

## Medeni ve Siyasi Haklara İlişkin Uluslararası Sözleşme'nin (ICCPR) 19. Maddesi Kapsamında İfade Özgürlüğünün Kapsamı ve Terörizme Teşvik Bağlamında Sınırları

### The Scope of Freedom of Expression under Article 19 of the ICCPR and Its Limits Regarding Incitement to Terrorism

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#### Özet

Bu araştırma, Avrupa İnsan Hakları Mahkemesi (AİHM), İnsan Hakları Komitesi ve diğer bölgesel insan hakları mahkemeleri tarafından verilen kararlara göre, terörizmi teşvikle mücadele alanında ifade özgürlüğü ile ulusal güvenlik arasındaki karmaşık etkileşimi incelemektedir. AİHM kararlarını ve uluslararası insan hakları standartlarını inceleyen bu çalışma, temel hakları korurken kısırtmayı ele almanın doğasında olan karmaşık hukuki, etik ve politika hususlarını ele alıyor. Temel bulgular, terörizmi kısırtmanın oluşturduğu riskleri azaltırken ifade özgürlüğünü korumak için gereken hassas dengenin altını çiziyor. AİHM tarafından oluşturulan niyet, içerik, bağlam ve potansiyel zararın değerlendirilmesi gibi hukuki standartlar, izin verilen ifadenin sınırlarının belirlenmesine yönelik bir çerçeve sunmaktadır. Araştırma, kısırtma durumlarında ifade özgürlüğüne yönelik açık yasal çerçevelere, haklı sınırlamalara ve orantılı kısıtlamalara duyulan ihtiyacı vurguluyor. Ayrıca çalışma, güvenlik zorunluluklarını sivil özgürlüklerle uzlaştırma konusunda paydaşların karşılaştığı etik ikilemleri vurguluyor ve terörle mücadele amacıyla ifade özgürlüğünün kısıtlanmasının doğasında olan etik hususların altını çiziyor. Araştırma, politikaların sonuçlarını ve uluslararası insan hakları belgelerini inceleyerek politika yapıcılara, hukukçulara ve insan hakları savunucularına, insan hakları ilkelerini korurken terörle mücadelenin karmaşıklıklarını aşma konusunda içgörüler sunuyor. Temelde bu araştırma, terörizme teşvikle ilgili hukuki, etik ve politika boyutlarının incelikli bir şekilde anlaşılmasına katkıda bulunmakta ve ifade özgürlüğünün korunması ile insani açıdan ulusal güvenlik sorunlarının ele alınması arasında bir denge kurmaya çalışan paydaşlar için değerli bir kaynak sağlamaktadır.

**Anahtar Kelimeler:** Teröre Teşvik, Terörü Yüceltme, İfade Özgürlüğü ve İfade Özgürlüğüne Yönelik Sınırlamalar

#### Abstract

Since its first ever judgment *Lawless v. Ireland* (no. 1) the European Court of Human Rights (ECtHR) has had occasion to adjudicate a large number of cases concerning terrorism. Combating terrorism remains one of the top priorities of the European union. The approach towards the online content possibly connected to terrorist propaganda has become stricter. Modern terrorism is global and decentralized while the social media and the social platforms such as Facebook, X, You Tube, TikTok are abused for terrorist propaganda. The aim of this paper is to observe some of the major human rights implications of combating incitement to and glorification of terrorism and to provide some elementary tools for researchers and students to use in the development of policy and practice in this field. The paper will provide a brief overview of how human rights (particularly freedom of expression) work in practice, and under what specific circumstances may be lawfully restricted. It will then outline the major international instruments concerned with the issue of incitement to terrorism, including the international framework governing freedom of expression. Considering the international human rights standards, decisions taken by European Court of Human Rights as a basic purpose of this article. Moreover, decisions of the UN Human Rights Committee (HRC), the European Court (ECtHR) and Commission of Human Rights (ECommHR) as well as decisions from outside the European Convention system such as those of the US Supreme Court. This paper will try to outline basic principles that apply to the restriction of freedom of expression in the context of combating direct incitement or glorification of terrorism.

**Keywords:** Incitement to Terrorism, Glorification to Terrorism, Freedom of Expression and Limitations on Freedom of Expression.

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## 1. INTRODUCTION

Since its landmark judgment in *Lawless v. Ireland (no. 1)*, the European Court of Human Rights (ECtHR) has adjudicated numerous cases concerning terrorism and has played a central role in shaping human rights standards in this field. As combating terrorism remains a key priority of the European Union (EU), regulatory approaches to online content associated with terrorist propaganda have become increasingly stringent, particularly in response to the growing influence of digital platforms.

The intersection between freedom of expression and national security presents complex legal and ethical challenges, especially in cases involving incitement to terrorism and the glorification of extremist acts. This research examines the human rights implications of measures taken to combat incitement to terrorism, with a particular focus on ECtHR jurisprudence and its relationship with Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

By analyzing ECtHR case law and relevant international legal frameworks, this study seeks to clarify the principles governing restrictions on freedom of expression in the context of counterterrorism. It further explores how states can strike an appropriate balance between protecting civil liberties and ensuring national security, considering legal precedents, ethical concerns, and policy implications.

Moreover, modern terrorism has become increasingly globalized and decentralized, with social media platforms such as Facebook, X, YouTube, and TikTok frequently exploited for terrorist propaganda. In this context, the findings of this research aim to provide insights for policymakers, legal practitioners, and human rights scholars on developing counterterrorism strategies that comply with international human rights standards.

