 4 of the Constitution of the French Republic.¹³⁹ In the criminalisation of expression related offences, it is imperative to uphold the respect for human rights. In the French legal system, the suppression of terrorism is not only limited to the criminal liability of a person for terrorist offences. Simultaneously, there are some elements of civil and administrative liability. For example, refusal of entry into its territory, escorting to the border, freezing of assets, blocking access to sites provoking or defending (justifying) acts of terrorism. To ensure the effective prosecution of persons alleged for terrorism and terrorism related offences, the French law introduces three main elements to determine persons’ culpability under the national law:

1. The legal definition of terrorism in a separate law establishing the conspiracy to commit terrorism must be considered a terrorist offence. To launch an investigation under this law, the occurrence of an act of terrorism is not requested.
2. Specific courts are established for terrorism related offences.
3. Specialised intelligence and investigation service to deal with terrorism related offences.

¹³⁶ Council Decision (CFSP) 2021/372 of 2 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 71 I/6, 2.3.2021, Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LI.2021.071.01.0006.01.ENG&toc=OJ%3AL%3A2021%3A071I%3ATOC>. Accessed 13 March 2021.

¹³⁷ CoE, *Supra* note 133.

¹³⁸ France, *No. 86-1020 de 9 September 1986 Loi relative à la lutte contre le terrorisme* (Law on Struggle against Terrorism). Available on: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000693912/>. Accessed 26 February 2021.

¹³⁹ France, *The Constitution of the Republic of France of October 4, 1958*, Paragraph 3 of Article 4. Available: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf. Accessed 26 February 2021.

The foundation of French criminal legislation against terrorism is established by Section 421-1 of the French Penal Code criminalising violent terrorism. To prosecute the incitement of terrorism, it is important to establish a direct link between the provocation (incitement) and the risk (intention of the offender) that terrorism might be committed. In this regard, the Penal Code criminalises particular offences, even if they have not resulted in violent terrorist acts, such as terrorism. This includes membership in a terroristist group, the financing of terrorism and direct incitement (provocation) to commit an act of terrorism.¹⁴⁰ To ensure the protection of human rights guaranteed by the French Constitution, the procedural measures to suppress terrorism are encapsulated in the French Code of Criminal Procedure.

The Code of Criminal Procedure requires that the prosecution of terrorism be conducted under a specific procedural regime. Among other special techniques, the French court might authorise police, carrying out the investigation related to terrorism, hearing witnesses anonymously, the usage of video surveillance, infiltration tactic in terroristic organisations, and applying telephone tapping.¹⁴¹ Taking into consideration the development of information technology communications for the prevention of terrorism and incitement to it, the new law was adopted in 2014.¹⁴² This law gives the possibility for investigators to utilise technical devices aiming to capture the computer data entered, but not yet disseminated. The possibility of application of these procedural techniques is essential because terrorists and terrorist organisations extensive use of the internet to spread propaganda. This law also establishes special criminal procedural protection of those who facilitate the disclosure of conspiracy to commit terrorism. To strengthen the suppression of terrorism and incitement to it, the Code of Criminal Procedure authorises the application of a particular cyber technique to facilitate the investigation of terrorism related offences.

Moreover, the Code of Criminal Procedure provides that the offences of terrorism shall be litigated by a specific court that has judges qualified in the penalisation of terrorism. Important to emphasise that the French legislation provides the prosecution for terrorism and any related offences also minors that are over the age of 16.¹⁴³ Furthermore, the Code of Criminal Procedure contains provisions authorising for the investigation of terrorist offences, a prolonged period of pre-trial investigations than of investigation for other crimes. The Code of Criminal Procedure also authorises the freezing of assets and the application of other specific measures related only to

¹⁴⁰France, *Code pénal* (Criminal Code), Section 421-2-5. Available on https://www.legislationline.org/download/id/8546/file/France_CC_am012020_fr.pdf (French only). Accessed 13 March 2021.

¹⁴¹ France, *Code de procédure pénale* (Criminal Procedure Code), Title XV. <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006071154/> (only French) Available on: Accessed 13 March 2021.

¹⁴² France, *Loi No. 2011-267 du 14 mars 2011 d'orientation et de programmation pour la performance de la sécurité intérieure* (Law No. 2011-267 of 14 March 2011 orientation and Programming Law for Internal Security Performance). Available on: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000023707312/> (only in French). Accessed 13 March 2021.

¹⁴³ France. Ordinance, Feb. 2, 1945, on Juvenile Offenders. Available on: <https://halshs.archives-ouvertes.fr/halshs-00458770/document>. Accessed 26 February 2021.

the prosecution of terrorism.¹⁴⁴ After receiving the final award of court convicting a person for terrorism or terrorism-related offences, the sentence of a convicted person can be reduced if they have collaborated with law enforcement authorities to disclosure of other terrorist offences.¹⁴⁵ Mentioned specific investigatory techniques apply also to the prevention and disclosure of the provocation of terrorism. In 2014 France has adopted amendments to its Code Penal to establish the penalisation of the provocation of terrorism.¹⁴⁶ However, taking into consideration the nature and possible extent of restrictions of freedom of expression, they must be evaluated in conjunction with the provisions of the 1881 Law on Freedom of the Press Act¹⁴⁷ and IHRL.

