The Chilling Effect of Terrorism and Violent Extremism Regulation: The UN, UK and US

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Executive Summary

A study into the laws and policies at national, regional and international levels - from case studies of the United States (US), United Kingdom (UK) and United Nations (UN) - aimed at tackling terrorism and violent extremism and the effect on our freedom of expression.

Terrorism is a security concern for many States and a particularly motivating factor for enhancing national security laws. Following 9/11, there was a proliferation of anti-terrorism regulation as well as policies aimed at countering violent extremism (or radicalisation) domestically, as exampled by the UK and US. Also, internationally, as is reflected by different bodies of the UN; namely the Security Council, Human Rights Council, Human Rights Committee, and Special Procedures.

This thesis considers that the jurisdictional tests for protecting free expression with the broad and undefined national security aims give way to regulation which can, and do, impede free expression. In particular, examining how the lack of a universal and concise definition of those threats has led to the excessive and overbroad regulation which has, in turn, had an absurd and arbitrary chilling effect on important actors in our democracies, invoking examples of the media, journalists, human rights defenders, academics, Internet intermediaries, and vulnerable persons and groups. This thesis will identify the domestic free speech and national security justifications and standards, as well as the authoritative interpretation and scrutiny of UN bodies.

Utilising this comparative assessment, the thesis will then foster a more pragmatic defining approach to such regulation. It will make recommendations to each jurisdiction to bring counter-terrorism and violent extremism regulation in line with international human rights standards and thus better protect our freedom of expression.

I. Introduction

Terrorism is a concern on both a national and international level. The concern takes different forms in different arenas. Following 9/11, the international community began to view terrorism as a "global phenomenon that could cause massive and pain and destruction anywhere," resulting in a proliferation of new and updated anti-terrorism laws and policies.[1] There was also a parallel increase in regulation of speech related to violent extremism or terrorism and, in particular, a demand to address subsidiary issues which might give way to terrorist threats, such as the proscription of terrorist organisations and the 'crack-down' on speech which might incite terrorist association or acts or violent extremism. 9/11 effectively served as a lightning rod to State responses to contemporary terrorism.

This was visible across the globe and reflected in the dialogue of the United Nations' (UN) various bodies. The United States of America (US) had suffered the consequences of international terrorism[2] while the United Kingdom of Great Britain and Northern Ireland (UK) has almost consistently had a moderate domestic terrorism threat since the 20th century Irish Republican Army (IRA) attacks, now severe, as well as a high international terrorism alert following a series of London attacks in the 2000's, downgraded to substantial only on November 4 2019.[3] The world was particularly sensitive. The exchange of lessons learnt from terrorist attacks, particularly in Western States such as the UK, US., France, and Australia, resulted in a new regulatory infrastructure to prevent any further attacks.[4] Yet these countries

[1] Mike Smith, 'Securing our Future: A Decade of Counter-terrorism Strategies', < https://www.un.org/en/chronicle/article/securing-our-future-decade-counter-terrorism-strategies> accessed 9 November 2019

[2] Bob Budahl, '9-11 Terrorist Attack: Defensive countermeasure of deter and detect', (August 16 2019) <https://moderndiplomacy.eu/2019/08/16/9-11-terrorist-attack-defensive-countermeasures-of-deter-and-detect/> accessed 9 November 2019

[3] UK Government, 'Terrorism and National Emergencies', (4 November 2019) <https://www.gov.uk/terrorism-national-emergency > accessed 9 November 2019

[4] For example, with 9/11 in the US, the late 1900's IRA attacks in the UK and the 2005 London bombings, the 2004 Madrid bombings, the 2015 Paris attack and the 1009 Holsworthy Barracks terror plot in Australia.

suffered only 2% of terrorism related deaths in 2017, a figure which does not conflate much in other years.[5] As a result of the big powers being effected by terrorism, albeit little comparatively, this new counterterrorism infrastructure was prompted on an international level also and can be seen in the developments of dialogue and resolutions from different organs of the UN. For example, with Security Council Resolutions 1371 (2001) and 1624 (2005) which also established the Counter-Terrorism Committee, the 2006 General Assembly adoption of the United National Global Counter-Terrorism Strategy, Human Rights Council dialogue, the inclusion of terrorism-related issues in the Human Rights Committee's 2011 General Comment 34, as well as the establishment of a Special Rapporteur mandate on Counter-terrorism and human rights.[6]

