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Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law

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Abstract

In the recent case of *Holder v. Humanitarian Law Project*, the Supreme Court of the United States ruled that a criminal prohibition on advocacy carried out in coordination with, or at the direction of, a foreign terrorist organization is constitutionally permissible: it is not tantamount to an unconstitutional infringement of freedom of speech.

This Article aims to understand both the decision itself and its implications in the context of the global effort to define the limits of speech that aims to support or promote terrorism. More specifically, the Article compares the European approach, which focuses on whether the content of the speech tends to support terrorism, with the U.S. approach, which focuses on criminalizing speakers who have links to terrorist organizations. Both approaches are evaluated against the background of the adoption of Resolution 1624 by the United Nations Security Council in 2005, which called on states to prohibit by law incitement to commit terrorist acts. The Article then follows the implementation of the resolution by comparing the traditional American resistance to direct prohibitions of incitement that fail to meet the standard set by the *Brandenburg v. Ohio* precedent and European legislation that is open to such limitations subject to balancing tests. It then evaluates the potential advantages and threats each option pose to freedom of speech by

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examining them from the perspective of the controversy of candor within legal decision-making. Based on this analysis, the Article also articulates the challenge of balancing international norms regarding the limits of freedom of speech with different and even conflicting domestic traditions regarding the scope of protection of freedom of speech.

Introduction

On June 21, 2010, the United States Supreme Court decided in *Holder v. Humanitarian Law Project*¹ that a criminal prohibition on advocacy performed in coordination with, or at the direction of, a foreign terrorist organization is not unconstitutional. Thus the Court dismissed any constitutional challenges posed by the offense of “knowingly provid[ing] material support or resources to a foreign terrorist organization.”² More specifically, the Court ruled that the Humanitarian Law Project was not allowed to provide legal support to the Partiya Karkeran Kurdistan (“PKK”), a designated terrorist organization, on how to follow and implement humanitarian and international law, even when this support impacts peaceful resolutions of disputes and the petitioning of various international bodies, such as the United Nations for relief.³ In addition, the Court ruled that the Humanitarian Law Project could not provide the Liberation Tigers of Tamil Eelam (“LTTE”), another designated terrorist organization, with support in the forms of either training its members to present claims for tsunami-related aid to mediators and international bodies and/or negotiating peace agreements between its organization and the Sri Lankan government.⁴

Despite both the presumably non-violent and peaceful particulars offered by the Humanitarian Law Project and the freedom of speech arguments presented by it, the Supreme Court ruled that the prohibition of material support to terrorist organizations is constitutional.⁵ The Court was fully cognizant of the fact that its ruling

¹ *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010).

² *Id.* at 2712, 2731 (holding that, in regulating the particular forms of support that plaintiffs sought to provide to foreign terrorist organizations, Congress acted consistent with the limitations of the First and Fifth Amendments). *See also* 18 U.S.C. §§ 2339(a), 2339(b) (2006). This provision was originally enacted in 1994, but amended after 2001 by the USA PATRIOT Act and later amendments. *Humanitarian Law Project*, 130 S.Ct. at 2712–13.

³ *Humanitarian Law Project*, 130 S.Ct. at 2710–11.

⁴ *Id.*

⁵ *Id.* at 2722–31 (discussing free speech issues in applying the criminal statute to these specific cases).

limits the scope of freedom of expression.⁶ However, the Court stated that the offense of providing material support to a terrorist organization is a legitimate preventive measure against terrorist attacks whose probability of occurrence increases due to such support. The Court explained:

Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups — legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds — all of which facilitate more terrorist attacks.⁷

The *Humanitarian Law Project* decision does not stand alone. Instead, it embodies the peak of other legal efforts of the United States government to fight terrorist activities by limiting the speech that supports them. On April 23, 2009, in another case dealing with the offense of providing material support for terrorism, the United States District Court, Southern District of New York, sentenced Javed Iqbal to five and a half years in prison after convicting him of violating the criminal prohibition against providing material support to a terrorist organization by helping to broadcast Hezbollah's TV station Al-Manar.⁸ Earlier that year, the same court convicted Iqbal's business partner, Saleh Elahwal, of the same offense.⁹ The judgment relied on a plea bargain and, therefore, did not include any substantive discussion of its implications to freedom of speech.

From the standpoint of constitutional law, these cases are interesting examples of the United States' willingness to support the conviction of offenders for operations that in other circumstances might have been understood as protected speech. From the standpoint of international processes, the cases should also be evaluated as part of a global move that seeks to limit speech that supports terrorism, terrorist acts, or terrorist organizations.

The impetus for the global move in this area was the United Nations Security Council (UNSC) Resolution 1624 of 2005, which

⁶ *Id.* at 2723.

⁷ *Id.* at 2725.

⁸ See Christine Kearney, *NY Man Sentenced to 5 Years for Aiding Hezbollah*, REUTERS, Apr. 23, 2009, <http://www.reuters.com/article/idUSTRE53M7B420090423>.

⁹ See Press Release, U.S. Dep't of Justice, Man Pleads Guilty to Providing Material Support to Hizballah TV Station (Dec. 30, 2008), <http://www.justice.gov/opa/pr/2008/December/08-nsd-1156.html>.

specifically “calls upon all states to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to . . . prohibit by law incitement to commit a terrorist act or acts.”¹⁰ It is important to note that the United States has specifically mentioned the offense of providing material support to terrorist organizations as well as the designation of Al-Manar as a terrorist organization as two of the steps taken in compliance with Resolution 1624.¹¹

Within the context of these cases, which reflects a growing concern even in the United States about the implications of incitement to terrorism, the aim of this Article is to study the attempt of the international community to apply a new global standard for the prohibition of incitement to terrorism, a particularly intriguing question given the different traditions regarding the regulation of freedom of speech and the acknowledged domestic nature of freedom of speech jurisprudence.¹² This Article discusses different answers to the new international norm and assesses their implications. It then returns to the American context in which the *Humanitarian Law Project* decision and the Iqbal case are considered, and evaluates the advantages and disadvantages of the American response situated within the context of the experience of other systems. The Article next questions the use of the broadly drafted offense of material support as a means to shut down a media channel or to limit advocacy on behalf of a terrorist organization. This analysis focuses on comparing explicit legal restrictions on freedom of speech (which characterize the European approach) and more indirect ways of suppressing speech that attempt to avoid confronting the issue (which we argue characterize U.S. law), against the background of the controversy on candor and legal decision-making. From this perspective, the question is what are the relative prices paid when the legal system is willing to openly and candidly compromise the level of protection of an important value such as freedom of speech vis-à-vis a

¹⁰ S.C. Res. 1624, ¶ 1, U.N. Doc. S/RES/1624 (Sept. 14, 2005), available at <http://www.un.org/documents/scres.htm> (follow "2005" hyperlink). See also Yael Ronen, *Incitement to Terrorist Acts under International Law*, 23 LEIDEN J. INT'L L. 645 (forthcoming 2010).

¹¹ See Response of the United States of America to the Counter-Terrorism Committee: Implementation of Security Council Resolution 1624 (2005) (Jun. 7, 2006) <http://www.un.org/en/sc/ctc/resources/1624.html> (follow "S/2006/397" hyperlink appearing next to "United States").

¹² For an example of this international variance and an analysis of the differences in the application of intellectual property international norms in different systems, taking into consideration their different traditions of free speech, see Michael Birnhack, *Global Copyright, Local Speech*, 24 CARDOZO ARTS & ENT. L.J. 491 (2006).

situation in which the system keeps the formal view that this value may not be compromised, but in fact it is open for limiting it indirectly.

More specifically, following this introduction, Part I of the Article reviews the different traditions of criminal provisions aimed at limiting speech supportive of terrorism. It focuses on the contrast between the European and the United States' views and the way in which they shaped Resolution 1624, which attempted to merge them. This Part addresses four legal systems that have engaged in the challenge of fighting terrorism, and chose to do so also by directly criminalizing incitement to terrorism — Spain, France, the United Kingdom, and Israel. It studies them in comparison to the U.S. approach, which indirectly limits expressions of support of terrorism in the context of laws that supposedly do not regulate speech (such as the offense of conspiracy). Part II of the Article discusses the experience gathered from the implementation of formal law in this area in the systems reviewed, as shaped also by institutional choices of the prosecution and the courts. More concretely, it studies judicial balancing tests and prosecutorial policies developed for narrowing the potential of prohibitions on incitement to terrorism to limit the scope freedom of speech. Part III compares the actual results of the application of the European view vis-à-vis the expected results of the U.S. view in as much as it is reflected in the *Humanitarian Law Project* decision, tries to map the relative advantages and disadvantages of the two and speculates about possible future developments.