To evaluate the French policy towards limitations of freedom of expression, it is important to emphasise the importance that France devotes to this freedom, including freedom of the press. Section 23 of the 1881 Law on Freedom of the Press Act provides that everyone that misusing the freedoms granted by this law inciting hatred of violence against a person or a group regarding its race, religion shall be held criminally liable. Moreover, Article 24 of the Law sets out the obligation to penalise the incitement/ justification/ glorification (*apologie*) of listed severe crimes. However, both Sections do not contain specific reference to incitement to terrorism, but taking into consideration the severity of terrorism can be applied to terrorist propaganda and incitement to terrorism. However, the incitement of terrorism and terrorist propaganda cannot occur without the expression of hate towards some particular group that is distinguished. Moreover, the 1881 Act defines offences arising from the violation of this law are governed by specific procedural rules.¹⁴⁸ Through the application of strict rules of procedure, the aim is to have a balance between combating the incitement of any criminal offences and safeguarding freedom of opinion and expression enshrined in many international instruments.¹⁴⁹

In recent years the whole world, but in particular France, has faced a different form of terrorism that undermines the effectiveness of balance achieved. This terrorism differs from classical or even modern terrorism, because it has no motive to compel the state rather to punish nationals of state for being nationals of the state. Thus, the legal mechanism for the protection of

¹⁴⁴ France. Monetary and Financial Code, Chapter IV. Available on: <https://www.amf-france.org/sites/default/files/pdf/63451/en/GR-into-force-since-20210101.pdf?1620390590>. Accessed 13 March 2021.

¹⁴⁵ Criminal Procedure Code, *supra* note 141, Section 706-81. Section 80-5.

¹⁴⁶ *Ibid.*, Section 706-25-2.

¹⁴⁷ France, *Loi du 29 juillet 1881 sur la liberté de la presse* (The press Freedom Act of 29 July 1881). Available on: <https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006070722/> (only in French). Article 23 (unofficial translation):

Speeches, shouts or threats expressed in public places or meetings, or by written words, printed matter, drawings, engravings, paintings, emblems, pictures or any other written, spoken or pictorial aid, sold or distributed, offered for sale or displayed in public places or meetings, either by posters or notices displayed for public view, or by any means of electronic communication. Accessed 26 February 2021.

Article 24 (unofficial translation):

Incitement to discrimination, hatred or violence on account of origin or membership of a racial or religious group of those who, by one of the means established by Article 23, incite hatred or violence against a person or group of persons on account of their origin or membership or non-membership of a given ethnic group, nation, race or religion, or his true or supposed sexual orientation or gender identity.

¹⁴⁸ *Ibid.*, Paragraph 5 Section 2 (unofficial translation): during criminal proceedings the importance of information requested is taken into account to assess the of infringement or crime. The aim of investigation is to establish the truth.

¹⁴⁹ *Ibid.*

human rights in the context of prevention of radical violent extremism is not completely elaborated.

Addressing the problem of radicalisation the French government has emphasised “[R]adicalization is a behaviour change which may lead certain individuals to extremism and terrorism”.¹⁵⁰ Moreover, The French *Conseil d’État* on 9 January 2014, re-instated the prohibition of the public show of controversial comedian *Dieudonne M’Bala*, which had been annulled by a previous Court. The *Conseil d’État* determined that the show posed “severe risks” to public order, violated principles and values embodied in the Universal Declaration of Human Rights and that it was of such nature as to challenge “national cohesion”. Many French observers criticised this decision for departing from the precedent established in 1933 regarding the balance between public order and freedom of expression and assembly.¹⁵¹

Right after attacks on *Charlie Hebdo* dozens of people in France was charged with ‘incitement to racial hatred’, that in accordance with Penal Code allowing for faster prosecution. However, concerns regarding this approach was raised by Union Judges, claiming that expedited procedures applied due to urgent and politically charged case, rarely of the circumstances and never of the person indicted with glorification of terrorism: Not for having organised demonstrations of support for the authors of the attack, nor for having drafted and largely distributed their pitch, but for clamors made while drunk or in anger (...) Convictions are raining down heavily accompanied by incarcerations at the hearing.¹⁵²

To better understand this new problem related to distinguish the incitement to terrorism and freedom of expression, important to have further regard to jail sentences sentenced by the French court regarding the prosecution in incitement to terrorism.

In March 2015, the Court de Cassation ruled that *M. Bogour* was guilty of glorification of terrorism for a T-shirt he gave to his 3 year old nephew with prints, “I am a bomb’ and on the other ‘Jihad’ and ‘born 11 September’”.¹⁵³ His nephew had worn a T-shirt at his kindergarten, underneath a jumper. Decided to go to the bathroom, he requested assistance from his mentor. Assisting to him the mentor saw the print on T-shirt. In mentioned circumstances, the French court judged that using a young child as the medium to carry a criminal offence constituted an act of glorification constituting a violation of Article 10 of the ECHR.¹⁵⁴

The French court considered that this constitutes the offence of glorification. The court reached these conclusions because of the words on T-shirt, and the day (9/11) was deemed to

¹⁵⁰ France. Ministry of Interior, *Assistance aux familles et prévention de la radicalisation violente* (Assistance to Families and Prevention of Violent Radicalism), 2019. Available on: <https://www.interieur.gouv.fr/Dispositif-de-lutte-contre-les-filieres-djihadistes/Assistance-aux-familles-et-prevention-de-la-radicalisation-violente>. Accessed: 13 March 2021.

¹⁵¹ France. Conseil d’Etat, du 19 mai 1933, 17413 17520, publié au recueil Lebon (Council of State, announcement on 19 May 1933 No. 17413 17520 on publication and collection freedom). Available on: <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007636694/>. Accessed 13 March 2021.