This thesis will compare the impact of the proliferation of anti-terrorism and countering violent extremism (CVE) laws and policies which emerged in response to, and after, 9/11 on the freedom of expression. It will compare the defining terms of 'terrorism' and 'violent extremism' in the jurisdictions of the UK and the US, measuring these against their comparative tests for protecting the freedom of expression. Freedom of expression is regulated on all levels. For the purposes of this thesis, international human rights law prescribed by the

[5] Hannah Ritchie, Joe Hasell, Cameron Appel and Max Roser, 'Terrorism', (July 2013, revised September 2019) <https://ourworldindata.org/terrorism> accessed 9 November 2019

[6] UN Security Council, *Security Council resolution 1371 (2001) [on the situation in The former Yugoslav Republic of Macedonia],* 26 September 2001, S/RES/1371 (2001), <https://www.refworld.org/docid/3c4e94551c.html> accessed 9 November 2019; UN Security Council, *Security Council resolution 1624 (2005) [on threats to international peace and security],* 14 September 2005, S/RES/1624 (2005), <https://www.refworld.org/docid/468372832.html> accessed 9 November 2019; Counter-Terrorism Committee, <https://www.un.org/sc/ctc/> accessed 9 November 2019; UN General Assembly, *The United Nations Global Counter-Terrorism Strategy : resolution / adopted by the General Assembly,* 20 September 2006, A/RES/60/288, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N0550488.pdf?OpenElement> see also <https://www.un.org/counterterrorism/ctitf/en/united-nations-general-assembly-adopts-global-counter-terrorism-strategy> accessed 9 November 2019; UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression,* 12 September 2011, CCPR/C/GC/34 <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> accessed 9 November 2019; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Commission on Human Rights, *Resolution 2005/80 on Protection of Human Rights and Fundamental Freedoms While Countering Terrorism,* 21 April 2005, E/CN.4/RES/2005/80, <https://www.refworld.org/docid/429c57ad4.html> accessed 9 November 2019, see also <https://www.ohchr.org/en/issues/terrorism/pages/srterrorismindex.aspx> accessed 9 November 2019

UN, and in particular the Human Rights Committee, regional European Convention law as related to the UK, as well as domestic federal law in the US will be considered. This thesis considers the application and interpretation of normative standards reflected in the terminology found in all three human rights systems and how this can facilitate or impede one's freedom of expression, identifying the justifications of the latter and how just they really are. The central question for this thesis to examine, therefore, is how far definitions of 'terrorism' and 'violent extremism' disproportionately impede our freedom of expression.

This question is important for many reasons. First and foremost, it reflects the functionality or understanding of one of the most important human rights – that of free expression – against contemporary challenges. The many rationales for this will be considered by this thesis. It is prudent to note here, however, that the notion of a 'democratic society' depends on free expression. This can be seen from Barendt's leading theory for freedom of expression. First, democracy and pluralism require an established marketplace for free expression. Second, and certainly interrelated, the human rights system persistently refers to the freedom of expression as a basis for the practice of other rights and freedoms.

The human rights systems have also acknowledged the challenge for jurisdictional governance of terrorism as an ongoing and special threat. This may, in turn, be considered so ongoing, so special and so circumstantial as to permit greater impeachments of our freedom of expression. This consideration must also be factored into this thesis's assessment to ensure that the conclusion is neither ignorant nor indifferent to the context which made it an issue in the first place. It is clear that the domestic laws and policies in question have a real impact on the freedom of expression, such as with actions against media and civil society, surveillance of internet information, and restrictions in journalism and academia. This applies to the international arena also. This is therefore a fertile starting point for evidencing the importance

of this thesis; to consider the underlying rationales for such interferences with free expression and just how rational they really are.

The three jurisdictions to be considered in this thesis are; the UN, UK, and US. Two domestic jurisdictions and one international have been selected as the most appropriate comparators for the purpose of basing the assessment on both the domestic implications of the problem as well as addressing a potential resolution.

The selection of these domestic jurisdictions is three-fold. First, the current consideration of the UK to change its anti-terrorism laws in a way which may have greater impacts on the freedom of expression makes this an issue which is real, relevant and potentially pressing. Second, the UK and US provide primary examples of the proliferation of dramatic anti-terrorism and violent-extremism laws regulation. They are also both appropriate case studies for considering the different laws and policies which were established on the basis of 'terrorism' and 'extremism' definitions enshrined in their (new) legislation. For example, the 'Prevent' strategy of the UK[7] and the US Animal Enterprise Terrorism Act of 2006.[8] Indeed, it is precisely these effects which are capable of infringing our freedom of expression. Third, these two domestic jurisdictions are better able to establish a case study which focuses on how the protection of free expression as implicated by such regulation is, in general, affected by their different standards afforded to the protection of free expression. This, consequently, ensures that they will provide a comparison based on a more global level as well as provide findings toward a contribution or resolution which could be better utilised.