## 2. LITERATURE REVIEW

for the examination of Human Rights Committee, European Court of Human Rights American Court and the African Court on Human and Peoples' Rights decisions based on requirements of Article 19 of the ICCPR concerning incitement to terrorism encompasses a range of scholarly works, legal texts, and international documents. Key themes and sources in the literature review include:

**Freedom of Expression and Terrorism:** Scholars like have explored the complex relationship between freedom of expression and the criminalization of incitement to terrorism (Martin Scheinin, 2011). They discuss the challenges of balancing the right to free speech with the need to prevent terrorist acts (Ronen, 2009).

**Human Rights Framework:** The literature review delves into the human rights framework established by international instruments such as the ICCPR and regional conventions ICCPR, 1976, art 18, 19, 20). Authors like analyze how these instruments provide a legal basis for restricting freedom of expression (G. Tunkin, 1974; K. Tedin, 1972).

**ECtHR Jurisprudence:** Studies by examine the decisions of the European Court of Human Rights (ECtHR) concerning incitement to terrorism. These works analyze the principles and precedents set by the ECtHR in cases involving the restriction of freedom of speech in the context of combating terrorism (*Leroy v. France, no. 36109/03, European Court of Human Rights (2008.)*).

Legal scholars have conducted comparative analyses of how different jurisdictions approach the criminalization of incitement to terrorism. They assess the similarities and differences in legal standards and practices, shedding light on the challenges of harmonizing national laws with international human rights norms (European Union Agency for Fundamental Rights, 2017; Human Rights Committee, 2005; Council of Europe, 2005).

This study also considers the policy implications of restricting freedom of expression in cases of incitement to terrorism. Authors like discuss the significance of the right to freedom of speech and expression while addressing the legitimate aims of preventing terrorist acts (*Biancardi v. Italy, 2022;*

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Cumpăna and Mazăre v. Romania, 2003; Leroy v. France, 2008; Otegi Mondragon v. Spain, 2011; Stomakhin v. Russia, 2018; Yavuz and Yaylalı v. Turkey, 2013).

The ECtHR has consistently seized with the challenge of balancing the right to freedom of expression with the imperative of national security. In cases involving incitement to terrorism, the Court has emphasized the need to protect individuals from violence while upholding the principles of freedom of expression. The research highlights the legal standards applied by the HRC, ECtHR and other regional instruments in determining what constitutes incitement to terrorism. These Courts has established criteria such as the intention of the speaker, the content of the speech, the context, and the likelihood of violence or discrimination.

### 3. INCITEMENT TO TERRORISM

“International cooperation in the battle against terrorism has taken on different shapes since its inception in the 1960s” (Ronen, 2009: 3). It began with a wave of international treaties which these treaties criminalized specific acts linked to terrorism and established frameworks for international cooperation in addressing these acts. However, they did not define the term "terrorism" itself or describe its typical characteristics (Tokyo Convention, 1963; Montreal Convention, 1971; Hague Convention, 1970). International efforts to prevent incitement to terrorism are expected to create new conflicts, mainly involving the balance between preventing terrorism and upholding freedoms of speech, association, and religion.

Incitement is the encouragement of another person to commit a crime. Depending on the jurisdiction, some or all types of incitement may be illegal. Where illegal, it is known as an inchoate offense<sup>1</sup>, where harm is intended but may or may not have actually occurred. In it is a category in some national legal systems which may criminalize direct encouragement of acts of violence or praise for proscribed terrorist organizations<sup>2</sup>. In other word it is an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed A/HRC/16/51, 2011).

“Incitement to commit a terrorist act' can be interpreted by reference to these treaty offenses. The 2005 Convention, for example, requires the criminalization of provocation to commit a ‘terrorist offense’, which is defined by reference to the treaties listed in the Convention’s appendix. The appendix lists the major international conventions concerning terrorism-related offenses, which include specific, well-defined conducts that constitute offenses.”(Yael Ronen, 2009: 20.). In addition to ICCPR there are several conventions that have stipulated about Incitement. Such as Convention for the Suppression of Unlawful Seizure of Aircraft art 1<sup>3</sup>, Montreal Convention<sup>4</sup> and International Convention for the Suppression of the Financing of Terrorism.<sup>5</sup>

Incitement to terrorist offenses is considered by some to be an unjustified infringement of free speech rights, further it is argued that general encouragement of terrorism may be a political statement rather than literal encouragement to commit terrorist offenses. However, some advocates of

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<sup>1</sup> An inchoate offense, preliminary crime, inchoate crime or incomplete crime is a crime of preparing for or seeking to commit another crime. The most common example of an inchoate offense is "attempt". "Inchoate offense" has been defined as the following: Conduct deemed criminal without actual harm being done, provided that the harm that would have occurred is one the law tries to prevent.

<sup>2</sup> That organization which currently officially designated as terrorist organizations.

<sup>3</sup> Signed at the Hague on 16 December 1970, 860 UNTS 105, Article 1.

<sup>4</sup> Concluded at Montreal on 23 September 1971, 974 UNTS 177, Article 1.

<sup>5</sup> Adopted in New York on 9 December 1999 UN Doc A/54/49 (vol. I) (1999) 39 ILM 270 (2000) Article 2.

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criminalization believe that it is possible and desirable to criminalize a definition of incitement to terrorism which does not excessively infringe freedom of speech.

Incitement can be understood as a direct call to engage in terrorism, with the intention that this will promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring (United Nations, 2008, pp. 13–14).

“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”(CETS 196: 5(1). Additionally it is stipulated by second paragraph of this article that “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”(CETS, 196: 5(2).