¹⁵² Library of Congress, “Limits on Freedom of Expression: France”, available on : <https://www.loc.gov/law/help/freedom-expression/france.php>. Accessed 13 March 2021

¹⁵³ France, Court de Cassation, Arrêt No. 787 du 15 mars 2015 (13–87.358)/ ECLI:FR:CCASS:2015:CR00787/ 17 March 2012., available only in French at: https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/787_17_31352.html. Accessed 13 March 2021.

¹⁵⁴ *Ibid.*

constitute an essential part of the characterisation of the offence. The explanations by the accused that this had been intended as humour were rejected because that persons' death shall not be a subject of humour, particularly when it was committed on a large scale. Furthermore, the Court found that the intention of glorification can be revealed through the debate with the mother of a child should this T-shirt be worn in school. Finally, the Court established that T-shirt that, in this particular case, is considered to be a medium for the speech worn in public space. The fact that the T-shirt in question was worn underneath a sweater and had been seen by two persons only (the teachers) was not even considered.¹⁵⁵ Similarly, the controversial French comic *Dieudonne* was found guilty of glorification of terrorism for a tweet which he posted after the attacks on *Charlie Hebdo*.

France has adopted a lot of measures to prevent terrorism. This is encapsulated in recently adopted legislation and in interpretation of its courts what is considered to be the incitement of terrorism. As has been mentioned in recent years, France faces a new form of terrorism that particularly emphasises the targeting of individuals for expressing an opinion that is not considered acceptable by others. In the context of recent events, France has not fully fulfilled its duty to protect freedom of expression from abuses coming from other people, and prevent violent attacks on its nationals while respecting freedom of expression.

5.2. Latvia

Latvia has ratified CECPT on the 2nd February 2009, without making a reservation.¹⁵⁶ The criminalisation of the incitement to terrorism shall be analysed in the light of fundamental human rights guaranteed by the Constitution of the Republic of Latvia. Its Article 100 stipulates that every person in the territory of Latvia is free to obtain or to distribute information obtained, *inter alia*, their beliefs.¹⁵⁷ However, as it is established by relevant the IHRL instruments, those rights are not absolute and can be subject to restrictions to preserve the lawful interests of others people and the public safety of the state. The provision of Section 79⁶ of the Criminal Law¹⁵⁸ that penalise incitement of terrorism, is one of those provisions limiting the application of Section 100 of the Constitution.

For the time being, there has been neither a violent terrorist offence, nor did any terrorist organisation activities be detected in Latvia. Regardless of that, Latvia has taken several legislative measures to ensure that from Latvian territory a terrorist attacks against other countries cannot be launched. Taking into account the large share of the Latvian Banking sector in the Latvian economy, it has taken several steps to prevent money laundering and the financing of terrorism through the Latvian banks. In doing so, the Latvian government pays paramount importance to ensuring that all counterterrorism measures taken comply with IHRL. The Latvian

¹⁵⁵ *Ibid.*

¹⁵⁶ CoE, *supra* note 133.

¹⁵⁷ Latvijas Republikas Satversme (The Constitution of the Republic of Latvia) (15 February 1922). Available on: <https://likumi.lv/ta/en/id/57980-the-constitution-of-the-republic-of-latvia>. Accessed 13 March 2021.

Article 100. Everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express his or her views. Censorship is prohibited.

¹⁵⁸ Krimināllikums (Criminal Law)(17 June 1998). Available (<https://likumi.lv/ta/id/88966-kriminallikums>). Accessed 13 March 20.

legislation does not have a specific legal act on suppression of terrorism, therefore general the regulation established by the Criminal Law and the Criminal Procedural Law legislation applies. Latvia considers terrorism in all forms of its forms and manifestation a threat to the interests of people, democracy and state function. Therefore, Latvian Criminal Law contains specific Chapter IX¹ devoted to penalisation of all forms of terrorism. To prosecute a person under any Section of this Chapter, the intent of the offender to compel the State or an international organisation to comply with the requests of terrorists must be established. In addition to penalisation of violent terrorism, the Chapter penalises the financing of terrorism, the establishment of or participation in a terrorist group, training and recruiting for terrorist offences, travel for terrorist purposes and incitement of terrorism. Moreover, considering that each preparatory offence to terrorism is established as a severe offence, separate they can be prosecuted even if no violent terrorist attack is committed.

Section 79⁶ of Chapter IX¹ of Latvian Criminal Law¹⁵⁹ establishes the criminal liability for incitement to commit terrorism as a severe offence. The wording of this Section particularly stipulates that a person shall be prosecuted under this Section only if the alleged incitement to commit terrorism is committed publicly. Important to emphasise that the Criminal Law does not contain a definition of “public incitement”, however, many provisions of the Criminal Law establish the liability for incitement or provocation to commit other severe crimes such as genocide, aggressive war, praise a war. In other sections of the Criminal Law, “incitement” is defined as the affection of a person’s consciousness, will, or behaviour to force a person to commit an offence. Noteworthy, the provisions of the Criminal Law particularly emphasise that the incitement to terrorism must be committed publicly, i.e. the message shall be publicly available, in a manner understood by the broader public – it means the incitement shall be expressed in the presence of other persons or in a manner easily accessible to other persons. Thus, to commit an offence under this Section, a message containing the incitement has to be intentionally made available to the wider public through mass media, the internet, leaflets or a particular public speech.