The UN was considered an appropriate comparative jurisdiction with these two domestics in order to represent the standards of international human rights law as well as the mechanisms by which this is interpreted. The US and UK are State parties to UN bodies and as such, it also

[7] United Kingdom: HM Government, 'Prevent Strategy,' CM 8092, June 2011
[8] United States of America: Animal Enterprise Terrorism Act 2006 (Pub.L.109-374; 18 US.C. § 43)

acts as a body by which these States can be scrutinised, particularly before the Human Rights Council. Additionally, bodies in the UN, such as the Security Council, are able to create binding law applicable to States to promote international peace and security. The Human Rights Committee has a principal role in setting the standards of human rights within the remit of the International Covenant on Civil and Political Rights (ICCPR) (which includes freedom of expression). Dialogue surrounding this issue within many organs of the UN, as well as others, such as the Organisation for Security in the Council of Europe (OSCE),[9] is certainly not novel on the level of international governance. In particular, from Special Rapporteurs whom this paper will rely on as an authority throughout much of this paper.[10] The UN will therefore be assessed based on the outputs of these actors with competing mandates and perspectives; the Security Council, Human Rights Committee, Human Rights Council, and Special Procedures. None of which have yet resolved this issue with any form of binding international consensus.

In particular, it is the role of the Human Rights Committee to interpret Article 19 of the ICCPR and therefore, their interpretation of the freedom of expression in General Comment 34 provides an authoritative and measurable basis for this assessment.[11] This thesis certainly aims to address the omission to properly define 'terrorism' and 'violent-extremism' from this realm. In addressing this question, it is also necessary to consider the convolution of the terms with each other; they are often perceived as interrelated in legislation or policy-making when they should rather be clearly distinguished from each other. This is a subsidiary problem of the

[9] The Organisation for Security in the Council of Europe is an intergovernmental organisation mandated to address transnational threats to security. The UK and US are both members. The Secretariat has a counter-terrorism department which includes also issues of violent extremism and radicalization that lead to terrorism. See here: OSCE, 'Institutions and Structures', <https://www.osce.org/secretariat/terrorism> accessed 9 November 2019

[10] Focusing on the Special Rapporteur for the promotion and protection of freedom of opinion and expression, the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, as well as some joint work with the Special Rapporteur on the protection of human rights defenders and the Special Rapporteur on the rights to freedom of peaceful assembly and association

[11] UN General Assembly, *International Covenant on Civil and Political Rights,* (ICCPR) 16 December 1966, United Nations, Treaty Series, Vol.999, 171; and General Comment 34 (n 6)

ambiguity of these terms in each jurisdiction. How far this affects the practice of complying with these laws in each case will also be considered.

This thesis will compare the definitions at domestic levels which are affected only by domestic interests with that prescribed at an international level. It is submitted that the Security Council, as the only organ of the UN capable of producing binding treaties agreed to by States, is consequently an ideal comparator for the purpose of taking a standpoint as to what the best definition of such terms might be, with particular reference to its 2004 Resolution 1566, the only and the closest it has come so far.[12] It is also prudent to note that, while this thesis will focus on the impact on expression, it will necessarily encounter the impact that such laws and policies have on other interrelated rights in the process.

I will argue that the impact of anti-terrorism and CVE regulation on free expression has a disproportionate and unjustified impact, particularly on those sections of society in which free speech is generally afforded the greatest protection. Such regulation has an arbitrary chilling effect on media, civil society, academia, Internet intermediaries, and the vulnerable. This thesis will show that this is predominantly based on the divergent and vague definitions, as opposed to a direct consequence of how the jurisdictions have transposed the freedom within their own jurisdictions.

This thesis will be based predominantly on a desk study of the laws, policies and cases deriving from the domestic jurisdictions and the European Court of Human Rights (ECtHR), as supported by secondary literature discussing their utility and appropriateness from a human rights perspective, while making reference to relevant and recent news on the issue. It will also

[12] UN Security Council, *Security Council resolution 1566 (2004) [concerning threats to international peace and security caused by terrorism]*, 8 October 2004, S/RES/1566

consider the authoritative texts from different organs of the UN, including resolutions, reports, recommendations and comments from, as well as the general dialogue and press releases.