I. Norms: The Different Legacies of Anti-Incitement Law

When assessing the challenge posed by an effort to create a global culture of freedom of speech, the gap between the legal traditions of the various national players involved in prohibiting the incitement of messages merits attention. Hence, the discussion begins with a review of several comparative case studies, which serve as a source of inspiration for critical thinking about the implications of U.S. law in this area.¹³

A. *The European Approach*

The first legal approach presented here supports express regulation of inciting speech, reflecting the view that freedom of speech

¹³ Even without taking a stand in the controversy regarding the proper scope of the use of comparative law by courts, we believe that the comparison may serve as a mirror that can inspire self-reflection for purposes of critical thinking. For the advantages of recourse to comparative constitutional law, see generally VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

may be legitimately limited when it is abused. This view is referred to here as the European approach because it is exemplified by the experience of several European systems and currently reflected also in European conventions and case law. Generally speaking, in the context of the European legal tradition, prohibitions on speech that incites terrorism are not considered illegitimate limitations on freedom of speech.

To exemplify this approach, the analysis focuses on the experience of four countries that have engaged in the challenge of fighting terrorism — Spain, France, the United Kingdom, and Israel. The United Kingdom was the leading voice behind Resolution 1624, while France and Spain have relatively long histories of criminalizing incitement and glorification of terrorism.¹⁴ Israel, although not formally part of Europe, upholds a legal system influenced by British law,¹⁵ and possesses a long history of experience in this area of law. They all share additional important traits relevant to the analysis — they are countries with a stable democratic tradition, at least in the last few decades, and are committed to the protection of freedom of speech. The United Kingdom, Spain, and France are parties to the European Convention on Human Rights, which protects the right to freedom of expression.¹⁶ Article 10(1) of the Convention states: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”¹⁷ Israel is not a party to this Convention, but has nevertheless recognized freedom of speech as a constitutional tenet.¹⁸

¹⁴ A survey of national laws for a working group of the Council of Europe’s Committee of Experts of Terrorism, *Apologie du Terrorisme*, found that Denmark, France, and Spain were notable for having criminalized this form of speech prior to the new international developments in recent years. See IAN CRAM, TERROR AND THE WAR ON DISSENT – FREEDOM OF EXPRESSION IN THE AGE OF AL-QAEDA 92 (2009).

¹⁵ Israel’s formative legislation in the area dates back to the days of the British Mandate in Palestine, when the British government enacted anti-terrorism laws in an attempt to confront local resistance to its rule.

¹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=EN>

G [hereinafter European Convention of Human Rights].

¹⁷ *Id.* art. 10(1).

¹⁸ This recognition was based on unwritten constitutional principles declared and enforced by the Israeli Supreme Court. See HCJ 73/53 Kol Ha’am v. Minister of Interior, 7 PD 871 [1953] (Isr.). Later on, the Israeli Supreme Court interpreted the constitutional right to human dignity, recognized by Basic Law: Human Dignity and Liberty, as implying a constitutional protection of the right to freedom of speech. See

In Spain, acts that can generically be categorized as “incitement to terrorism” have been prohibited under the Spanish Penal Code, which prevents and punishes three different forms of such conduct, defined according to the seriousness of the acts concerned. The first form is rather general. Article 18.1 of the Spanish Penal Code criminalizes provocation (and, within that category, *apologie* as a form of provocation). Provocation is an attempt to induce another person to commit an actual offense.¹⁹ Such offenses are punishable whether or not they actually spawn terrorist criminal acts. If the provocation or direct incitement to commit a terrorist offense is followed by the perpetration of such an offense, the speaker is punished as a principal perpetrator, in accordance with Article 28 of the Spanish Penal Code. In 2000, Spain enacted Organic Law No. 7/2000 of 22 December, which reformed Article 578 of the Spanish Penal Code. This new legislation defines the new criminal offense of glorification of terrorism. It stipulates:

glorification or justification, through any form of public information or communication, of the offenses referred to in articles 571 to 577 hereof or of persons having participated in their perpetration, or the commission of acts tending to discredit, demean or humiliate the victims of terrorist offenses or their families, shall be punishable by one to two years imprisonment.²⁰

More specifically, within this offense, two specific types of criminal conduct are penalized: one is the glorification or justification (*el enaltecimiento o la justificación*) of terrorist offenses or their perpetrators, and the other is the humiliation of the victims of terrorist offenses or their families.²¹

HCJ 10203/03 HaMifkad Haleumi v. Attorney General [2008] (Isr.), available at <http://elyon1.court.gov.il/files/03/030/102/c22/03102030.c22.htm>.

¹⁹ According to Article 18.1 of the Spanish Penal Code: Provocation shall mean direct incitement, through the press, radio or any other similarly effective means of publicity, or before a group of individuals, to the perpetration of an offense,” while “*Apologie*, for the purposes of this Code, shall mean the expression, before a group of individuals or by any other means of communication, of ideas or doctrines that extol crime or glorify the perpetrator thereof. *Apologie* shall be criminalized only as a form of provocation and if its nature and circumstances are such as to constitute direct incitement to commit an offense. See Response of Spain to the Counter-Terrorism Committee: Implementation of Security Council Resolution 1624 (2005) (Mar. 19, 2007), <http://www.un.org/en/sc/ctc/resources/1624.html> (follow “S/2007/164” hyperlink appearing next to “Spain”).

²⁰ *Id.*

²¹ *Id.*

The French prohibition on incitement dates back to 1881. Article 24 of the French Press Act of 1881²² criminalizes incitement (*provocation*) to and advocacy of terrorism, as well as glorification of terrorism (*l'apologie du terrorisme*). Currently, Article 24, paragraph 6, prescribes “anyone who, using one of the means set forth in the preceding Article has directly caused any of the terrorist acts set forth in Book IV, Title II of the Penal Code or has advocated such acts, shall be subject to five years imprisonment and a fine of 45,000 euros.”²³ According to Article 23 of the same law, to be punishable, such incitement must be committed by using:

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.²⁴

In the United Kingdom, the current prohibition on “encouragement to terrorism,” enacted as section 1 of the Terrorism Act 2006, was a reaction to the London bombings of July 2005, which initiated a new political commitment to confronting extremism, as explained in the background to Resolution 1624 below. This provision applies to “a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences,”²⁵ and adds that a statement can be regarded as indirectly encouraging the commission of such acts if it “glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences” and “is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.”²⁶

²² Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 29, 1881 on the Freedom of the Press], <http://www.legifrance.gouv.fr>.

²³ *Id.*

²⁴ Response of France to the Counter-Terrorism Committee: Implementation of Security Council Resolution 1624 (2005) (July 14, 2006), <http://www.un.org/en/sc/ctc/resources/1624.html> (follow “S/2006/547” hyperlink appearing next to “France”).

²⁵ Terrorism Act, 2006, 54 Eliz. 2, c. 11, § 1(1) (Eng.).

²⁶ *Id.* § 1(3). For further analysis, see CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION 57–63 (2d ed. 2009).

The European approach culminated in 2005 in the Council of Europe Convention on the Prevention of Terrorism.²⁷ The Convention regards the prevention of incitement to terrorism as one of the main elements of an effective counter-terrorism strategy. In Article 5, it obliges the parties to the Convention to “adopt such measures as may be necessary to establish public provocation to commit a terrorist offense, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offense under its domestic law.”²⁸ It is worth mentioning that the French and Spanish concepts of criminalization of glorification of terrorism were not adopted by the Council of Europe, and only public provocation or incitement are criminalized under the Convention. The Convention also includes a specific provision designed to minimize the danger entailed in the use of the said prohibition for suppressing freedom of speech or other human rights. Hence, Article 12, which carries the title “Conditions and Safeguards” states:

Each party shall ensure that the establishment, implementation and application of the criminalization under Articles 5 to 7 and 9 of the Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set for in, where applicable to that Party, the Convention for the Protection for Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

The legitimacy of anti-incitement norms, properly applied, also has been recognized by the European Court of Human Rights (in its case law discussing Article 10 of the European Convention on Human Rights).²⁹ In the case of *Zana v. Turkey*,³⁰ the Court found no violation of

²⁷ Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. 196, available at <http://treaties.un.org/doc/Publication/UNTS/No%20Volume/Part/I-44655.pdf>.