Regarding the dissemination of the message publicly inciting the commission of terrorism through Mass Media, the scope of the particular Section of the Criminal Law must be read in conjunction with the provisions of Section 7 of the “Law on Press and other Mass Medias”.¹⁶⁰ In

¹⁵⁹ *Ibid.*, Section 79.⁶ Justification of Terrorism, Invitation (incitement) to Terrorism and Terrorism Threats

(1) For the public glorification or justification of terrorism, or public invitation (incitement) to terrorism, or distribution of material containing glorification or justification of terrorism, or invitation (incitement) to terrorism, the applicable punishment is the deprivation of liberty for a period of up to five years or temporary deprivation of liberty, or community service, or a fine, with probationary supervision for a period of up to three years.

(2) For threats to pursue terrorism, if there are grounds to beliefs that it may be committed, the applicable punishment is the deprivation of liberty for a period of up to eight years, with probationary supervision for a period of up to three years.

¹⁶⁰ Likums par presi un citiem masu informācijas līdzekļiem (Law on Press and other Mass Medias Para) (20 December 1990). Available: <https://likumi.lv/ta/id/64879-par-presi-un-citiem-masu-informacijas-lidzekliem>. Accessed 14 March 2021.

Paragraph 1 Section 7 of “It is prohibited to publish the information that contains the State Secret or other information access to which is restricted in accordance with law, incite to violence or to overthrow by violent means the existing government, to praise a war, atrocities, the national, racial or religious supremacy or intolerance, in other manner instigate to commit a crime”.

accordance with Section 2 of the law, it shall also apply to all registered in accordance with this law internet sources. Moreover, the meaning of “public incitement to commit terrorism” regarding public speeches, Section 79⁶ of the Criminal Law, must also be read in conjunction with Paragraph 2 of Section 10 of the “Law on Gathering, Marches and Manifestations”.¹⁶¹ This Section sets out the prohibition during any gathering, march or manifestation of inciting persons to disobey the law, to propagate the violence, national, or racial hatred, (...) the prior committed offence or incite a person to commit new offences penalised by the Criminal Law.

The wording of Section 79⁶ does not specify the penalisation of a direct or an indirect incitement, and therefore, the indirect incitement may also be prosecuted under Section 79⁶, if there are evidences showing the intent to terrorism. However, the requirement to establish particular intent, beyond doubts, is an important element to prosecute a person under this section. First, the particular intent of the offender must be established, i.e. the person was intentionally disseminating information to provoke other persons to commit a terrorist offence. However, the safeguard mechanism provided by CECPT, requesting that the incitement shall increase the risk that terrorism might be committed, is not established by the Latvian Criminal Law, thus excluding criminal liability only in cases, if a person is not mentally capable. Nevertheless, the terrorism threat level in Latvia being estimated as low, no person has ever been prosecuted by the Latvian courts for commission of the indirect incitement. However, Section 79⁶ is considered to be a severe crime, therefore Paragraph 3 of Section 15 shall apply, establishing that the instigator shall be prosecuted, even if the commission of a criminal offence is not completed, for an attempt to commit an offence. Thus, the Criminal Law provides for a possibility to take all preventive measures, even if no actual incitement of terrorism is committed to secure that Latvian territory or especially the banking sector is not used to launch terrorist offence against other states.

In applying preventive measures to ensure their conformity to the human rights standards, it is important to comply with the procedure determined by procedural law. The procedural framework of the struggle against terrorism is established by four laws setting out the procedures in cases of prevention of terrorism: (1) general regulation is established by the Law on Criminal Procedures, (2) the Law on the Prevention of Money Laundering and Terrorism Financing, (3) the Investigatory Operations Law and (4) the Law on Special Protection of Persons. At the same time there are no specific courts devoted only to the suppression of terrorism in Latvia, however investigatory authority in prevention of terrorism in Latvia is the Security Police. Moreover, the Security Police is responsible for collecting, acquiring and analysing information concerning threats of terrorist attacks and also for the prevention of possible terrorist attacks. Considering the great danger posed by terrorist attacks to the safety of the whole community, the Constitutional Defence Bureau is also involved in organising and coordinating the intelligence (counter-intelligence) activities. The Constitutional Defence Bureau receives, compiles, stores, saves, analyses and utilises information related to state security, defence and economic sovereignty to

¹⁶¹ *Ibid.*, Paragraph 2 Section 10.

(2) During the above-mentioned events, it is forbidden to attack the independence of the Republic of Latvia, propose forcible amending of the political system of Latvia, to incite the disobedience of laws, propagate violence, national and racial hatred, open Nazism, fascism, or communism ideology, to propagate war, or to praise or suggest committing criminal offences and other law infringements.

secure the constitutional system of the state, State independence and territorial inviolability against external and internal threats including, *inter alia*, national or international terrorism.

Latvia has a diligent attitude towards its international obligations, including the suppression of terrorism. Therefore, all international law obligations are implemented by national law. This applies to international law regarding the suppression of terrorism, as well as implementation of IHRL. The terrorism threat level in Latvia remains low, however it is of paramount importance to prevent the Latvian banking sector being involved in the financing of terrorism.

5.3. The Russian Federation

The Russian Federation has ratified CECPT on prevention of terrorism on 19th May 2006¹⁶², making two declarations reservation:

The Russian Federation assumes that the provisions of Article 21 of the Convention shall be applied in such a way as to ensure inevitable liability for the commission of offences falling within the purview of the Convention, without prejudice to the effectiveness of international co-operation in extradition and legal assistance matters.