There will be five substantive chapters. The first will be theoretical; it will explain what we mean by the concept of 'protecting free expression.' This chapter will set the landscape for this thesis by considering the reason why the protection of free expression is important, what the relevant elements of the right are, and why the right is limited.

The second chapter will turn to the opposing theory; that of limiting the right to freedom of expression in the name of national security. Within this, it will consider, from a conceptual stance, the terms 'terrorism' and 'violent extremism' to demonstrate the real and current threat as well as explaining the different terminology used in academia and in law, and provide rationales for the limitation of protection in a way which will form a basis for later analysis.

The third chapter will be a legal and a comparative one. It considers how the freedom of expression is incorporated into each jurisdiction. It forms the basis for this case study. It will be made clear, however, that there is, at least to some extent, a minimum universal core of the right producing a universal standard of application in each jurisdiction. This can inform the subsequent two chapters which will analyse the conflict between the implications of anti-terrorism and violent-extremism regulation with our freedom of expression.

The fourth chapter will answer the question indicated from the last; does counter-terrorism and CVE regulation cause a chilling effect on expression? This chapter is based on the proposition that there *is* an interference with our freedom of expression and thereby seeks to resolve the principle question regarding the cause and justifications for this. The proposition that free expression can be so limited based on the aforementioned justifications will be refuted. It will consider five specific points of comparison: (1) the regulatory texts of each jurisdiction; (2) the definitions of 'terrorism' and 'violent extremism' within these and their adequacy; (3) the

definition and appropriateness of ‘incitement’ as a crime and its social impact; (4) the lack of concise exemptions and or justifications to be balanced against national security interests and the vulnerability this causes; and (5) the more novel penetration of regulation into the online realm and the problems this causes for online expression and liability of Internet intermediaries.

The final substantive chapter will utilise this analysis and formulate a pragmatic proposal to consolidate the systems – domestic, regional, and international – by way of necessary considerations that are currently omitted in the definitions of the terms ‘terrorism’ and ‘violent-extremism.’ These should be capable of meeting the aims of national security protection while minimising its arbitrary and unnecessary impact on human rights. It will also provide specific recommendations to the UN, as well as to the States, in an attempt to bring regulation in line with both domestic and international human rights standards and reduce the chilling effect currently seen. This chapter will also offer some personal and academic reflections to encourage further dialogue and research on the issue, before concluding.

II. The Theory for Protecting Expression

It is an accepted virtue of all democratic societies that we have a right to our own opinions and a freedom to express them. In the British and American democracies, this is and has been true for a long time. This influenced also the inclusion of speech as one of the fundamental freedoms in the ICCPR. For example, free speech was one of Roosevelt's four freedoms which set the framework for the Convention.[13] It is therefore a fertile starting point for this thesis to consider the theory behind why expression should be free, particularly those deriving from the jurisdictions in focus of this thesis. This chapter will therefore consider the different prescribed justifications for protecting the right to freedom of expression. This will be processed from three perspectives, as proposed by Barendt; rationales, interests and values. Together, these justifications embrace a single value or kind of culture "that we call liberal."[14]

i. Rationales of Free Expression

Freedom of expression necessitates that there are benefits of protecting different forms of expression. Free expression is considered the 'foundation' of a democratic society and a basis for the practice of other rights, freedoms and principles,[15] such as those of truth, democracy, self-governance, self-fulfilment and autonomy.[16] Freedom facilitates fundamental motivations of checking government, developing character, and promoting democratic culture, through expression.[17]

Truth, Democracy and Self-Governance

The first and most crucial rationale for free speech protection is the arguably inherent human characteristic of truth-seeking. This is an American-oriented rationale. Barendt correctly

[13] OHCHR, 'Fundamental Freedoms', <https://2covenants.ohchr.org/Fundamental-Freedoms.html> accessed 9 November 2019
[14] Bloustein, in Geoffrey Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet, and Pamela S. Karlan, *Constitutional Law*, (New York: Wolters Kluwer, 8th edn, 2018) 1019
[15] General Comment 34 (n 6) [2]
[16] Eric Barendt, *Freedom of Speech*, (OUP, 2nd edn., 2005) 6-7
[17] Stone (n 14) 1018

identifies "the importance of open discussion to the discovery of truth."[18] It is the 'intellectual marketplace' and free exchange of ideas which necessarily consists of counter-speech and corrective-speech[19] that will "root out error" and ensure truth prevails.[20] This, in turn, is pivotal for our decision-making in a personal, social and political capacity. The "ultimate good desired is better reached by free trade in ideas."[21]