There are various types of Incitement to Terrorism. Here we discuss under two major titles Direct and Indirect Incitement.

### **3.1. DIRECT INCITEMENT**

The term "direct incitement to terrorism" generally refers to explicit and immediate calls or encouragement for individuals or groups to engage in acts of terrorism. This involves direct and clear language that is likely to prompt or induce others to commit terrorist acts. Direct Incitement often goes beyond the realm of abstract advocacy or general ideological support for terrorism and involves specific and immediate exhortations to commit violent acts.

While the concept is often understood intuitively, its legal interpretation can vary across jurisdictions. Different legal systems may have their own criteria for what constitutes direct incitement to terrorism, and these criteria can be influenced by the legal traditions, cultural perspectives, and considerations of each jurisdiction regarding freedom of expression.

International efforts to combat terrorism, such as the “United Nations Global Counter-Terrorism Strategy,”<sup>6</sup> generally call for member states to criminalize incitement to commit terrorist acts. However, the details of how this is defined and prosecuted are left to the discretion of individual states.

It's important to note that legal definitions and interpretations of terms like "direct incitement" can be subject to change, and specific cases and legal precedents can contribute to the evolving understanding of these concepts.

Direct incitement requires the following elements: a) direct and clear language; b) often goes beyond the realm of abstract advocacy; and c) specific and immediate exhortations to commit violent acts.

#### **3.1.1. ONLINE TERRORIST CONTENT INCLUDING INCITEMENT TO TERRORISM**

Manifestations of terrorists’ beliefs and movements are visible online as terrorists use online social media and platforms to magnify impact of their performances or to promote their crimes publicly.

“Terrorist groups persist to exploit a wide array of online service providers, including forums, video streaming and sharing sites, file sharing sites, blogs, messaging and broadcast application, social media sites etc.”(Ramešová, 2020: 126; IOCTA, 2019: 48).

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<sup>6</sup> The strategy is a unique global instrument to enhance national, regional and international efforts to counter terrorism.

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“On 15 March 2017 the EU adopted the Counter-Terrorism directive in order to harmonize legislation on fighting terrorism and to adapt legal norms to specific transnational nature. The Counter-Terrorism directive replaced the Framework Decision 2008 and amended parts of the Decision 2005/671/JHA on sharing information and on the cooperation concerning terrorist offences”(Ramešová, 2020: 1-6). Regarding online social media, the Counter-Terrorism directive aims particularly to address online propaganda (DIRECTIVE (EU) 2017/541: 5 -6), recruitment, and other auxiliary behavior( *ibid*, article 6, 7 – 12.) all of which increase the risk that terrorist offence would be committed(Shamieh, L. and Szenes, Z, 2015: 9).

One major motivation for criminalizing incitement to terrorism is its potential usefulness as an upstream prevention for deadly terror attacks. Some experts even argue that incitement is a “sine qua non”<sup>7</sup> for terrorist attacks (Ronen, 2010, p. 20-26).

### 3.1.2. PUBLIC PROVOCATION TO TERRORISM

‘Public provocation’ means ‘the distribution, or otherwise making available, of a message to the public, intentionally or recklessly to incite a terrorist offence, causes a danger that one or more such offences may be committed.’

The different forms of public provocation offence are unclear, and vague, noting that there are no clear criteria to distinguish lawful forms of expression from illegal ones. It is to be asked if public provocation is consistent with the principle of legality and the requirement of foreseeability, as individuals do not know whether their actions will be considered a crime or not. The rationale for criminalization is that such induces create ‘an environment and psychological climate conducive to criminal activity(Alinak v. Turkey, 2006, para. 27; Kremnitzer & Ghanayim, 2000, pp. 147, 197)

Framework Decision 2008 as the cornerstone of criminal response to counter terrorism has defined a “public provocation to commit a terrorist offence” for the first time as: “the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed”(Council of the European Union, 2008, Art. 3(1)(a)).

After the adoption of the Framework, most of the European Union member states introduced measures criminalizing public provocation to commit a terrorist offence.

In comparison to the Framework Decision 2008 the criminalization of involvement in public provocation to commit a terrorist offence has been extended to inciting Directive (EU) 2017/541, 14 (2). Definition of public provocation to commit a terrorist offence has emphasized the intent that “is punishable as a criminal offence when committed intentionally”(Ramešová, 2020: 132).

Article 5 of the directive introduces the crime of public provocation to commit a terrorist offence. It explicitly covers both offline and online provocation. The offence comprises two material elements and a subjective one: an act of communicating, whether online or offline, a message advocating, directly or indirectly, the commission of terrorist offences; causing an objective danger that an offence will be committed as a result of the act of communication; with the intent to incite the commission of such offences. Notwithstanding the requirement of danger, there is no need for a terrorist crime to be actually prepared or attempted as a result of the provocation (European Parliament & Council of the European Union, 2017, p. 50).

### 3.2. INDIRECT INCITEMENT

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"Indirect incitement to terrorism" generally refers to actions or communications that, while not explicitly urging or instructing individuals to commit terrorist acts, create an environment conducive to, supportive of, or encouraging of terrorism. Unlike direct incitement which involves explicit and immediate calls for terrorist acts, indirect incitement may involve more subtle forms of encouragement, glorification, or support for terrorism.

Indirect incitement can encompass a range of activities, including the dissemination of propaganda, promotion of extremist ideologies, or glorification of terrorist acts through various mediums such as speeches, literature, social media, or other forms of communication. It may contribute to radicalization by fostering an atmosphere that legitimizes or romanticizes violence for political, ideological, or religious purposes.