The Russian Federation declares that it shall have jurisdiction over the offences established in accordance with Articles 5 to 7 and 9 of the Convention in the cases envisaged in Article 14, paragraphs 1 and 2, of the Convention.¹⁶³

The Russian Federation has a long experience in struggling against terrorism. Therefore, the Russian Federation devotes paramount importance not only to minimise negative consequences of terrorist attacks but also to ensure the prevention and prohibition of ideological and propagandistic methods to disseminate terroristic beliefs.

Article 29 of the Constitution of the Russian Federation clearly stipulates that everyone has the right of freedom of speech as long, as it is not considered an instigation of racial and national hatred.¹⁶⁴ Moreover, Article 17 of the Constitution contains a clause establishing that people living in the Russian Federation enjoy all universal human rights¹⁶⁵, and those rights

¹⁶² CoE, *supra* note 133.

¹⁶³ The Council of Europe. Reservations and Declarations for Treaty No.196 - Council of Europe Convention on the Prevention of Terrorism, Available on https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196/declarations?p_auth=4v7dDhwx. Accessed March 13, 2021.

¹⁶⁴ The Russian Federation. The Constitution of the Russian Federation (12 December 1993) Available on: <http://www.constitution.ru/en/10003000-01.htm>. Accessed 26 February 2021, Article 29 of Constitution:

1. Everyone shall be guaranteed the freedom of ideas and speech.
2. The propaganda or agitation instigating social, racial, national or religious hatred and strife shall not be allowed. The propaganda of social, racial, national, religious or linguistic supremacy shall be banned.
3. No one may be forced to express his views and convictions or to reject them.
4. Everyone shall have the right to freely look for, receive, transmit, produce and distribute information by any legal way. The list of data comprising state secrets shall be determined by a federal law.
5. The freedom of mass communication shall be guaranteed. Censorship shall be banned.

¹⁶⁵ *Ibid.*, Paragraph 1 of Article 17

In the Russian Federation recognition and guarantees shall be provided for the human rights and freedoms according to the universally recognized principles and norms of international law and according to the present Constitution.

might be limited only by law¹⁶⁶. Therefore, the restrictions established by the laws of the Russian Federation limit access to information containing incitement to mass unrest, extremist activity, terrorism or participation in public events held in violation of regulations applicable to them shall be considered in line with the provisions of the Constitution. To comprehend the scope of the limitations, the provisions of the Criminal Code of regarding the suppression of incitement of terrorism must be analysed. The Criminal Code defines terrorist acts and assistance to terrorist activities, including the incitement and justification of terrorism. Section 205 of the Code penalises terrorism (a terroristic act)¹⁶⁷, and Section 205.2 of the Code penalises the incitement to terrorism also though the internet¹⁶⁸.

To evaluate these provisions of the Criminal Code in the context of other legislation of the Russian Federation, it is important to analyse the regulation of 2006 and Federal Law on Countering Terrorism as amended in 2020¹⁶⁹. This law establishes the legal definition of counterterrorism measures, including actions to prevent terrorist activities. The law defines that counterterrorism operations shall be launched against terrorist activities and offences of direct incitement of terrorism and dissemination of information that glorify and justify terrorist offences. Thus, the law penalises the indirect incitement of terrorism. Moreover, the law permits the armed forces of the Russian Federation engaged in counterterrorism operations to eliminate threats to the stability of the Russian Federation, including operations beyond the territory of the Russian Federation. Moreover, the law establishes a specific legal regime for counterterrorism operations that allows temporary removal of any person from a particular territory and establishes complete control over the communications in a particular territory. In 2002 the Russian Federation adopted a federal law “On Counteracting Extremist Activity”, which was further amended to address new challenges posed by violent extremism and radicalisation. This law provides for an expansion of the definition of extremism, to include “hatred or hostility towards

¹⁶⁶ *Ibid.*, Paragraph 3 of Article 55:

The human rights and freedoms may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.

¹⁶⁷ The Russian Federation, the Criminal Code 1996 13 June 1996, Available : <https://legalacts.ru/kodeks/UK-RF/>. (only in Russian) Accessed 26 February 2021.

¹⁶⁸ *Ibid.*, Article 205.2. (unofficial translation) Public Incitement for Committing of Terrorist Activity or Public Justification of Terrorism

1. Public incitements to commit of terrorist offence or public justification of terrorism – the applicable penalty us of up to five hundred thousand roubles or in the amount of a wage or other income of the convicted person for the period up to three years, or with compulsory labour for a term of up to four years, or deprivation of liberty for a term of two to five years.

2. The same offences committed through the mass media - the applicable penalty is a fine of three hundred thousand roubles to one million roubles or in the amount of a wage or other income of the convicted person for the period of three to five years, or with compulsory labour for a term of up to five years with deprivation of the right to hold specific offices or engage in specified activities for a term of up to five years or without such, or deprivation of liberty for a term up to seven years with prohibition from certain offices/positions or from pursuance of a certain activity for a term up to five years.

Note for application. In the present article "the public justification of terrorism" means a public statement on the recognition of the ideology or practices of terrorism as correct and shall be supported and followed.