This factors into the free speech justification from democracy. This rationale is considered the most influential,[22] and the reason why expression is awarded such a fundamental status in human rights, as emphasised in paragraph 3 of the Human Rights Committee's General Comment 34. It corresponds with the notion that free and diverse expression can lead to the "discovery and spread of political truths."[23] The decision-making we exercise when utilising this consequently ensures our rights to political participation are effective. Indeed, without effective public participation, there is no democracy. It could seem perverse that we utilise our free speech for the purpose of ensuring a democratic government whom, in their functions, enact regulations which impede that very freedom. The legislator is, however, representative and therefore, there is some level of trust in the truthfulness of the debates and negotiations which result in an Act. Further, there is some trust in them as experts to correctly balance our free speech interests with our nation's security.

Self-governance, as a further and separate rationale for protecting free speech, is thus important even if the previous rationale is self-evident. This rationale entails the suspicion that there is a danger or agenda behind regulation of speech.[24] This is a negative argument and, although there

[18] Barendt (n 16) 7
[19] ibid, 9
[20] Martin H. Redish, 'The Value of Free Speech,' University of Pennsylvania Law Rev. Vol. 130, No.3 (January 1982) 616
[21] Stone (n 14) 1014
[22] Barendt (n 16) 37
[23] ibid, 18
[24] ibid, 21

might be legitimate justification for restricting speech, there is nevertheless the persistent question of whether the government's distinction between that which should be regulated and that which should be tolerated is correct.[25]

The self-governance and suspicion rationale can itself promote or hinder the purpose of its preceding rationales. For example, free speech resulting in political truth (to make such a general assumption), might nevertheless be sceptically received. As such, one could argue the speech leading to that outcome was pointless. This can be countered with regards to the interests of the speaker (in the next subchapter), but also, again, with the rationale of truth. The notions of self-governance and democracy, truth and scepticism do not have to oppose. They all contribute to the marketplace of ideas, and are within themselves counter-speech thus ensuring the truth prevails. Arguably, therefore, the rationale for democracy cannot stand alone. Neither can the rationale for truth.

As such, the protection of expression resulting in political truths should be, and is, awarded a greater level of protection. This should ensure that those actors within society whom have the greatest potential to contribute to debates on public interest, such as civil society, experts and academia, and the intermediaries used to disseminate this, should be facilitated rather than hindered. This is certainly something which has had an inordinate array of jurisprudence on an international, regional and domestic level by the UN, UK and US. The protection of political truth, however, goes two ways; there is greater protection for criticism of government while there is also greater privilege in executive speech. When it comes to speech not serving such a public interest, then speech might lose such a grant of immunity. Barendt clearly limits the application of the above rationales as a justification for protected speech only if that speech

[25] ibid, 22

contributed to political debate or discourse.[26] This might include extremist speech. Arguably, terrorist sentiment and violent-extremism might cross the line and lose such a protection, rather being prior-censored by legislation. This thesis will question the ability of this 'line' to be manipulated with vague and ambiguous definitions of those acts that allegedly cross it, thereby causing a chilling effect on those social actors that contribute the most to ensuring effective governance.

Self-fulfilment and Autonomy

A subsidiary rationale for the protection of the freedom of expression is self-fulfilment. This rationale considers the freedom in its legal sense as the enjoyment of an individual right as well as other interconnected rights. It also considers the philosophical perspective; without free expression, "the life of the spirit is meagre and slavish."[27] The freedom of expression allows everyone to establish themselves according to their own autonomy, opinions and beliefs. This right facilitates our ability to freely exercise other rights, such as our religion, thoughts and conscience.[28] In this way, free expression exhibits the self-fulfilment and development of our personalities.[29]

The problem arises when this rationale is used to justify violence, in the forms of extremism or terrorism, at which point one might criticise the justification. The infamous maxim 'one man's terrorist is another man's freedom fighter' speaks loud and clear of this. Arguably, one is engaging in their own self-fulfilling prophecy or as a martyr for the self-fulfilment of others when undertaking such extreme or violent expressive acts.[30] While this is a dramatic example, it evidences how a generally widely-encompassing notion of expression could be used to rationalise such acts. The rationale of self-fulfilment is, nevertheless, important in the

[26] Eric Barendt, 'Incitement to, and Glorification of, Terrorism,' Chapter 22, in Hare, I. and Weinstein, J., Extreme Speech and Democracy (OUP, 2009) 449
[27] Stone (n 14) 1018
[28] Barendt (n 16) 13
[29] ibid
[30] Joseba Zulaika, *Terrorism: The self-fulfilling Prophecy*, (University of Chicago Press, 1st edn, 2009) 4

realisation that we have such an autonomy over our expression. The non-absolute nature of free expression should thus set a capable boundary for preventing such abuses.