The legal definitions and interpretations of indirect incitement can vary across jurisdictions, and what constitutes indirect incitement may depend on specific laws and legal frameworks in each country. International efforts to counter terrorism often call for member states to criminalize not only direct but also indirect incitement to terrorism. However, the specific legal provisions and definitions are typically determined at the national level.

It's important to note that the distinction between direct and indirect incitement can sometimes be nuanced, and legal frameworks may evolve to address new challenges posed by online platforms and changing patterns of radicalization.

#### **4. FREEDOM OF EXPRESSION AND INCITEMENT TO TERRORISM**

However, like every right, freedom of expression also has a norm area. As a result of this situation, some expressions are within the scope of freedom of expression. While being evaluated, some of them may be evaluated outside the scope. However, like every right, freedom of expression also has a norm area. As a result of this situation, some expressions may be considered within the scope of freedom of expression, while others may be considered outside the scope (Tanör; Yüzbaşıoğlu, 2006: 159).

European Court of Human Rights jurisprudence illustrates the difficulty of reconciling freedom of expression with the crime of public provocation to terrorism in its various forms. The objective of the fight against terrorism signifies a legitimate restriction on the freedom of expression (Leroy v. France, 2008, paras. 249–254, 270; Perinçek v. Switzerland, 2013, para. 131). Article 10 of the ECHR also permits only restrictions on the freedom of expression that are necessary and proportionate ‘within a democratic society’ and are clearly prescribed by law, which includes their accessibility and foreseeability.

Accordingly, opinions that do not incite violence, by justifying terrorist acts to achieve the objectives of their supporters and cannot be seen as promoting violence by instilling deep and irrational hatred of identified persons, cannot justify any restrictions to freedom of expression (Turkey v. Sürek, 1999, paras. 58–60). “This means that, measures solely based on newspaper articles, or pre-trial detention for making political statements against government policies, are disproportionate and therefore incompatible with the ECHR. On the other hand, the ECtHR has also ruled that criminalizing certain sufficiently specific acts of provocation may be justified and proportionate, taking into account the context of the act. For instance, the publication of a cartoon depicting the destruction of the World Trade Center with the caption ‘We have all dreamt of it ... Hamas did it’. The ECtHR took into account the context, including how soon after the events the publication was, the language used, and the modest penalty imposed” (EU Agency for Fundamental Rights, 2017: 52).

The protection of freedom of expression under international human rights law extends to speech that may be deeply offensive to some (General Comment No.34, 2011, para. 11). At the same time certain forms of expression that cannot genuinely be characterized as terrorist and would not fall within the

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scope of the above definition, may nonetheless be unlawful. In particular, such content may amount to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and should be addressed in line with Articles 20 and 19(3) of the International Covenant on Civil and Political Rights and the standards spelled out in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Human Rights Committee [HRC], 2013, para. 29). |

## 5. CRIMINALIZATION OF INDIRECT INCITEMENT

What is new on the scene is the proliferation of crimes of “indirect incitement,” that is, criminalization of speech which is thought to have some potential to incite criminal action, but which may be less targeted in message or audience and less obviously a proximate cause of actual criminal acts. These laws are often ambiguous on whether the proscribed speech must merely portray terrorism or terrorists—variously or vaguely defined—in a favorable light to an outside observer, or whether it must be specifically intended to spur violent criminal acts and present a real risk of doing so under the circumstances.

Indirect encouragement of terrorism is punishable by up to seven years’ imprisonment. The statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which (a) glorifies the commission or preparation of such acts or offences. (b) a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified (UK Act, 2006, section 3).

The availability of glorification of violence and terrorist propaganda on the Internet (Akdeniz, 2010: 102), and content which may encourage terrorist activities “Abu Hamza trial, the Guardian, 2006). Not only the content of the expression but also its probable consequences had to be considered. Therefore, great emphasis was put on the contextual setting in which the words were uttered.

The scope of indirect incitement(provocation) varies considerably among national legal orders. They include both narrower approaches and broader ones, such as ‘apology for terrorism’ in France. The act of directly provoking acts of terrorism or publicly defending such acts shall be punishable by five years' imprisonment and a fine of €75,000 (French Penal Code, art. 421-2-5).

## 6. GLORIFICATION OF TERRORISM

In the context of the fight against terrorism a troubling trend has been the proscription of the glorification of terrorism, involving statements which may not go so far as to incite or promote the commission of terrorist acts, but nevertheless applaud past acts. While such statements might offend the sensitivities of individual persons and society, particularly the victims of terrorist acts, it is important that vague terms of uncertain scope such as “glorifying” or “promoting” terrorism not be used when restricting expression. Incitement can be understood as a direct call to engage in terrorism, with the intention that this will promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring. In their fight against terrorism and in order to respect freedom of expression, as a general provision(Karan, 2018: 3), States should be careful to differentiate the two notions. The praising or the justification by any means of public expression or dissemination of the offences are punishable(Spain Penal Code 1996, art. 578).

## 7. THE GLORIFICATION TO TERRORISM IS CRIMINALIZED BY CIVILIZED NATION.

In the UK indirect encouragement of terrorism includes a statement that glorifies the commission or preparation of acts of terrorism if members of the public could reasonably be expected to infer that what is being glorified in the statement that should be emulated by them in existing circumstances In

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democratic western societies public provocation and glorification is criminalized by convicting in imprisonment and fines. For instance, Slovenia, (*Criminal Code of Slovenia, 2005, p. 110*) Sweden Act on Criminal Responsibility for Public Provocation, Recruitment and Training concerning Terrorist Offences and other Particularly Serious Crime, Latvia the Parliament of the Republic of Latvia Translation, 2013), UK, Australia, Canada, Argentina, and Spain.