¹⁶⁹ The Russian Federation, Russian Federation Federal Law "On Countering Terrorism" No. 35, (March 2006, as of 18 March, 2020) available: <https://www.legislationline.org/topics/country/7/topic/5> . Accessed 26 February 2021.

any social group” with no definition of “social group” and new regulations on the distribution of the “extremist materials” that shall be included in a “Federal List”.¹⁷⁰

To strengthen the coherence of the latest amendments to the “Federal Law on Countering Terrorism” and the provisions of the Criminal Code with the Law on Mass Media, the amendments to the latter were adopted concerning journalists has been adopted. These amendments enable law enforcement authorities to prevent the leak of information regarding counterterrorism operations. These amendments regulate how journalists can obtain and collect information regarding counterterrorism operations. The amendments establish the prohibition to distribute any information regarding operational tactic or other information that might endanger the population. Furthermore, under amended law, new powers are granted to the Federal Security Service.¹⁷¹ As a penalty of the violation of the counterterrorism regulation, the Criminal Code stipulates that the property of persons shall be confiscated if they are convicted of terrorism-related crimes. This Section also establishes that the confiscation might also cover property or assets of persons that are not directly linked to terrorism-related offence.¹⁷² Furthermore, The Federal Law on Countering Terrorism enables the Supreme Court of the Russian Federation to recognise any organisation as a terroristic organisation and thus prohibit its activities on the territory of the Russian Federation.¹⁷³ Alongside the measures to eliminate terrorism threats, the Russian Federation also has taken measures to prevent radicalisation and violent extremism.

Evaluating the measures adopted by the Russian Federation to prevent radicalisation and violent extremism, the Special Rapporteurs of the United Nations Human Rights Council on the promotion and protection of the right to freedom of opinion and expression in 2018 has reported that measures taken by the Russian Federation do not correspond with the standards of IHRL. The adopted legislation provides the legal possibility of significant interference in the private life of citizens. Particular concerns were raised regarding the adoption and possible further implications of “Foreign Agent Law”¹⁷⁴. Many human rights observers have expressed concerns that restrictions imposed by the law excessively limit freedom of the press and thus freedom of expression in the Russian Federation.¹⁷⁵ The amendments adopted by the Russian Federation in 2017 to Law about Mass Media defining the restrictions to information inciting for mass unrest, extremist activities or participation in the public events considered by Russian Federation authorities as undesirable.¹⁷⁶ Moreover, the law contains provisions establishing illegal the access to information containing in particular incitement to mass unrest or extremist activity, and participation in the public events held in violation of the established order may be restricted. The

¹⁷⁰ Russian Federation. *Federal Law No. 114 FZ on combating of extremist activity* (10 July 2002). Available on: <https://www.legislationline.org/topics/country/7/topic/5>. Accessed 26 February 2021.

¹⁷¹ The Russian Federation, Law of December 27, 1991 No. 2124-1, About mass media. Available on <https://cis-legislation.com/document.fwx?rgn=1618>, Accessed 26 February 2021.

¹⁷² Criminal Code, *supra* note 167, Chapter 15.1. Confiscation of Property.

¹⁷³ Criminal Code, *supra* note 168.

¹⁷⁴ Human Rights Council, OL RUS 2/2018 of 5 February 2028. Available on:

<https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL.RUS.05.02.2018.pdf>. Accessed 26 February 2021.

¹⁷⁵ Human Rights Watch. Online and On All Fronts Russia’s Assault on Freedom of Expression, available: <https://www.hrw.org/report/2017/07/18/online-and-all-fronts/russias-assault-freedom-expression>. Accessed 26 February 2021.

¹⁷⁶ Law about Mass Media, *supra* note 171, Paragraph 9 of Section 4.

necessity to establish such restrictions is decided by Prosecutor- General and not by Court. However, the Russian Federation has rejected all accusations.

The Russian Federation has emphasised that all legislative measures taken by it are in line with IHRL, and new challenges require the adoption of new standards that correspond to the threat posed.¹⁷⁷ Therefore the Russian Federation considers that the restrictions of access to information containing incitement of mass unrest, extremist activity or participation in public events held in violation of the established order are measures intended to detect and prevent the activity of an extremist, terrorist or separatist nature. The Russian Federation considers that violent extremism and interference of a foreign state in its domestic affairs poses an imminent danger of accelerating threats terrorist attacks.¹⁷⁸ Furthermore, the Russian Federation has adopted the Strategy to Combat Extremism in the Russian Federation by 2025¹⁷⁹. To enact this Strategy, the Russian Federation has also planned to implement measures in the field of education, culture, mass media, NGOs and civil society to reduce the risk of violent terrorism and extremism.

The Russian Federation has applied a rather severe measure to the suppression of terrorism, applying measures that have raised doubts whether the Russian Federation complies with its obligations under international law. Moreover, in 2021 criticism has been expressed by international organisations towards the Russian Federation for severe violations of human rights in a systematic and a widespread manner.¹⁸⁰ Moreover, the new form of terrorism – radicalisation and extremism — are unresolved issues in the Russian Federation.

5.4. Sweden

Sweden has ratified CECPT on 30 August 2010.¹⁸¹ With the ratification, Sweden has submitted a reservation regarding the refusal to extradite persons to countries that do not meet democratic standards.¹⁸² With this reservation, Sweden has confirmed its belief that the actions taken by the government to suppress terrorism cannot violate the obligations of the government under IHRL. Moreover, as it is stated by a reservation, the measures to implementation and application of CECPT cannot be justifications for suppression of the political opposition and thus, reaffirming its strong commitment to the prevention of terrorism, it refrains from extradition of a person if a requesting country does not meet democratic standards.

¹⁷⁷ Permanent Mission of the Russian Federation to the United Nations Office and other International Organizations in Geneva, HRC/NONE/2018/55. Available on: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=33999>. Accessed 26 February 2021.