²⁸ *Id.* art. 5(2). Article 5(1) defines “public provocation to commit a terrorist offense” as including the “distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offense, where such conduct, whether or not directly advocating terrorist offenses, causes a danger that one or more such offenses may be committed.” *Id.*

²⁹ According to Article 10(2) of the European Convention on Human Rights, *supra* note 16:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions,

Article 10 when a court in Turkey convicted a former mayor for expressing support for the PKK³¹ in an interview in which he described the PKK, as a “national liberation movement.”³² The Court’s decision was based also on the fact that the Mayor’s statement coincided with murderous attacks on civilians carried out by the PKK in southeast Turkey and was published in a major national daily newspaper. Accordingly, the Court regarded this statement as likely to exacerbate an already explosive situation in the region.³³

In the case of *Kaptan v. Switzerland*,³⁴ the Court found that Swiss authorities had not violated Article 10 of the European Convention on Human Rights when they had confiscated publications that promoted and extolled PKK terrorist acts. The court found that these publications had encouraged violence and that interference was therefore necessary in a democratic society, in the interests of national security, and crime prevention.³⁵

The European Court of Human Rights recently had an opportunity to analyze the French criminal prohibition on glorification of terrorism in the case of *Leroy v. France*.³⁶ This decision involved French cartoonist Denis Leroy, convicted by a French court in 2002. The facts of the case involved the publication of a cartoon in the Basque weekly *Ekaitza*.³⁷ On September 11, 2001, the cartoonist submitted to the magazine’s editorial team a caricature representing the attack on the

restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

³⁰ *Zana v. Turkey*, App. No. 18954/91 Eur. Ct. H.R., (1997), available at <http://www.echr.coe.int/ECHR/EN/hudoc> (search App. No. 18954/91).

³¹ The PKK is Kurdish separatist organization which fights an armed struggle against Turkey. See Nimet Bariker-Atiyas, *The Kurdish Conflict in Turkey: Issues, Parties and Prospects*, 28 SEC. DIALOG 439, 439 (1997).

³² *Zana v. Turkey*, App. No. 18954/91 Eur. Ct. H.R., ¶ 12.

³³ *Id.* ¶ 60.

³⁴ *Kaptan v. Switzerland*, App. No. 55641/00, Eur. Ct. H.R. (2001).

³⁵ DIRECTORATE GENERAL OF HUMAN RIGHTS, FREEDOM OF EXPRESSION IN EUROPE: CASE LAW CONCERNING ARTICLE 10 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 67 (2002), available at <http://portal.coe.ge/downloads/Elections%20File/Publications/Freedom%20of%20Expression%20in%20Europe%20-%20E.pdf>.

³⁶ *Leroy v. France*, App. No. 36109/03, Eur. Ct. H.R. (2008), available at <http://www.echr.coe.int/ECHR/EN/hudoc> (search App. No. 36109/03).

³⁷ *Id.* ¶ 4.

twin towers of the World Trade Center, with a caption that parodied the advertising slogan of a famous brand: “We have all dreamt of it . . . Hamas did it” (a spoof on “Sony did it”). The caricature was published on September 13, 2001.³⁸ In its next issue, the magazine published excerpts from letters and e-mails reacting to it. It also published a statement by Leroy explaining that, when making the cartoon, he had failed to consider the human grief and suffering caused by the attacks. He emphasized that his aim had been to illustrate the decline of the United States through an attack on American icons, and stressed that cartoonists who comment on current events have little time for sober reflection. He also noted that his real intention had been to make a political statement, communicating his anti-American position through a satirical image that emphasizes the decline of America’s global position.³⁹

The public prosecutor, at the request of the regional governor, initiated proceedings against the cartoonist and the newspaper’s publishing director in application of Article 24, section 6 of the French Press Act of 1881.⁴⁰ The publishing director was convicted for condoning terrorism, while Mr. Leroy was convicted for complicity in condoning terrorism.⁴¹ The cartoonist brought an application to the European Court of Human Rights, relying on Article 10 of the Convention guaranteeing freedom of expression.⁴² The court recognized Leroy’s right to freedom of speech, but then noted that the caricature was not limited to the criticism of American imperialism but also supported and glorified its violent destruction at the expense of countless lives. The applicant had expressed his moral support for those he had presumed to be the perpetrators of 9/11 attacks. Leroy had endorsed the violent death of thousands of civilians whose dignity he further diminished by submitting his cartoon on the anniversary of the attacks. The caricature was published on September 13, and lacked any language-content precautions.⁴³ In the Court’s opinion, this factor — the date of publication — increased the cartoonist’s responsibility for his account of, and even support for, this tragic event, whether considered from an artistic or a journalistic perspective. The impact of such a message in a politically sensitive region such as the Basque Country cannot be overlooked. According to the Court, the cartoon provoked a clear public reaction, one capable of fomenting violence and impacting

³⁸ *Id.* ¶ 6–8.

³⁹ *Id.* ¶ 10.

⁴⁰ Law of July 29, 1881 on the Freedom of the Press, *supra* note 22.

⁴¹ *Leroy v. France*, App. No. 36109/03, ¶ 11.

⁴² *Id.* ¶ 3.

⁴³ *Id.* ¶ 27.

public order in the region. The Court decided that the grounds set by the domestic courts in convicting Mr. Leroy had been “relevant and sufficient.” Given the modest nature of the fine and the context in which the impugned caricature had been published, the Court found that the sentence imposed on the cartoonist was not disproportionate to the legitimate aim pursued. Accordingly, the Court found no violation of Article 10 of the Convention.⁴⁴

The Israeli experience with anti-incitement norms offers a particularly interesting paradigm because of Israel’s political history and existential demand of facing and overcoming terrorist threats ever since its founding. The offense of “sedition,” enacted in the days of the British Mandate, concerned incitement to engage in activities against the government or the peace of the country.⁴⁵ Soon after Israel’s establishment in 1948, confronted with the dangers of that time, the new nation enacted the Prevention of Terrorism Ordinance, 1948. The Ordinance authorized the government to declare a group a terrorist organization, and made membership in and support of, such groups criminal offenses. This legislation also defined expression of support for violent measures used by a terrorist organization as an offense. The Prevention of Terrorism Ordinance is still in force, although it has been amended several times, including with regard to this anti-incitement norm, as described below. For many years, the main provision concerning incitement to terrorism was Section 4 of the Ordinance.⁴⁶

⁴⁴ *Id.* ¶¶45–48.

⁴⁵ Originally the prohibition was enacted in Mandatory Palestine as Sections 59–60 of the Criminal Code Ordinance, 1936. It is currently found in Sections 133–134 of the Israeli Penal Law, 1977. The provisions on sedition do not expressly mention the word “terrorism” but are broad enough to also apply to acts of terrorism aimed against the government or the peace of the country. According to § 136(4) of the Israeli Penal Law: “For the purpose of this article, ‘sedition’ means . . . to promote feelings of ill-will and enmity between different sections of the population.” Penal Law, 5737-1977, § 136(4), *reprinted in* LAWS OF THE STATE OF ISRAEL: SPECIAL VOLUME PENAL LAW, 5737-1977 45 (Government Printer, Jerusalem, ed., 1978).

⁴⁶ Section 4 of the Prevention of Terrorism Ordinance stated: “A person who – (a) publishes, in writing or orally, words of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence; or (b) publishes, in writing or orally, words of praise or sympathy for or an appeal for aid or support of a terrorist organization . . . (g) commits an act that expresses identification with a terrorist organization or sympathy to it, by waving a flag, displaying a symbol or a slogan or reciting a hymn or a slogan or any similar overt act which clearly discloses identification or sympathy in a public place or in a manner that people who are present in public place can see or hear such an expression of identification or sympathy; shall be guilty of an offense and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding one thousand pounds or to both such penalties.” Prevention of Terrorism Ordinance, 5708-1948, 1 LSI 7 (Isr.).