In France, the offence of apology for terrorism covers condoning or inciting terrorism, including the constructive demonstration of acts of terrorism and their perpetrators. The French courts have held that the offence is sufficiently precise to guarantee against the risk of arbitrariness and does not violate the principle of legality of criminal offences. For example, in the case of the French comedian Dieudonné. He was sentenced to two months' imprisonment for apology after posting on social 'I feel like Charlie Coulibaly', in reference to the two terrorist attacks at the Charlie Hebdo magazine offices and the Hyper Cacher supermarket on seven and ninth January 2015. The defense challenged the constitutionality of Article 421-2-5 of the Criminal Code, arguing that it does not define the constituent elements of the offence. The Appeal Court, however, confirmed the decision to sentence the defendant.

UNSC condemned the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts (United Nations Security Council [UNSC], 2005)). Likewise, Council of Europe Convention on Terrorism requires states to criminalize "provocation" or glorification of terrorism (CETS 196, 34, 98; Council of Europe Convention on the Prevention of Terrorism, 2007). Even glorification of terrorism is one of the grounds for deprivation of citizenship or to deportation of aliens in the UK, as in France.<sup>8</sup> As an example in France glorification to terrorism is punishable by up to five years in prison and a fine of up to €75,000. Offenses committed online can lead to seven years in prison and a €100,000 fine.<sup>9</sup>

## **8. ANALYZING THE UNSC RESOLUTION 1624 AND LEGISLATIONS IN THE UK AND FRANCE**

"The preamble of the resolution asks states to repudiate attempts aimed at 'justification or glorification (*apologie*) of terrorist act or incitement of such terrorist act'"(Ben Saul, 2005: 870).

After adoption of the UNSC Resolution 1624, Tony Blair, Prime Minister of the UK, stated that to combat the problem of terrorism, the world must unite in resisting its poisonous propaganda and not merely in condemning the acts of terrorism. He stated that action must be taken against those who give curled reasoning and wretched excuses for acts of terrorism. His statement indicated that the fight against terrorism now included combating the ideology that supported or even promoted it. Resolution 1624 calls on member States to enact laws prohibiting incitement to terrorism but does not include a definition of incitement. This lack of definition is of concern given that the Security Council has also failed to define terrorism itself. At the same time lack of definition and allowing states to unilaterally define the scope of criminal liability might encourage States to excessively restrict freedom of expression.

## **9. CRIMINALIZATION OF INCITEMENT TO TERRORISM**

Commenting on the offence of incitement to terrorism, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recalled that it must be prescribed by law in precise language, including by avoiding reference to vague terms such as 'glorifying' or 'promoting' terrorism. The solution that the Special Rapporteur offered in

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<sup>8</sup> See Opinion of the Commissioner for Human Rights, Alvaro Gil-Robles, on the draft Convention on the Prevention of Terrorism, Strasbourg, February 2, 2005, BCommDH(2005), [26] (Gil Robles notes, "The question is where the boundary lies between indirect incitement to commit terrorist acts and the legitimate voicing of criticism."); [https://www.hrw.org/legacy/test/wr2k7/essays/shrinking/bak/2.htm#\\_ftnref13](https://www.hrw.org/legacy/test/wr2k7/essays/shrinking/bak/2.htm#_ftnref13).

<sup>9</sup> France Penal Code 1 March 1994 article 421-2-5, <https://www.hrw.org/news/2018/05/30/frances-creeping-terrorism-laws-restricting-free-speech>.

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his report on best practices in countering terrorism was to replace references to direct or indirect provocation with the phrase ‘whether or not expressly advocating terrorist offences’<sup>10</sup>

The one who justifies, encourages or finances the terrorist acts is subject to imprisonment for from five to ten years together with a fine Penal Code of Algeria, 2004, art 87 bis 4) criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes” and that such acts “are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them” UNGA Resolution 49/60,1994).

## **10. SIGNIFICANCE OF THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION**

Article 19(1) and 19(2) of ICCPR provides everyone with a right to have opinions without interference and a right to freedom of expression. This right, however, comes with duties and responsibilities and is subject to some restrictions that can be imposed on the ground of respecting reputation of others (for example, preventing defamation) or in the interest of national security, public order, morals or public health, under article 19(3) paragraph (a) and (b) (ICCPR, 1976).

### **10.1. FREEDOM OF EXPRESSION ENSHRINED BY ARTICLE 19 OF THE ICCPR**

#### **10.1.1. FIRST PARAGRAPH (FREEDOM OF OPINION)**

As stated by the Committee of Ministers, “any restrictions to this right will be inconsistent with the nature of a democratic society”(P. Van Dijk and G. Van Hoof, 1990: 413).

“This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion”(Robert Faurisson v. France, 1996).

States must not try to indoctrinate their citizens and should not be allowed to distinguish between individuals holding one opinion or another. Moreover, the promotion of one-sided information by the state may constitute a serious and unacceptable obstacle to the freedom to hold opinions. Under freedom to hold opinions, individuals are also protected against possible negative consequences in cases where particular opinions are attributed to them following previous public expressions. The freedom to hold opinions includes the “negative freedom” of not being compelled to communicate one’s owning opinions (Vogt v. Germany, 1995).

The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1(*Essono Mika Miha v. Equatorial Guinea*, 1994; *Mpaka-Nsusu v. Zaire*, 1986). Any form of effort to coerce the holding or not holding of any opinion is prohibited(*Kang v. Republic of Korea*, 2003). Freedom to express one’s opinion necessarily includes freedom not to express one’s opinion.