¹⁷⁸ Ibid.

¹⁷⁹ The Russian Federation, *The Russian Federation, Russian National Security Strategy*, 2015. Available on: <http://www.ieee.es/Galerias/fichero/OtrasPublicaciones/Internacional/2016/Russian-National-Security-Strategy-31Dec2015.pdf>. Accessed 26 February 2021.

¹⁸⁰ Council Decision (CFSP) 2021/372, *supra* note 136.

¹⁸¹ CoE, *supra* note 133.

¹⁸² Council of Europe. Treaty section. Reservations and Declarations for Treaty No.196 - Council of Europe Convention on the Prevention of Terrorism. Available on: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196/declarations?p_auth=JopAqkyD&coeconventions_WAR_coeconventionsportlet_enVigueur=false&coeconventions_WAR_coeconventionsportlet_codeNature=2&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconventionsportlet_codePays=SWE. Accessed 11 March 2021.

The Kingdom of Sweden has not a single constitution; Sweden has four fundamental laws:

1. The Instrument of Government;
2. The Act of Succession;
3. The Freedom of the Press Act;
4. The Fundamental Law on Freedom of Expression.¹⁸³

Sweden pays paramount importance to respecting the rule of law and freedom of expression. The fundamental laws give the constitutional framework for national laws regarding the penalisation of a particular offence. For the violation of freedom of expression, the principle of double criminality applies through Penal Law and the Fundamental Law on Freedom of Expression.¹⁸⁴ In accordance with Article 21 of the Instrument of Government

The limitations referred to in Article 20 may be imposed only to satisfy a purpose acceptable in a democratic society. The limitation must never go beyond what is necessary with regard to the purpose which occasioned it, nor may it be carried so far as to constitute a threat to the free shaping of opinion as one of the fundamentals of democracy. No limitation may be imposed solely on grounds of a political, religious, cultural or other such opinion.¹⁸⁵

Moreover, the Fundamental Law on Freedom of Expression Article 1 encapsulates the aim and purpose of this legal act:

Every Swedish citizen is guaranteed the right under this Fundamental Law, *vis-à-vis* the public institutions, publicly to express his or her thoughts, opinions and sentiments, and in general to communicate information on any subject whatsoever on sound radio, television and certain similar transmissions, through public playback of material from a database, and in films, video recordings, sound recordings and other technical recordings.¹⁸⁶

Sweden, in its Fundamental Law, has expressed its understanding that freedom of expression is not absolute and the state can impose certain restrictions to ensure state security and public health. However, considering deeply embedded traditions of freedom of expression of the press, the penalisation of incitement to terrorism shall be evaluated in the context of the provisions mentioned in the Freedom of the Press Act.¹⁸⁷ Important to notice that Chapter IV Article 3 of the

¹⁸³ Sweden, *The Constitution of the Kingdom of Sweden*. Available on: <https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf>. Accessed 11 March 2021.

¹⁸⁴ *Ibid.*, *Freedom of the Press Act*, Liability rules, para 4 Section 7 and Fundamental Law on Freedom of Expression para 1 of Section 5.

¹⁸⁵ *Ibid.*, *The Instrument of Government Article 21*: The limitations referred to in Article 20 may be imposed only to satisfy a purpose acceptable in a democratic society. The limitation must never go beyond what is necessary with regard to the purpose which occasioned it, nor may it be carried so far as to constitute a threat to the free shaping of opinion as one of the fundamentals of democracy. No limitation may be imposed solely on grounds of a political, religious, cultural or other such opinion.

¹⁸⁶ *Ibid.*, *The Fundamental Law on Freedom of Expression*, Paragraph 1 of Article 1:

Every Swedish citizen is guaranteed the right under this Fundamental Law, *vis-à-vis* the public institutions, publicly to express his or her thoughts, opinions and sentiments, and in general to communicate information on any subject whatsoever on sound radio, television and certain similar transmissions, through public playback of material from a database, and in films, video recordings, sound recordings and other technical recordings.

¹⁸⁷ *Ibid.*, *The Freedom of the Press Act*, Article 2: No written matter shall be scrutinised prior to printing, nor shall it be permitted to prohibit the printing thereof. Nor shall it be permitted for a public authority or other public body to

Swedish Freedom of the Press Act stipulates the restrictions of publications, however, none of them explicitly mention terrorism.¹⁸⁸

As the suppression of terrorism creates significant concerns regarding the respect for human rights, Sweden has adopted the Act on Criminal Responsibility for Public Provocation, Recruitment and Training concerning Terrorist Offences and other Particularly Serious Crime in 2010 and amended it in 2016¹⁸⁹. This Law establishes the list of offences that might be criminalised by Swedish Criminal Law as terrorist offences.¹⁹⁰ However, this law also determines that only violent actions can be considered as terrorist offences, excluding non-violent actions that seriously intimidate population. Taking into consideration the increase of terrorist-related activities, including the propaganda and financing of terrorism, Sweden has amended the 2016 Act on “Criminal Responsibility for the Financing of Particularly Serious Crime”¹⁹¹ establishing the financing of terrorism as a separate, severe offence. These amendments to Sweden to criminalise the incitement of the financing of terrorism. However, considering the low level of terrorism threat in Sweden, the Swedish Code of Judicial Procedure¹⁹² does not contain specific regulation regarding the suppression of terrorism, therefore all alleged terrorism suspects are subject to equal criminal proceedings as other suspects.