The most significant part of this provision for the issue of incitement was sub-section 4(a), which applied to “words of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence.”⁴⁷ However, when these prohibitions reached the courts, the judiciary adopted a narrow and balanced view regarding the implementation of anti-incitement norms. The Israeli Supreme Court revealed its views on this matter in two cases it heard soon after the assassination of Prime Minister Itzhak Rabin on November 4, 1995 (although the events leading to the indictments had preceded it) — the *Jabareen* case⁴⁸ and the *Benjamin Kahana* case.⁴⁹

The *Jabareen* case concerned a newspaper column that praised attacks against Israeli soldiers in the occupied territories. Inspired by the value of freedom of speech, the Court adopted a narrow interpretation and stated that section 4(a) of the Prevention of Terrorism Ordinance applied only to utterances that encouraged violent acts committed by a terrorist organization but not to utterances that encouraged violent acts of individuals who do not act as agents of a terrorist organization.⁵⁰ This limitation proved crucial in the circumstances of the case and, accordingly, the defendant was acquitted. The Ordinance does not include any such condition, however, and the Israeli Supreme Court adopted it as a guideline by interpreting the Ordinance in light of the value of freedom of speech.

The Supreme Court issued the *Benjamin Kahana* decision on the same day that it gave the *Jabareen* decision. Formally, this decision did not apply the provision on incitement to terrorism but rather the general provision on “sedition.”⁵¹ Substantively, however, the decision dealt with utterances that encouraged violence against civilians. Specifically, the decision dealt with the publications of right-wing Jewish extremist Benjamin Kahana, who called for the bombing of Arab villages in Israel in retaliation for terrorist attacks against Jewish Israelis. Kahana was charged with “sedition,” and the Court was forced to confront the challenge of interpreting this unspecific and inadequately defined offense originally drafted by the non-democratic legislature of the British Mandate period. The central question was whether the values protected by this offense were government stability, or social stability as well. The

⁴⁷ *Id.*

⁴⁸ CA 8613/96 *Jabareen v. State of Israel* 54(5) PD 193 [2000] (Isr.).

⁴⁹ CA 1789/98 *State of Israel v. Benjamin Kahana* 54(5) PD 145 [2000] (Isr.).

⁵⁰ *Jabareen*, 54(5) PD at 201–08.

⁵¹ *See supra* note 45.

Court opted for the latter view.⁵² After deliberation, the justices in the majority opinion decided to convict Kahana (although Jabareen, charged with a different offense, was acquitted). The Court's rationale for this distinction was that the offense of sedition contains appropriate safeguards against misuses or overuses of it (i.e., a short time limitation and approval of the Attorney General). The need to interpret it narrowly is therefore less urgent than is true of the offense of incitement to terrorism under the Prevention of Terrorism Ordinance discussed in the *Jabareen* case.⁵³

Following the *Jabareen* decision, Israel replaced section 4 of the Prevention of Terrorism Ordinance with a new section 144D2 that was added to the Israeli Penal Law. This provision clarifies that the prohibition also applies to terrorist actions not necessarily connected to a designated terrorist organization.⁵⁴

From a more general perspective, the systems discussed so far express a willingness to criminalize incitement to terrorism. The details of their criminal prohibitions on incitement of this sort are not identical, but are indeed based on similar principles and on an open willingness to prohibit these forms of expression.

B. *The American Approach*

American jurisprudence on freedom of speech stands in clear contrast to the European tradition, as analyzed above. Generally speaking, American jurisprudence does not allow for content-based and viewpoint-based limitations on freedom of speech.⁵⁵ The American view is, by definition, in tension with the idea of prohibiting speech — even if it provides support to terrorism — if the prohibition is content-based.

⁵² *Benjamin Kahana*, 54(5) PD 145, 165–67.

⁵³ *Id.* at 179–181. See Mordechai Kremnitzer & Liat Levanon-Morag, *Limiting Freedom of Speech for the Prevention of Violence*, 7 L. & GOV'T 305 (2004) (Hebrew), for further analysis of this case.

⁵⁴ 144D2 of the Israeli Penal Law, as amended in 2002 states, “[a] person who publishes a call to commit a violent act of terror, or expressions of praise, support or encouragement for violent acts of terror (for the purpose of this section, an inciting publication), that, according to its content and the circumstances of its publication could lead to an actual violent act or to an act of terror, shall be liable to a five year term of imprisonment.”

⁵⁵ See, e.g., Wilson R. Huhn, *Assessing the Constitutionality of Laws that are Both Content-Based and Content Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801 (2004); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006).

It is worthwhile to note that the American view on this matter has not always been so clear about protecting speech that may threaten the stability of government or the lives of citizens. In the past, the United States Supreme Court upheld the constitutionality of various statutes that significantly limited freedom of speech — including during the twentieth century — under the stress of the World Wars and the perceived communist threat.⁵⁶ However, in the last few decades, since the path-breaking precedent handed down in *Brandenburg v. Ohio*, American jurisprudence in this area has taken a very firm view, which completely resists such limitations on freedom of speech.⁵⁷ *Brandenburg v. Ohio* dealt with the constitutionality of a law which prohibited “advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform,” and the United States Supreme Court invalidated it, stating that the First Amendment negates any prohibition of freedom of speech unless in circumstances of likelihood of an imminent result. According to the Court, “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce that action.”⁵⁸

Accordingly, when the United States joined the International Covenant on Civil and Political Rights,⁵⁹ it added a reservation regarding the application of Article 20, which refers to obligations to prohibit “any propaganda for war” and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”⁶⁰

The *Brandenburg* approach has inspired U.S. case law for decades since. In later decisions, when American courts started to deal with the newer prohibition on providing material support to terrorist organizations, the assumption underlying the decisions was that

⁵⁶ See *Schenck v. United States*, 249 U.S. 47 (1919). See generally GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004), for the history of the jurisprudence in this area.

⁵⁷ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁵⁸ *Id.* at 447.

⁵⁹ International Covenant on Civil and Political Rights, *opened for signature* 19 December 1966, 999 U.N.T.S. 171, art. 19(1), (entered into force 23 March 1976), available at <http://www.un.org/millennium/law/iv-4.htm>.

⁶⁰ The United States ratified the ICCPR in 1992. Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. U.J. INT'L HUM. RTS. (2005).

“advocacy is always protected under the First Amendment whereas making donations is protected only in certain contexts.”⁶¹

This case law suggested almost no room for prohibitions on speech aimed at supporting terrorist acts or terrorist organizations, let alone, of incitement to terrorism, or glorification of terrorism.⁶² Presumably, it did not allow for balancing tests, like in the European context, thus deserting earlier precedents, which were open for such analysis,⁶³ and reflecting the ambivalence of U.S. law regarding the use of balancing.⁶⁴

In fact, however, the analysis of the broader context of U.S. law reveals that the *Brandenburg* standard did not end government initiatives to fight terrorism by addressing those who aim to influence others to engage in terrorist activities. This motivation leads to the use of legal measures that indirectly influence the arena of free speech. It is not the only example of taking side routes of this type, without openly addressing the appropriateness of the *Brandenburg* standard.

One side route has always been immigration law, which offers weaker protections to the freedom of speech of non-citizens. Aliens can be deported if, among other reasons, they endorse or espouse terrorist activity.⁶⁵

⁶¹ Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134 (9th Cir. 2000). The Ninth Circuit further added that “[p]laintiffs here do not contend they are prohibited from advocating the goals of the foreign terrorist organizations, espousing their views or even being members of such groups. They can do so without fear of penalty right up to the line established by *Brandenburg v. Ohio*.” *Id.*

⁶² In contrast to the possibility of criminalizing offers to engage in illegal activity. *See* United States v. Williams, 553 U.S. 285 (2008) (dealing with offers to sell child pornography).