As the third party in this theory, the question of how this applies to the State should be considered. In principle, the State should not restrict our right to free expression as this would also entail a restriction on our right to self-fulfilment. Clearly, however, to permit all forms of expression would have a damaging impact on many other human rights. This is the reason why the qualifiable nature of the protection of expression is universally accepted. If we allow, for example, the above 'freedom fighter' to commit acts of violence in the name of political or ideological expression, then we are facilitating the 'terrorist' act as is received by society – that which can result in many forms of harm, not least death.

Conclusion

The rationales for expression above indicate that the primary motive for protecting the freedom of such rely on the notion that, beyond protecting its own values (to be considered in section iii.), this right is both indicative of other values and facilitates the effective enjoyment of other rights. Indeed, it has been seen that the non-absolute 'freedom' is also intended to meet this goal by way of protecting other rights. Following this, it is reasonable to build on the assumption that everyone holds some interest in the protection of expression.

These rationales can be seen to serve both the 'democratic' interest as well as the 'terrorist' interest. For example, terrorism and violent extremism can be said to undermine democracy or the search for truth in that they dominate the marketplace with expression containing violent elements. On the other hand, from the perspective of self-governance or self-fulfilment, terrorist or violent extremist expression might be perceived as the only means to those ends. As such, tensions can be seen between the rationales themselves. This leads to a further tension in that it both justifies governments subversion of free expression while also demonstrating the

vulnerability of the freedom in certain situations or of people with certain characteristics or associations.

ii. Interests of Free Expression

These rationales and values of free expression can only be justified if they serve a human interest. Barendt identifies three persons' interests; the speaker, audience and the general public.[31]

Speaker

First and foremost for consideration is the speaker's, or more correctly, the author's interest – this is 'paramount.'[32] In particular, the author has interests in the self-fulfilment and democracy rationales above; one must be permitted to express their personality and contribute to the society they are governed by.[33] Further, it would be reasonable to assume that the speaker has an interest in communicating or expressing their thoughts, ideas or opinions simply by virtue of the fact that they have done so and presumably intended to do so.[34]

At the same time, it is generally understood that the speaker has some responsibility when choosing to exercise this freedom. For example, in ensuring it will not have a violent impact or intentionally defame someone, as are criminally prohibited. This is obvious. The regulation of terrorist and extremist sentience, on the other hand, is not so obvious. This is not only because of much of its ambiguity (which will be examined in-depth in the second chapter), but also due to its ability to transpire onto modern platforms, such as social media, occupied by a larger section of the population. It is therefore not only in the interest of the speaker to have the freedom to express, but also to clearly know where that freedom should stop. Any

[31] Barendt (n 16) 23
[32] ibid
[33] ibid
[34] ibid, 25

regulation would otherwise result in the so-called 'chilling effect' or persecute innocent dissemination.

Audience

The corresponding interest argument is that the audience have an opportunity, in the marketplace of ideas, to hear and respond to those ideas which the speaker has communicated. This is important for accessing truth and the practice of self-fulfilment. Generally, expression which concerns ideas of public interest and/or debate, will be given greater protection. This is because the audience has greater utility in hearing such ideas – to falsify misinformation, to justify or clarify a debate, etc. – and therefore, must have greater protection for greater prospects of being received.

The audience's interest might, nevertheless, be limited. They might even have a greater interest in not receiving ideas. Freedom of expression, in principle, protects this interest also; one is free to express, not to speak, or to avert their eyes from witnessing expressive art, for example. This is a logical claim that governments might insist on when regulating expression. This must, nevertheless, satisfy a test – minimal impairment, balancing of interests, proportionality, reasonability – taking different formats in different jurisdictions (these will be later considered). It is fair to say, however, that it is in the interest of neither the audience nor the speaker to be so restricted as to prevent access to information in the public interest. Theoretically, this does not seem problematic. When legislation seeking to prevent violence, or recruitment to terrorist or violent extremist organisations, are not defined in a way which limits them to only the intended nature of expression, it can have a chilling effect on otherwise legitimate expression.

General Public

The public interest in free speech consists of the above interests as well as the more general interest in the discovery of truth and thus the free and informed political participation in a

democratic society,[35] as well as the practice of tolerance. Public interest is also the qualifying standard for heightened protection. Where there is a public interest in receiving the expression, then there is a higher expectation of States not only to not interfere, but also to facilitate its delivery.