#### **10.1.2. SECOND PARAGRAPH (FREEDOM OF EXPRESSION)**

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<sup>10</sup> Netherlands, Act No 268, Dutch Citizenship Act (Rijkswet op het Nederlanderschap), 19 December 1984, Art. 14. According to some observers, using the measure against persons who have not been prosecuted can not only reduce the applicable safeguards but also lead to conflict with other international law obligations and result in impunity, either by removing nationality as the jurisdictional link that would make it possible to prosecute alleged acts of terrorism committed abroad, or by preventing the perpetrator from returning to the country where they may be prosecuted if the deprivation of nationality takes place in absentia.

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Paragraph 2 provides for two components: firstly, freedom to impart information and ideas; secondly, freedom to receive information and ideas. These freedoms must be exercised freely, without interference by public authorities except under the second paragraph requirements and regardless of frontiers.

This paragraph requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20 (Ballantyne, Davidson and McIntyre v. Canada, 1990). It includes political discourse (*Essono Mika Miha v. Equatorial Guinea*, 1994), commentary on one's own (*Anthony Fernando v. Sri Lanka*, 2005) and on public affairs (*Patrick Coleman v. Australia*, 2006), discussion of human rights ("Mr. Vladimir Velichkin v. Belarus", 2005), cultural and artistic expression (*Hak—Chul Shin v. Republic of Korea*, 2004), teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive (*Malcom Ross v. Canada*, 2000), although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art.

## **11. IS FREEDOM OF EXPRESSION AN ABSOLUTE RIGHT**

Freedom of expression is vital to our ability to convey opinions, convictions, and beliefs, and to meaningfully participate in democracy. The state may, however, limit the freedom of expression for certain reasons. International and domestic law empowers the state to impose limitations on freedom of expression in order to advance broad aims such as national security, public order, public health, and public morals. Different cases around the world demonstrate that freedom of expression is vulnerable to unwarranted restrictions (Dr. Richard Carver, 2016: 13-14).

Freedom of expression is not an absolute right and can be subjected to restrictions (ICCPR, 1976, art 19; ECHR, 1953, art. 8, 10; ACHR, 1978, art 13; Arab ICCPR, 1976, art. 19; ECHR, 1953, arts. 8, 10; ACHR, 1978, art. 13; Arab Charter on Human Rights, 2004, art. 27; ASEAN Human Rights Declaration, 2012, arts. 23–24). Because such right carries with it special duties and responsibilities (*Animal Defenders International v. the United Kingdom*; *Hachette Filipacchi Associés v. France*; *Handyside v. the United Kingdom*; *Perna v. Italy* (No. 1); *Gough v. the United Kingdom*).

### **11.1. PARAGRAPH 3 (JUSTIFIABLE LIMITATIONS)**

The Limitations Analysis Despite its importance, freedom of expression is not an absolute right. Instead, it may be limited in the case of conflicting interests. Or there are several situations in which the right can be justifiably limited (Köksal, 2018:38. However, the process of limiting freedom of expression (or any other human right) cannot be done without proper justification. There is authority from around the world that stipulates that rights cannot be limited in such a way that would make the right itself nugatory. For example, in *Chimakure v. Attorney-General of Zimbabwe* (*Chimakure v Attorney-General of Zimbabwe*, 2014) the Zimbabwe Constitutional Court remarked that to control the manner of exercising a right should not signify its denial or invalidation. The Human Rights Committee also noted that "when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself" (UNHRC, 2011).

### **11.2. THE RESTRICTION MUST BE CONSISTENT WITH ARTICLE 19 OF THE ICCPR.**

The right to freedom of expression is enshrined under Article 19 of the ICCPR and regional human rights instruments (A/HRC/37/58/Add.2, para 15; ECHR, 1953, art 8, 10; ACHR, art 13; Arab

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Charter, art 27), is not absolute, therefore carries with it special duties and responsibilities speech inciting immediate breach of peace (Lawrence Byard Solum, 1989, p. 54.; “MULLER v. SWITZERLAND”) does not contribute to the marketplace of ideas; thus, is not protected under Article 19(*Chaplinsky v New Hampshire*, 1942). The freedom of expression under Article 19 does not protect speech which constitutes “true threats” or is likely to cause “imminent lawless action”(State v DeLoreto, 2003; *United States v Fullmer*, 2009; *United States v Parr*, 2008; *United States v Pinkston*, 2009).

Regarding responsibilities, the restrictions must follow a three-part test to determine whether the right to freedom of expression may be justifiably limited(Human Rights Committee, 2005; Keun-Tae Kim v. Republic of Korea, 1999). a: must be prescribed by law. b: be necessary to achieve the prescribed purposes(*Handyside v. United Kingdom*, 1976) c: and follow a legitimate aim(*Albert Womah Mukong v Cameroon*, 1994; *Luisiana Rois v Republic of Venezuela*, 2004) as affirmed by Inter American Court of Human Rights (IACtHR) in *Gomes Lund v Brazil*(*Gomes Lund v Brazil* , 2010), and European Court of Human Rights (ECtHR) in *Handyside v United Kingdom* (*Handyside v. United Kingdom*, 1976). Consequently, the freedom of expression stipulated by article 19 of the ICCPR is not absolute right therefore the direct incitement is subject to limitations and indirect incitement to terrorism is subject to limitations under justifiable situations.