⁶³ *See, e.g.,* Schenck v. United States, 249 U.S. 47 (1919). In *Schenck*, Justice Oliver Wendell Holmes, like the European Court of Human Rights in *Leroy v. France*, specified that the timing and context of speech could be as relevant to the speech’s constitutional protection as the content of the speech itself. Holmes reasoned that during a time of war, speech may be deemed criminal even though under different circumstances it may otherwise be constitutionally protected. *Id.*

⁶⁴ *See* T. Alexander Alienikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

⁶⁵ 8 U.S.C. § 1182(a) (2006). *See* Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO IMMIGR. L.J. 313 (2000) and Gerald L. Neuman, *Discretionary Deportation*, 20 GEO IMMIGR. L.J. 611, 647–49 (2006), for further elaboration on freedom of speech with regard to terrorist-related activities in the area of immigration.

Another route has been to convict speakers for conspiracy, or another similar offense, especially when their inciting words led to specific actions. This possibility served as the basis for the prosecution of Sheik Omar Abdel Rahman regarding several terrorist initiatives, including the attempt to bomb the World Trade Center in 1993.⁶⁶ Rahman's involvement in these initiatives primarily featured instructing followers to “do jihad with the sword, with the cannon, with the grenades, with the missile . . . against God's enemies” and dispensing religious opinions on the holiness of the planned acts.⁶⁷ Rahman's teachings and dictates served the basis for his conviction in seditious conspiracy⁶⁸ (as well as solicitation).⁶⁹ Another similar conviction was that of Al-Timimi, a Sheik who demanded that his followers join the Taliban. In fact, some of them traveled to Pakistan and joined the training of a militant group. Al-Timimi was convicted for soliciting others to levy war against the United States and inducing others to use firearms in violation of federal law.⁷⁰

The Iqbal affair mentioned in the Introduction reveals yet another path, and probably an even more effective one, to criminalizing incitement-related speech. It exemplifies the possibility of using the offense of providing “material support” for a terrorist organization with regard to any acts that facilitate the delivery of the messages (by various technologies).⁷¹ The argument for prosecuting Iqbal was based on the fact that he provided a service (i.e., a satellite television broadcasting

⁶⁶ United States of America v. Omar Ahmad Ali Abdel Rahman, 189 F.3d 88, 104 (2d Cir. 1999).

⁶⁷ *Id.*

⁶⁸ See 18 U.S.C. § 2384 (2006).

⁶⁹ Rahman, 189 F.3d 88.

⁷⁰ *Jury Convicts Islamic Scholar of Exhortation*, FOXNEWS.COM (Apr. 26, 2005), <http://www.foxnews.com/story/0,2933,154635,00.html>.

⁷¹ See 18 U.S.C. §§ 2339A–2339B. According to the definition in 18 U.S.C. § 2339A(b)(1):

the term ‘material support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

This offense has been gradually broadened throughout the years. See David Cole, *Criminalizing Speech: The Material Support Provision*, in PATRIOT DEBATES: EXPERTS DEBATE THE USA PATRIOT ACT 144 (Stewart A. Baker & John Kavanagh eds., 2005).

service) to a designated terrorist organization. Thus, the goal was to limit inciting speech indirectly — without analyzing its content — by addressing the identity of the speaker who supplied a terrorist organization with a channel of communication (e.g., Hezbollah) and avoiding a direct clash with the *Brandenburg* standard. In the Iqbal trial, the indictment alleged that, through a company called HDTV Ltd., Iqbal and Saleh Elahwal conspired to relay to HDTV customers the broadcasts of Hezbollah's television station, Al-Manar, from September 2005 through August 2006. In exchange, HDTV received thousands of dollars from Al-Manar.⁷² Hezbollah was designated a Foreign Terrorist Organization by the United States Secretary of State on October 8, 1997, pursuant to Section 219 of the Immigration and Nationality Act.⁷³ In addition, the Department of Treasury designated Hezbollah a Specially Designated Global Terrorist on October 31, 2001.⁷⁴ The Department of Treasury separately designated Al-Manar a Specially Designated Global Terrorist on March 23, 2006.⁷⁵ It is worth noting that although the offense of providing material support to terrorist organizations was already applied and challenged as a limitation on freedom of speech in prior cases, its use in the Iqbal case portrays the dilemmas involved in new ways. Previously, the offense was attacked with regard to speech-related activities, such as the offering of money donations or expert advice to terrorist organizations, but not for spreading the inciting messages of the terrorist organization itself (as happened with the broadcasting of Al-Manar).⁷⁶

⁷² Press Release, United States Attorney for the Southern District of New York, U.S. Arrests Two For Supporting Hizballah (Nov. 26, 2006), *available at* <http://www.usdoj.gov/usao/nys/pressreleases/November06/iqbalandelahwalindictmentpr.pdf>.

⁷³ See Designation of Foreign Terrorist Organizations, Notice, 62 Fed. Reg. 52,650, 52,650–51 (Oct. 8, 1997), *available at* <http://www.federalregister.gov/articles/1997/10/08/97-27030/designation-of-foreign-terrorist-organizations>.

⁷⁴ See Steven C. Welsh, *Hezbollah Fundraiser IRSO Branded Terrorist Financier by Treasury*, STEVEN C. WELSH (Aug. 30, 2006), <http://www.stevencwelsh.com/cdi-archive/hezbollah-finance083006.php>. See also Cram, *supra* note 11, at 40.

⁷⁵ See Press Release, U.S. Dep't of the Treasury, U.S. Designates Al-Manar as a Specially Designated Global Terrorist Entity (Mar. 23, 2006), *available at* <http://www.ustreas.gov/press/releases/js4134.htm>.

⁷⁶ Constitutional challenges to this provision were accepted by the Court of Appeals of the Ninth Circuit in a series of decisions, which came out of a litigation led by the Humanitarian Law Project. Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134 (9th Cir. 2000) was the Ninth Circuit's first decision in this matter. See also David Cole, *The New McCarthyism, Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 8–15 (2003). In a later decision, the Ninth Circuit decided that the offense was unconstitutionally vague, even after it was amended by Congress. See Humanitarian Law Project v. Mukasey, 552 F.3d 916 (9th Cir. 2007), *cert. granted*, Sept. 30, 2009 (S.Ct. No. 08-1498).

The *Humanitarian Law Project* decision of the United States Supreme Court, already mentioned in the Introduction, reaffirms the approach of the *Iqbal* case and offers another side route. Indeed, the decision did not directly deal with incitement to terrorism. However, it demonstrated clear willingness to prohibit speech when it is linked to a terrorist organization in a manner that supports its activities. The Court regarded advocating for and coordinating with foreign terrorist organizations as forms of providing material support to such organizations. The effect of this decision on freedom of speech cannot be underestimated. Indeed, the decision presumably follows the U.S. freedom of speech jurisprudence in the sense that it affirms a prohibition that abstains from addressing the content of the speech and focuses only on the link between the speaker and a terrorist organization. The Court stressed in this regard that “[u]nder the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations.”⁷⁷ At the same time, the *Humanitarian Law Project* decision has the potential to limit freedom of speech far beyond content-based prohibitions of the sort prevalent in Europe. It opens the door for prohibiting any speech related to a terrorist organization, no matter how peaceful it is, as long as it is expressed in coordination with or under the direction of a terrorist organization.

Taken together, the *Rahman*, *Al-Timimi*, and *Iqbal* cases and the new *Humanitarian Law Project* decision made it possible to broaden the scope of criminalizing speech, which would otherwise have been considered protected. Hence, although incitement to terrorism is not criminalized as such in the United States, its law enforcement agencies are equipped with many other tools to limit the spread of terrorist messages. Against this background, the question should be: what would better serve civil liberties — acknowledging that the protection of advocacy and incitement under the First Amendment is not absolute or adhering to the absolutist principle while taking side routes for criminalizing such conduct? These questions are addressed in the last part of the Article.

C. *The Emergence of an International Compromise*

Despite the very different traditions in regulating incitement to terrorism, a seemingly new international consensus emerged through

⁷⁷ *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2722–23 (2010).

UNSC Resolution 1624. UNSC Resolution 1624, adopted in 2005, is an ambitious attempt to bridge the differences between the European approach and the American approach to prohibiting incitement to terrorism. Its adoption, with the support of the United States, shows that the differences in views between the United States and Europe may be wide in theory but not necessarily in practice, specifically when accounting for the role played by prosecutions and courts.