As it is obvious from the Swedish legislation regarding the suppression of terrorism, it devotes paramount importance to due criminal proceedings, to ensure the respect of human rights of persons suspected of the commission of terrorism. To ensure the respect for human rights, Sweden emphasises the importance of strengthening international criminal cooperation in criminal matters through the conclusion of international treaties (multilateral and bilateral) on cooperation in criminal matters and extradition. An important treaty on extradition in the context

take any action not authorised under this Act to prevent the printing or publication of written matter, or its dissemination among the general public, on grounds of its content.

¹⁸⁸ Ibid, *The Freedom of the Press Act*, Article 3 “If a person communicates information under Chapter 1, Article 1, paragraph three, or if, without being responsible under the provisions of Chapter 8, he or she contributes to material intended for insertion in printed matter, as author or originator or as editor, thereby rendering himself or herself guilty of:

1. high treason, espionage, gross espionage, gross unauthorised trafficking in secret information, insurrection, treason or betrayal of country, or any attempt, preparation or conspiracy to commit such an offence;
2. wrongful release of an official document to which the public does not have access, or release of such a document in contravention of a restriction imposed by a public authority at the time of its release, where the act is deliberate;
3. deliberate disregard of a duty of confidentiality, in cases specified in a special act of law; provisions of law concerning liability for such an offence apply”.

¹⁸⁹ Sweden, *Act on Criminal Responsibility for Public Provocation, Recruitment and Training concerning Terrorist Offences and other Particularly Serious Crime (2010:299)*. Available on:

<https://www.government.se/498ee7/contentassets/f0c331a80c244813af517a0661b8c163/act-on-criminal-responsibility-for-public-provocation-recruitment-and-training-concerning-terrorist-offences-and-other-particularly-serious-crime-2010299> . Accessed 11 March 2021.

¹⁹⁰ Sweden, *The Act on Criminal Responsibility for Terrorist Offences (2003:148)*. Available on:

<https://www.government.se/498ee7/contentassets/f84107eae6154ce19e65d64151a1b25f/act-on-criminal-responsibility-for-terrorist-offences-2003148>. Accessed 11 March 2021.

¹⁹¹ Sweden, *Act on Criminal Responsibility for the Financing of Particularly Serious Crime in some cases (2002:444)*. Available on:

https://www.legislationline.org/download/id/7961/file/Sweden_Act_criminal_responsibility_financing_particularly_serious_crime_2002_am2016.pdf. Accessed 11 March 2021.

¹⁹² Sweden, *Code of Judicial Procedure (1942:740)*. Available on: <http://data.riksdagen.se/dokument/GMB465>. Accessed 11 March 2021.

of the CoE must be mentioned the 1957 European Convention on Extradition and two Additional Protocols thereto. In addition to that, the legislation of Sweden also allows extradition to states with which bilateral agreement on extradition is concluded.¹⁹³ However, in the latter case, it is of paramount importance to ensure, that human rights of person are not endangered by extradition. The national authority in charge of the identification and monitoring of those who are suspected of being involved in national or international terrorism is the Swedish Security Service.

Sweden is a state that pays paramount importance to the observation of human rights, especially freedom of expression, taking measures to prevent incitement to terrorism. The importance what Sweden devotes to freedom of expression can be revealed through the important role that this freedom has in the Constitution of Sweden. The terrorism threat level in Sweden, similar to Latvia, is considered low.

6. CONCLUSION

CECPT is the only international (regional) treaty law instrument devoted to the prevention of the incitement of terrorism. However, it was concluded 16 years ago. The provisions of CECPT contain safeguards protecting freedom of expression against the unjustified interference of state authorities and consolidating state obligations to respect their international law obligations in their efforts to prevent the incitement to terrorism. However, in the years following the entry into force of CECPT in 2007, the paradigm of the origin of threats of terrorism has changed.

The paradigm of terrorist threats has shifted from terrorist activities carried out by organised terroristic (criminal) groups to those masterminded and carried out by a single person. This de-centralised terrorism¹⁹⁴ requires a different approach from law enforcement authorities in the prevention of incitement of terrorism. The new form is closely related to radicalisation and violent extremism. This new strategy shall be related to the prevention of radicalisation of a person that are not directly involved in a terroristic organisation, i.e., terrorists acting alone. Regardless of that, CECPT contains the necessary equilibrium of measures to prevent terrorism and protect freedom of expression.

All four countries are the Member States of CECPT and they also have ratified the ICCPR and the ECHR, thus have undertaken to respect the legal obligations of these international public law instruments, including, *inter alia*, judgements of the ECtHR.¹⁹⁵ The terrorist threat level in each country is different, nevertheless, they have equal obligations under IHRL. Therefore, having analysed the legislation of mentioned four countries, it is obvious that in countries with a higher level of respect for freedom of expression, the terrorism threat level is not as high as in countries where more severe measures to freedom of expression are applied.

¹⁹³ Sweden, Act (2003:1156) on surrender from Sweden according to the European arrest warrant. Available on: https://www.imolin.org/doc/amlid/Sweden_Act%20on%20Surrender%20European%20Arrest%20Warrant%202003_1156.pdf. Accessed 11 March 2021.

¹⁹⁴ Joel Brinkley, ISLAMIC TERROR: “Decentralized, Franchised, Global”, World Affairs ,2013, 176 (2)pp. 43-55, Stable URL: <https://www.jstor.org/stable/43554779>. Accessed 14 March 2021.

¹⁹⁵ ECHR, *Supra* note 85, Article 46.

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