### **11.3. THE RESTRICTION MUST HAVE BASIS IN DOMESTIC LAW**

A State’s positive obligation is even more profound where ‘fundamental values’ or ‘essential aspects’ of private life are at stake (Gaskin v. United Kingdom, 1989; Hämäläinen v. Finland, 2014; X and Y v. Netherlands, 1985), and the obligation has been narrowly and precisely defined under domestic law(*Botta v. Italy*, 1998; Hämäläinen v. Finland, 2014).

As the constitution represents “a unique legal act, written and codified, with the highest legal force, approved by the highest organ according to the special procedure, must be interpreted and implemented in conformity with the relevant international and regional jurisprudence” (Vyerentsov v. Ukraine, 2013).

While drafting constitutional norms, creators of the constitution are transforming a socio-political reality into a juridical reality(Padjen).

#### **11.3.1. ACCESSIBILITY OF LAW FOR THE PUBLIC**

Whenever a restriction is prescribed by law it must be accessible to all citizens (Kokkinakis v. Greece, 1993). Specially it should be accessible to the person concerned and foreseeable as to its effects (Kopp v. Switzerland, 1998).

The relevant legislation must specify in detail the precise circumstances in which interferences may be permitted on State obligations regarding the impact of the business sector on children’s rights (Malone v. United Kingdom, 1984, paras. 66–68)

#### **11.3.2. THE RESTRICTION FOR CONVICTION AND PROSECUTION OF GLORIFICATION MUST BE NECESSARY IN A DEMOCRATIC SOCIETY.**

In contemporary societies, freedom to express thoughts and obtain information is the basic condition and fundamental element of the democratic regime, human rights and development by perceiving and discussing different views (Reisoğlu, 2001: 66). Limitations to the right to Freedom of Expression must be necessary in a democratic society(*Animal Defenders International v. United Kingdom*, 2013). An interference is necessary in a democratic society as long as it: corresponds to a pressing social need; and is proportionate to the legitimate aims pursued(*Delfi AS v. Estonia*, 2015. Or the reasons given by the State to justify the restriction as necessary, it must be “relevant and sufficient” and must be proportionate to the aim pursued(*Lşngens v. Austeria*, 1986:39-40)).

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## 12. PROPORTIONALITY

The nature and extent of a punishment must be proportionate to the offence (Ceylan v. Turkey, 1999; Perna v. Italy, 2003). For instance, the HRC, in *Morais* case and *Sohn v Republic of Korea*, stipulated “that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on FoE to convict someone must be proportional to the value which the restriction serves to protect a legitimate aim; (*Ross v Canada*, 1997; *Sohn v Republic of Korea*, 1995; *Womah Mukong v. Cameroon*, 1994). Similarly, it is affirmed by European Court of Human Rights in the cases of *Handyside v United Kingdom*, *Sunday Times v. UK* and several cases (*Perinçek v. Switzerland*, 2013; *Murat Vural v. Turkey*, 2014). Moreover, by Inter American Court of Human Rights in *Gomes Lund v Brazil* and other different cases (*Carvajal v Colombia*, 2018; *Francisco Martorell v Chile*, 1996). Glorification of terrorism is convicted and subject to fine and imprisonment (Ministerio de Justicia de España, 2016).

For instance, in a free and democratic country such as Argentina, or in a big democracy like France, anyone who publicly incites violence against a group or persons is sanctioned with imprisonment for three to six years and a fine of up to €75,000. Offenses committed or if the justification or glorification was done via a public online service can lead to seven years in prison and a €100,000 fine (*Organization for Security and Co-operation in Europe (OSCE)*, 2016, p. 102). Considering the backlashes in states, the measures taken by regulations to restrict must be necessary and proportionate same as the ECtHR judgement in *Leroy v France* which considered the likelihood of violence that was significant, not the actuality of violence which had not taken place. Finally, the imposed measure and the fine on the committed person should not be disproportionate to the legitimate aim pursued and no violation of Freedom of Expression.

### 12.1. SOCIAL NEED AND SECURITY.

According to the UN Rabat Plan, the following factors must be considered: the intention of the speaker; the content of the speech; the context; the medium of the speech and the likelihood of hatred, discrimination, or violence occurring restrictions on freedom of speech is authorized by criminalizing speech that constitutes incitement directly or indirectly for, terrorism and violence (*Brandenburg v. Ohio*, 1969). Such an action is sanctioned with imprisonment (*Edison Lanza Special Rapporteur for Freedom of Expression*). States have a certain margin of appreciation in assessing whether such a need exists (*Perinçek v. Switzerland*, 2013; *Nowak & Rotunda*, 1997).

### 12.2. RELEVANT AND SUFFICIENT

To convict someone there should be a fair balance between the competing interests of the individual and of the community as a whole and must be in the margin of appreciation<sup>11</sup> enjoyed by the State (*Bărbulescu v. Romania*, 2017; *Palomo Sánchez and Others v. Spain*, 2011). Moreover, the reasons advanced by the State should be relevant and sufficient (*Tønsbergs Blad AS and Haukom v. Norway*, 2007). Such a risk was held to be sufficient to find that the State pursued the aim of maintaining public order (*Alinak v. Turkey*, 2006).

### 12.3. RESTRICTION MUST SERVE A LEGITIMATE AIM

The only permissible restrictions under the ICCPR are to protect national security, public order, public health, or morals, and to respect the rights and reputation of others. According to the ICCPR’s travaux preparators (Marc J. Bossuyt, 1987), such restrictions are exhaustive (Agnes Callamard, 2008;

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<sup>11</sup> The concept of “margin of appreciation” means that states have a certain level of discretion in deciding how to apply human-rights rules within their own legal and social context.