The resolution, proposed by the United Kingdom, was adopted unanimously at the World Summit on September 14, 2005,⁷⁸ soon after the attacks on London's public transport system on July 7 and July 21, 2005, which killed 52 people and injured some 700.⁷⁹ The resolution calls upon member states to adopt laws that prohibit incitement to commit a terrorist act or acts, to prevent such conduct, and to deny safe haven to any persons who are guilty of it (as credible information indicates).⁸⁰

Three elements that facilitated the adoption of this landmark resolution are important to fully understand it in context. The first element is the political circumstances of the time: the Council was meeting at the level of heads of states, only two months after the bombing attacks in London and one year after the Beslan attack,⁸¹ in addition to other terrorist incidents that occurred around that time. The general feeling was that the Security Council was expected to take a significant initiative. Second, the adoption of the Council of Europe Convention on the Prevention of Terrorism, on May 15, 2005, three months before the resolution was adopted, helped to pave the way for an international consensus on the issue of incitement to terrorism. The third element was the United Kingdom's understanding of anti-terrorism. The United Kingdom, which tabled the proposed resolution, held the view that terrorism is a movement with an ideology that has to be confronted not just by law enforcement and military campaigns but also in the

⁷⁸ The 2005 World Summit aimed to bring together all world leaders. It was a follow-up summit meeting to the United Nation's 2000 Millennium Summit. See The 2005 World Summit, <http://www.un.org/summit2005/> (last visited Nov. 30, 2010).

⁷⁹ See *7 July Bombings, Overview*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/uk/05/london_blasts/what_happened/html (last visited Nov. 30, 2010).

⁸⁰ S.C. Res. 1624, *supra* note 10, ¶ 1.

⁸¹ The Beslan attack was a three-day hostage-taking of over 1,100 people in September 2004, which was initiated by a Chechen terrorist group. It ended in the deaths of over 300 people. See *Beslan School Attack*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1700061/Beslan-school-attack>.

battlefield of “ideas, hearts and minds.”⁸² As Prime Minister Tony Blair stated immediately after the adoption of UNSC Resolution 1624, terrorism would not be defeated until the world united, not just in condemning the acts of terrorism, but also in fighting its “poisonous propaganda.”⁸³ He further added that the Security Council had to unite to uproot terrorism, by taking action against those who incite terrorism and fight for not only their methods, but rather their stimuli, their “twisted reasoning” and their “wretched excuses.”⁸⁴ Matching this linkage, the United Kingdom has initiated its own new legislation in this direction.⁸⁵

The United States supported the United Kingdom in its efforts, but had to find a way to do so without offending its fundamental constitutional principles. Several elements of the resolution illustrate the spirit of compromise that shaped it. The first element was the inclusion of the concept of glorification of terrorism only in the preamble, but not in the operative provisions of the resolution. The preamble *condemns* “in the strongest terms the incitement of terrorist acts” and then calls for “*repudiating* attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts.”⁸⁶ It thus links incitement to both terrorism and attempts to justify or glorify terrorist acts (*apologie*). However, in order to allow all member states to agree to this language, this paragraph was “pushed” into the preamble, leaving the issue without any operative implications.⁸⁷ Another element of the compromise was the specific and explicit statement in the preamble affirming its commitment to the

right to freedom of expression reflected in Article 19 of
the Universal Declaration of Human Rights and the right
to freedom of expression in Article 19 of the International
Covenant on Civil and Political Rights adopted by the

⁸² Prime Minister Tony Blair, Address at the Labor Party National Conference (July 16, 2005), available at http://news.bbc.co.uk/2/hi/uk_news/4689363.stm.

⁸³ See Press Release, Security Council, Security Council Meeting of World Leaders Calls for Criminal Prohibition of Terrorist Incitement, Enhanced Steps to Prevent Armed Conflict, U.N. Press Release SC/8496 (Sept. 14, 2005), available at <http://www.un.org/News/Press/docs/2005/sc8496.doc.htm>.

⁸⁴ *Id.*

⁸⁵ See *supra* text accompanying notes 25–26.

⁸⁶ The relevant section of the preamble to UNSC Resolution 1624 reads as follows: “*Condemning also* in the strongest terms the incitement of terrorist acts and *repudiating* attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts” S.C. Res. 1624, *supra* note 10, ¶ 4.

⁸⁷ In fact, as already noted, even when they adopted the European Convention on Prevention of Terrorism, the European countries themselves were not able to agree on the criminalization of glorification of terrorism.

General Assembly in 1966 (“ICCPR”) and that any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR.⁸⁸

The third element was the use of the slightly softer term “prohibit” instead of “criminalize” or “suppress,” as was used in other terrorism related resolutions.⁸⁹ The fourth and most important element of the compromise was the decision to base the resolution on Chapter Six of the United Nations Charter and not on Chapter Seven, given the non-binding nature and lack of enforcement tools regarding UN decisions (except for those accepted by the Security Council according to Chapter Seven). In this regard, Resolution 1624 differs from most of the other Security Council resolutions that deal with terrorism. Chapter Seven, which is aimed at confronting threats to international peace and security, authorizes the Security Council to issue decisions binding on all member states. The resolution was accepted in this fashion as a compromise and in order to enable the United States to support it without contradicting its constitutional tradition, which negates content-based restrictions on freedom of speech.⁹⁰

⁸⁸ The relevant section of the preamble to UNSC Resolution 1624 reads as follows:

Recalling the right to freedom of expression reflected in Article 19 of the Universal Declaration of Human Rights adopted by the General Assembly in 1948 (“the Universal Declaration”), and recalling also the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights adopted by the General Assembly in 1966 (“ICCPR”) and that any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR

S.C. Res. 1624, *supra* note 10, ¶ 6.

⁸⁹ UNSC 1373 (2001) requires states to “Prevent and suppress the financing of terrorist acts” as well as to “[c]riminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.” S.C. Res. 1373, at 2, U.N. S/RES/1373 (Sept. 28, 2001), available at <http://www.un.org/documents/scres.htm> (follow hyperlink “2001”).

⁹⁰ ERIC ROSAND, ALISTAIR MILLAR & JASON IPE, THE UN SECURITY COUNCIL’S COUNTERTERRORISM PROGRAM: WHAT LIES AHEAD? 6 (2007), available at [http://www.globalct.org/images/content/pdf/reports/unsccounterterrorism_program.pdf](http://www.globalct.org/images/content/pdf/reports/unsccounterterrorismprogram.pdf). For the processes that led to UNSC 1624, see generally Security Council Meeting of World Leaders Calls for Legal Prohibition of Terrorist Incitement, Enhanced Steps to Prevent Armed Conflict, United Nations News and Media Division (Sept. 14, 2005), <http://www.un.org/News/Press/docs/2005/sc8496.doc.htm>.

The next development in the UN's approach to incitement was the adoption of the United Nations Global Counter-Terrorism Strategy by the United Nations General Assembly in September 2006.⁹¹ Although the Strategy is a political document and therefore not legally binding, its adoption marks the first time that all member states of the United Nations agreed on a common strategic and operational framework for fighting incitement to terrorism. All member states agreed "to adopt such measures as may be necessary and appropriate and in accordance with our obligations under international law to prohibit by law incitement to commit a terrorist act or acts and prevent such conduct."⁹²

In summary, despite the absence of legally binding obligations in international law prohibiting incitement to terrorism, the view of the main United Nations bodies is that incitement to terrorism should be prevented and prohibited and that the prohibition of such incitement is a crucial element in an effective counter-terrorism strategy. The challenge for the future is to evaluate the different routes tried by different systems in the implementation of this new policy. The ways of implementation, as noted, are expected to be different, reflecting different constitutional traditions in this regard.

It is worth noting that from a broader perspective, the case of incitement to terrorism is an important example, but not the only one, of the potential clash between new international standards in the area of speech and national constitutional traditions. The international scene has seen a growing tendency to put limitation on freedom of speech when it is used for incitement and hatred. Another example of this tendency, from a completely different context, is the so-called Media case,⁹³ in which the Appeals Chamber for the International Criminal Tribunal for Rwanda upheld convictions and substantial sentences of three media leaders for crimes of speech committed via radio broadcasts and newspaper publications for inciting genocide.⁹⁴ The decision, based on international law, however, did not directly confront constitutional standards regarding freedom of speech and protections of the media. A similar case, decided in a domestic setting, would have needed to pass such a barrier, and probably different barriers according to the national constitutional context, as demonstrated by this Article.