Conclusion

The perverse assumption of this 'interests' analysis is that one is rational and that when utilising this freedom, we do so for a legitimate purpose. It also assumes that the audience will receive it rationally. Indeed, where the regulator is expected to be neutral and not curtail these interests disproportionately, it can have an adverse impact in society. For example, hate speech or indeed, speech which is considered 'extremist', can either be rationally countered or it can, as this thesis will explore, incite violent extremism or terrorism.[36] Arguably, the line drawn when making this balance is vague and so protection from such incitement, which is certainly for the protection of the public, might cross into the realm of obstructing the legitimate interests and values of those others.

iii. Values of Free Expression

It is important to acknowledge that the protection of expression could arguably go towards protecting numerous values, legal and non-legal. For the purpose of this thesis' assessment, however, the values of tolerance, liberty and pluralism are considered the most important by reason that they are the most contentious; they both give credit to protecting free expression while also prescribe motivations for why this might be sought to be restricted.

Tolerance

The final leading free expression value is tolerance, as Barendt appropriately summarises in *Extreme Speech and Democracy*:

[35] ibid
[36] ibid, 32-33

> There is… a real public interest in hearing extremist views… not because we might consider them right, or might wish at some stage to act on them… but because it is vital for us to know that they are held and held sufficiently strongly that some people wish to communicate them to others.[37]

In short, tolerance is an essential requirement of free expression. It is tolerance of other views in public participation that leads to truth and democratic decisions. Importantly, it is tolerance which ensures we have the opportunity to address any ill-held, extreme or offensive views Barnedt refers to above. And it is the tolerance of others which ensures we can freely express our own, potentially contentious, views.

Liberty

Liberty, for the purpose of this conceptual analysis, takes the ordinary meaning of the word. Intuition suggests that we have more freedom to speak than we have liberty in other areas.[38] While "dignity [is a] complex moral and political concept" in itself, it is nevertheless an important constituent element of the value of protecting free expression.[39] It goes two ways – it is both the value one exercises in expressing oneself while also being the value one might impede when expressing. As such, it is a significant reason for protecting free speech and also limiting that protection. There must be "equal respect and concern" for both the speaker and the audience's liberty and interests.[40]

Pluralism

The value of pluralism is one closely linked with democracy and self-fulfilment rationales. Pluralism means a diversity which the marketplace of ideas can facilitate. Freedom of expression is not just a right which ensures we can develop and present our true selves. It is a "public good or value"[41] which "reflects and reinforces pluralism."[42]

[37] Barendt (n 26) 453
[38] Stone (n 14) 1014
[39] Barendt (n 26) 33
[40] ibid, 32
[41] ibid, 35
[42] ibid, 34

Conclusion

These values inherent in free expression reinforce the conclusion from the rationales preceding them – that the freedom of expression is something of both intrinsic importance due to its very nature as well as its instrumental importance as a meta-right. For example, freedom of expression serves our own interests; as a speaker, as an autonomous being, and as a liberal character. It also serves our societies interests; as an audience or 'people', as a democracy or marketplace, and as a pluralistic community. In the latter sense, freedom of expression permeates other rights, such as that to political participation, that to assembly and association, and that to liberty and security, to name a few. Therefore, I argue that freedom of expression is "essential to the good working of the entire human rights system."[43]

[43] Michael O'Flaherty, 'Freedom of Expression: Article 19 ICCPR and the Human Rights Committee's General Comment 34' HRLR 12 (2012) 631

III. The National Security Justification

This chapter will consider the (present or alleged) national security threats which may possibly be envisaged by the regulation of terrorism and violent extremism, indicating how the current challenges to national security have enabled the creation of laws which impede our free expression. Many restrictions of free expression operate under the guise of national security justifications. This has a significant chilling effect. Problematically, it can also have the effect of achieving the opposite of its intended aim:

> From a practical standpoint, if the marketplace of ideas cannot be trusted to winnow out the hateful, there is no reason to believe that censorship will do it. The ideas will persist, and martyrs to an ugly cause will be created by operation of law.[44]

i. Terrorism

Terrorism, in its most basic form, concerns the "unlawful use of violence and intimidation, especially against civilians, in the pursuit of political aims."[45] In short, it is an attack on the State by unlawful and violent means to catalyse change of that State. Such change was, in its origins, political. The definition has expanded significantly in recent years. It is this expansion of the scope of terrorism which is problematic. For terrorism to constitute a threat which is clear and compelling enough to justify the restriction of human rights, it must be defined in a way which is sufficiently precise to make an assessment. This sub-chapter will consider the threat of terrorism in its origins in comparison to present-day modern terrorism, having regard for the level of expression affected by each notion of terrorism.