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Manfred Nowak, 2005). Hence, since ‘public interest’ is not a recognized restriction, the refusal to grant Ras’ request did not pursue a legitimate aim.

Restrictions may be placed on rights in enactment of legitimate aims (*Dahlab v Switzerland; Devidas Ramachandra Tuljapurkar vs State of Maharashtra & Ors*, 2015). Criminalizing incitement or apologetic might interfere in Freedom of Expression but could still constitute a legitimate restriction to protect public order, social need and security (*CODEXTER (2004)*). It is to be mentioned that such a right should not be restricted unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression (*UNESCO, 2015*).

### 13. RIGHTS AND REPUTATIONS OF OTHERS

The term “others” relates to other persons individually or as members of a community (*Malcolm Ross v. Canada*, 2000). Thus, it may, for instance, refer to individual members of a community defined by its religious faith or ethnicity (*Faurisson v. France*, 1996).

The term “others” in human rights law generally refers to people other than the person exercising a right, either as individuals or as members of a particular group or community. In the case of *Malcolm Ross v. Canada*, the United Nations Human Rights Committee clarified that the concept of “others” should be interpreted broadly in order to protect the rights and dignity of individuals and communities who may be affected by certain expressions or actions.

Legally, this interpretation means that the exercise of fundamental rights—such as freedom of expression under International Covenant on Civil and Political Rights—must sometimes be balanced against the rights and reputations of other persons. The word “others” therefore includes both single individuals and groups, particularly those who may be vulnerable to discrimination or hostility.

For example, “others” may refer to members of a religious or ethnic community whose rights to dignity, equality, and protection from discrimination could be harmed by certain forms of speech or conduct. In this sense, the legal interpretation emphasizes that human rights law aims not only to protect individual freedoms but also to ensure that these freedoms do not unjustifiably infringe upon the rights of other people or communities.

### 14. PUBLIC ORDER

‘Public order’ is identified as the rules which ensure the peaceful and effective performance of society. The limitation in article 19(3) would justify prohibitions on speech that may incite crime, violence or mass panic, provided the prohibition is reasonable, is effective to protect public order, and restricts freedom of expression no more than is necessary to protect public order. The second legitimate ground is that protection of national security or of ordre public, or public health or morals.

Freedom of Expression may be restricted to protect public order (*Dissanayake v. Sri Lanka*, 2005; *Human, Patrick Coleman v. Australia*, 2006). Crimes against the public order, penalized with two to six years of imprisonment (*Manuel Wackenheim v France*, 2002...). For the maintenance of public peace, safety and tranquility it is necessary to prevent any lawless action causing disorder (*Scanlen and Holderness v Zimbabwe*, 2009). Freedom of Expression itself is an important element of common interest (*Kedar Nath Singh v State of Bihar*, 1962; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*, 2016) therefore it shouldn’t be misused nor not create any threat to the public (*Drieman and Others v. Norway*, 2000; *Chaplinsky v. New Hampshire*, 1942).

### 15. FINDINGS

The findings demonstrate that limitations on freedom of expression in cases of incitement to terrorism may be justified under international human rights law, particularly within the framework of

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Article 19(3) of the ICCPR. While freedom of expression constitutes a cornerstone of democratic societies, both the Human Rights Committee (HRC) and regional human rights courts acknowledge that speech directly or indirectly inciting terrorist violence may be subject to lawful restrictions to protect national security and public order.

The research highlights that international human rights standards require such restrictions to meet the criteria of legality, necessity, and proportionality. In this context, ECtHR jurisprudence illustrates how these principles are applied in practice, emphasizing that restrictions must be clearly prescribed by law and narrowly tailored to prevent genuine risks of terrorist violence, rather than suppressing legitimate political or ideological expression.

Overall, the findings illuminate the complex legal, ethical, and policy considerations surrounding incitement to terrorism, underscoring the need for states to reconcile counterterrorism measures with their obligations under international human rights law, particularly the safeguards enshrined in Article 19 of the ICCPR.

## 16. CONCLUSION

This study has examined ECtHR jurisprudence on incitement to terrorism in light of Article 19 of the ICCPR, revealing the intricate balance between safeguarding freedom of expression and addressing national security concerns. The analysis demonstrates that, although freedom of expression is a fundamental human right, Article 19(3) of the ICCPR permits restrictions when they are provided by law and are necessary for the protection of national security, public order, or the rights of others.

The research further shows that ECtHR case law contributes to the interpretation of these limitations by establishing criteria for assessing incitement, including the intent of the speaker, the context and content of the expression, and the likelihood of violence or discriminatory harm. These judicial standards reinforce the requirement that any restriction on expression must be precise, foreseeable, and proportionate, thereby preventing arbitrary or overly broad limitations.

Moreover, the study underscores the importance of aligning counterterrorism measures with international human rights obligations. In particular, the normative framework of the ICCPR emphasizes that restrictions on expression must remain exceptional and subject to strict scrutiny, even in the context of combating terrorism. Ethical considerations also emerge as central to this discourse, highlighting the tension between security imperatives and the preservation of democratic freedoms.

In conclusion, by integrating ECtHR jurisprudence with the normative standards of Article 19 of the ICCPR, this research provides a comprehensive legal and doctrinal assessment of incitement to terrorism. The findings contribute to ongoing scholarly and policy debates on counterterrorism and human rights, offering guidance for policymakers, legal practitioners, and human rights advocates in designing legal frameworks that effectively address terrorist incitement while safeguarding fundamental freedoms.

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