⁹¹ G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

⁹² *Id.* ¶ 4.

⁹³ *Prosecutor v. Nahimana*, Case No. ICTR 99-52-A, Judgment, (Dec. 3, 2003).

⁹⁴ For an analysis of this decision, see Catharine A. MacKinnon, *Prosecutor v. Nahimana*, 103 AM. J. INT'L L. 97 (2009).

II. Institutions: The Role of the Courts and the Prosecution

The *Rahman*, *Al-Timimi*, *Iqbal*, and *Humanitarian Law Project* cases highlight the roles that prosecutorial policies and judicial interpretations play in narrowing or broadening the actual scope of the prohibition on incitement, beyond the normative decisions implied by the language of the law. This phenomenon is not unique to the American experience. Indeed, institutions play an important role in almost every legal context, yet in this arena, they prove crucial due to the ambiguous and relatively indefinite scope of anti-incitement prohibitions.

The balancing role played by the courts has been particularly prominent in the case of the European Court of Human Rights. In both the *Zana* and *Leroy* cases, the Court adopted a balancing approach to contextually assess the content of speech in order to avoid unnecessary infringement on freedom of speech. The context to be assessed may include such questions as who gave the speech, in what circumstances, to what audience, and so forth. In the *Leroy* decision, the Court upheld the conviction, taking into account the unique timing (two days after the September 11 attack), the place of publication (the Basque region), and the relatively modest sanction imposed.⁹⁵ In the *Zana* case, the political standing of the speaker and the timing of the interview affected the decision to uphold the conviction.⁹⁶

The importance of the context may be illustrated by yet another decision — *Erdoğdu and Ince v. Turkey*⁹⁷ — that dealt with the publication of separatist views. In this case, the court refrained from upholding the conviction and decided that, “the views expressed in the interview cannot be read as an incitement to violence; nor could they be construed as liable to incite to violence.”⁹⁸ Erdoğdu was the editor of the monthly review *Demokrat Muhalefet!* (Democratic Opposition!). Its January 1992 issue included an interview with a Turkish sociologist conducted by the second petitioner, Mr. Ince.⁹⁹ In the interview, the sociologist expressed the view that a Kurdish state in the making could be detected in certain areas of Turkey.¹⁰⁰ While arriving at the conclusion that these statements could not be interpreted as incitement to violence, the Court notably stated that it “must look at the interference in the light of the case as a

⁹⁵ *Leroy v. France*, App. No. 36109/03 Eur. Ct. H.R., ¶ 36–48 (2008).

⁹⁶ *Zana v. Turkey*, App. No. 18954/91 Eur. Ct. H.R., ¶ 49–50 (1997).

⁹⁷ *Erdoğdu and Ince v. Turkey*, App. Nos. 25067/94 and 25068/94 Eur. Ct. H.R. (1999).

⁹⁸ *Id.* ¶ 52.

⁹⁹ *Id.* ¶ 8.

¹⁰⁰ *Id.* ¶ 9.

whole, including the context of the impugned statements and the context in which they were made.”¹⁰¹

The Israeli experience with anti-incitement norms also reveals the important role played by the prosecution and the courts in this area. Despite their broad scope, the Israeli anti-incitement provisions were rarely used until the mid-1990s. The prosecution had been reluctant to levy indictments for offenses fitting this broad definition, and did so only in a limited number of cases, in a manner that reflected its high appreciation of the value of free speech. Indeed, until 1995, the prosecution’s policy had been to refrain almost entirely from issuing indictments for incitement to terrorism, relying on legal provisions demanding that indictments for the offense of sedition be approved by the Attorney General and served on a short six-month limitation period.¹⁰² As interpreted by the prosecution, this provision was meant to keep the number of indictments to a minimum, a position upheld by the Supreme Court.¹⁰³ As stated previously, the assassination of Prime Minister Rabin on November 4, 1995, led to a dramatic change in the approach of the Israeli prosecution to the offense of incitement to terrorism and to the possible links between incitement to terrorism and the furthering of terrorist acts. The assassination unleashed an intense soul-searching debate that primarily focused on the incitement that had preceded it and the responsibility of political and religious leaders for engendering an environment that legitimized assassination. Some also questioned the responsibility of the law enforcement system for this tragedy. The prosecution reacted to the criticism by submitting, immediately after the assassination, several highly visible indictments for incitement to terrorism against individuals who had expressed opinions that might be interpreted as legitimizing or glorifying the assassination. This change of policy was also criticized, since many saw this as a case of too little too late or as an attempt to stigmatize and silence anyone opposed to Rabin’s peace efforts.¹⁰⁴

As already stated, when the test cases of *Jabareen* and *Benjamin Kahana* reached the Israeli Supreme Court, the right to freedom of speech inspired the Court to adopt a narrow interpretation of the anti-

¹⁰¹ *Id.* ¶ 47.

¹⁰² Penal Law, 5737-1977, § 135, reprinted in LAWS OF THE STATE OF ISRAEL: SPECIAL VOLUME PENAL LAW, *supra* note 45, at 45.

¹⁰³ HCJ 292/86 Haetzni v. State of Israel, 42(4) PD 406 [1986] (Isr.); HCJ 588/94 Schlanger v. Attorney General, 48(3) PD 40 [1994] (Isr.).

¹⁰⁴ For discussion of the events before and after Rabin’s assassination, see generally Miriam Gur-Arye, *Can Freedom of Expression Survive Social Trauma: The Israeli Experience*, 13 DUKE J. COMP. & INT’L L. 155 (2003).

incitement provision included in the Prevention of Terrorism Ordinance.¹⁰⁵ Another perspective on the deliberations of the Israeli Supreme Court in this area is offered by the *Bashara* case,¹⁰⁶ which concerned allegedly inciting speeches by then Knesset member Azmi Bashara. Bashara was charged with incitement to terrorism, as well as glorification of terrorism, under the Prevention of Terrorism Ordinance. The charges referred to speeches by Bashara expressing admiration for Hezbollah, a terrorist organization. Bashara referred to the “sweet victory” of Hezbollah (over Israel) in Lebanon and praised the bravery and persistence of the Lebanese resistance.¹⁰⁷ As in the *Jabareen* case, the prosecution did not end in conviction, this time on the grounds that Bashara could claim parliamentary immunity for these speeches.¹⁰⁸

III. Choices: Between Direct and Indirect Approaches

Although UNSC Resolution 1624 presented a supposed international consensus regarding the danger of incitement to terrorism and the need to prohibit and prevent it, the positions of European countries on the one hand, and of American constitutional law on the other, remain as divergent as ever.

European countries have consistently acknowledged the legitimacy of anti-incitement law, subject to judicial methods of balancing the government interest in prohibiting terrorist incitement with the right of free speech, in the particular context.¹⁰⁹ At the same time, so far, Europe has not been willing to absolutely limit the training of terrorist organizations. The prohibition in European countries is generally limited to providing

instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a

¹⁰⁵ As noted above, this interpretation did not last in the sense that following CA 8613/96 *Jabareen v. State of Israel*, 54(5) PD 193 [2000] (Isr.), Israel replaced section 4 of the Prevention of Terrorism Ordinance with a new section 144D2 that was added to the Israeli Penal Law, according to which the prohibition applies also to terrorist actions not necessarily connected to a designated terrorist organization. *See supra note 54.*

¹⁰⁶ HCJ. 11225/03 *Bashara v. Attorney General* 50(4) PD 287 [2006] (Isr.).

¹⁰⁷ *Id.* at 293–94.

¹⁰⁸ This was the majority decision by Chief Justice Barak and Justice Rivlin, against the dissenting opinion of Justice Hayut. *Id.* at 336.

¹⁰⁹ Similarly, in its general direction, Israeli law also resembles this European tradition and demonstrates the importance of methods of implementation and interpretation in this context.

terrorist offense, knowing that the skills provided are intended to be used for this purpose.¹¹⁰

Moreover, several European NGOs, and even some funded by European governments, such as the Geneva Call, are devoted to providing training in international humanitarian law (IHL) and human rights law to armed groups, even those designated as terrorist organizations by the United States.

The United States continues to adhere to its classical approach, which rejects content-based prohibitions when the danger is not imminent. It does not criminalize incitement to terrorism and unlike European systems it adheres to the principle that anyone may say anything on any subject. At the same time, the United States tends to indirectly address the problem of incitement. The decisions in *Iqbal* and *Humanitarian Law Project* are not stand-alone examples. Taken together they represent an alternative U.S. path; they indirectly limit speech that supports terrorist acts or terrorist organizations through deportation powers with regard to aliens, or by prosecuting individuals who were involved in incitement by using broad, ostensibly content neutral offenses. Moreover, despite the different legal background, the U.S. Supreme Court rationalized its *Humanitarian Law Project* decision using similar arguments advanced by those advocating for Security Council Resolution 1624 as well as by European case law. First, it made clear that the offense of providing material support is a “preventive measure” that “criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur.”¹¹¹ It even accepted the view that such support “helps lend legitimacy to foreign terrorist groups — legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds — all of which facilitate more terrorist attacks.”¹¹²

In practice, the result is not only that the Court was willing to accept the legitimacy of preventing speech, but also that the scope of the prohibitions on terrorist-related speech is broader in some ways in the United States than in Europe. The United States prohibits any advocacy, training or any help offered, regardless of its peaceful nature, provided that it is coordinated with or connected to a terrorist organization. Europe, on the other hand, as already noted, limits the training of terrorists only if it is expressed in aiding violent actions.

¹¹⁰ Council of Europe Convention on the Prevention of Terrorism, *supra* note 27, art. 7(1).

¹¹¹ *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2728 (2010).

¹¹² *Id.* at 2725.

The question that emerges from this comparison concerns the relative advantages and disadvantages of these two approaches, assuming that they represent a possible model for enforcing norms through content-neutral legislative mechanisms.

The European experience, and to some extent the Israeli experience, show that content-based prohibitions can be enforced in a manner that assigns significant weight to the protection of speech. This protection rests on several layers: the conditions ingrained in the very wording of the prohibiting legislation, prosecutorial discretion (when exercised), judicial interpretations which tend to be hesitant in the application of anti-incitement prohibitions, and the application of general principles of European human rights law in specific cases, as well as in the drafting of new legal instruments. Together, these layers offer a robust protection against misuse or abuse of anti-incitement laws. On the other hand, the very existence of express prohibitions on incitement to terrorism, even if they are interpreted narrowly, may create some chilling effect on speech.

The U.S. legal system assigns supreme importance to freedom of speech, an approach reflected in the Constitution's First Amendment, the U.S. Supreme Court's jurisprudence, and the reluctance to legislate content-based prohibitions that would directly criminalize speech. However, in practice, in the context of the offense of providing material support to a terrorist organization, the scope of the limitations on freedom of speech is broader than in Europe at least in one manner. Anti-incitement laws in Europe do not prohibit activities such as those described at the *Humanitarian Law Project* decision. Moreover, the path to conviction (in cases such as *Iqbal* or *Humanitarian Law Project*) includes only two steps: an executive designation of an organization as terrorist based on its actions, and fact-finding regarding the question of whether the defendant provided this organization with services or goods. Since the content of the speech is not assessed by the court, no additional balancing tests and limitations, such as those in Article 12 of the Council of Europe Convention on the Prevention of Terrorism, are involved. Moreover, the conviction relies strongly on the decision to designate an organization as a terrorist organization — an executive decision accepted in the preliminary stage, which is hardly within the reach of effective judicial review.¹¹³

¹¹³ Theoretically, the designation of an organization is subject to judicial review. However, this legal challenge to the designation has to be made by the designated organization itself within thirty days. In the circumstances of the case, the LTTE sought judicial review of its designation as a foreign terrorist organization, but the designation was upheld. The PKK did not challenge its designation, at all. See *id.* at 2713.

The new U.S. case law raises the question as to what is the best route for criminalizing speech that supports the goals of terrorist organizations. Is it better to do so by directly and openly acknowledging the willingness to limit the content of utterances, or indirectly by shutting down a media channel or prohibiting any support (including in the form of advocacy) offered to a terrorist organization regardless of its intention and content?

On the one hand, the disadvantage of the American approach is that the litigation that focuses on the provision of material support to a terrorist organization is deemed to lead to a harsher result (from the perspective of protection of free speech) in comparison to direct anti-incitement prohibitions, because it lacks balancing mechanisms. On the other hand, its professed advantage is that it does not formally acknowledge the legitimacy of content-based limitations on freedom of speech. Thus, it preserves the principle of freedom of speech in its purity. In addition, the prohibition on “providing material support” does not directly limit the speaker, but rather restrains those who support him or her. In this manner, the limitation on freedom of speech is not at the core of the speech itself.¹¹⁴ Another advantage of the U.S. approach — this time in terms of effectively fighting terrorist organizations (and outside the immediate context of the implications of the prohibitions for the culture of freedom of expression) — is that it resists any form of assistance to such organizations. In the words of Chief Justice Roberts, “training and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities.”¹¹⁵ In fact, evidence gained from terrorist organizations shows that they give legal advice to their operatives and train them on how to manipulate the legal system if they are caught.¹¹⁶ No one could guarantee that legal advice provided to terrorist organizations by NGOs could not be misused to promote deadly purposes.

The dilemma presented here can be seen as a variant on the debate about the issue of candor and transparency in judicial decision-making. One of the best presentations of this dilemma is Guido

¹¹⁴ This distinction between speakers and their supporters appears in other contexts of U.S. freedom of speech law as well. For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the U.S. Supreme Court denied the legitimacy of limiting the expenses of political candidates, but acknowledged the legitimacy of limiting contributions by others.

¹¹⁵ *Humanitarian Law Project*, 130 S.Ct. at 2729.

¹¹⁶ See, e.g., THE AL-QAEDA MANUAL, available at http://www.justice.gov/ag/manualpart1_1.pdf.

Calabresi's discussion of "The Uses and Abuses of Subterfuges."¹¹⁷ Calabresi mentions two main reasons for hiding value judgments concealed in judicial decisions. One is an aspiration "to hide a fundamental value conflict, recognition of which would be too destructive for the particular society to accept."¹¹⁸ The second is a result-oriented slippery slope argument which assumes that keeping the façade of an absolute right will better protect it in future cases.¹¹⁹ In the present context, one may argue — following Calabresi — that the American system tends to indirectly criminalize speech because it allows it to avoid facing the value conflict between the struggle against terrorism and the preservation of the open marketplace of ideas, and carries the message of resistance to the idea of limiting free speech on a large scale. However, this story may also have a more problematic side. Addressing a constitutional challenge without fully admitting it may also lead to a weak protection of rights.

More specifically, one should look into the implications of limiting specific channels of communication on the scope of freedom of expression: do the shutting down of a TV channel and the prohibition on prohibiting any advocacy on behalf of a terrorist organization (designated as such by the executive) without acknowledging and thoroughly discussing the consequences of this step for freedom of speech, and without resorting to content-based balancing mechanisms such as those developed in the European context, secure a larger scope for freedom of speech? While this Article does not pretend to offer the right formula for balancing the need to burden anti-terrorist activity and securing a free political culture, it aspires to shed light on the potential risk of not acknowledging the actual limitation of freedom of speech posed by content-neutral prohibitions of the kind implemented by U.S. law. In an era of Internet services, including Facebook and Twitter, instant messaging, and satellite TV, the claim that shutting down a media channel does not affect the scope of constitutional freedom of expression does not appear tenable.

¹¹⁷ GUIDO CALABRESI, *COMMON LAW FOR THE AGE OF STATUTES* 172–77 (1982). Calabresi's analysis is partially based on former works, for example GUIDO CALABRESI AND PHILLIP BOBBIT, *TRAGIC CHOICES* (1977).

¹¹⁸ CALABRESI, *supra* note 117, at 172.

¹¹⁹ *Id.* at 173. The issue was debated also by using the terminology of judicial candor. See also David Shapiro, *In Defense of Judicial Candor* 100 *HARV. L. REV.* 731 (1987); Scott Altman, *Beyond Candor*, 89 *MICH. L. REV.* 296 (1990); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 *TEX. L. REV.* 1307 (1995).