Originality

Terrorism is an old, long-term threat to national security. Indeed, it is the greatest threat, particularly in present days where Cold War devastations could easily be surpassed by a 'hot

[44] Norman Dorsen, *A Transatlantic View of Civil Liberties in the United Kingdom* (P. Wallington ed., 1984) 358 - 359

[45] Oxford English Dictionary definition, 'Terrorism', <https://www.lexico.com/en/definition/terrorism> accessed 2 February 2019

war' capable of wiping out humanity. Crenshaw submits that there are three types of terrorism which Western democracies have been exposed to over time; domestic, transnational and compounded terrorism. He uses social contract theory to explain. The first is "terror where the aggressors' and victims' homeland overlap, a prominent example being the IRA attacks in the UK,[46] addressed by the Good Friday Agreement.[47] The second represents terrorist incidents where the perpetrator is from outside the territory under attack and the first of this kind in Western democracy was 9/11.[48] The response was the proclaimed 'war on terror', as supported by other Western democracies, particularly following warnings of follow-up attacks.[49] The final type of terrorism is the "amalgamation of the attackers' foreign ethnicity, culture and extreme religious beliefs with their domestic citizenship."[50] An example being the London bombings of July 2005. The responses to these events split society; many sought the accountability of terrorists, while others sought to protect their liberal democratic values. Many favoured a war, many others favoured salvation.

Crenshaw's three types of terrorism demonstrate the different forms of terrorism with regard to the actors, the jurisdiction, or alternatively the victims and the country. The examples used demonstrate the impact this has had, traditionally, on Western democracies such as the US and the UK. Crenshaw does not, however, consider the aims and modalities of terrorism beyond the traditional conception of violence for political aims, though one could conclude that Crenshaw concedes to the acceptance of ethnical, cultural or religious goals also. These are the aspects of the terrorist definition which have expanded significantly in its modern conception.

[46] Martha Crenshaw, *The Consequences of Counter-Terrorism*, (Russell Sage Foundation, 2010) 180
[47] ibid, 182
[48] ibid, 184
[49] ibid, 187
[50] ibid, 191

Modernity

The term 'modern terrorism' encompasses new motives, new means, new members. In its most extreme form, it has been alternatively labelled as 'superterrorism'.[51] This notion already asserts itself as more superior, and thus more threatening, than those previously encompassed. This notion focuses on the new means of terrorism, namely the capacity and use of technology, as opposed to the so-called 'terrorist' or jurisdiction in which they carry out their attacks.[52] Online acts are much more difficult to contain and prevent due to a number of reasons, all related to their potential scope and scale of reach. While the State has the expertise, the surveillance, the authority, it does not have the resources or the capacity to address these threats in their numbers, particularly given the complexity of behaviours, patterns and processes. Another example is the composition of the terrorist movements or groups. Gill highlights the 'lone wolf' nature of terrorism now. This represents a challenge; firstly, because they do not follow the traditional patterns of terrorism, secondly, they are difficult to discern, and thirdly, "they inspire copycats."[53] And finally, they do not necessarily belong to any traceable network. These same issues are of concern for the modern nature of violent extremism also.

Arguably, the definition of terrorism ought to be flexible enough to encompass these new forms of terrorist activities, actors, or intentions. Counter-instinctively, this has been utilised by liberal States to expand the notion of terrorism to situations which, under the framework of human rights, are legitimate groups, goals and events. For example, the use of criminal acts against individuals or property in pursuance of environmental-political change by human rights defenders has come to be termed 'eco-terrorism'.[54] This term has shown significant revival in the last year, for example, with climate change activists such as Extinction Rebellion framing

[51] Lawrence Freedman, *Superterrorism: Policy Responses*, (Oxford: Blackwell publishing, 2002) 7
[52] ibid, 7
[53] Paul Gill, *Lone-Actor Terrorists: A Behavioural Analysis (Political Violence)*, (Routledge, 1st edn., 2014) 9
[54] UN Human Rights Council, *Report on Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders*, 1 March 2019, A/HRC/40/52, [8]

themselves as rebels.[55] This is a minor, but extremely concerning, example of how the vague term 'terrorism' has been exploited to attach the notions of violence and extremist actions for the purpose of unwanted political, social, cultural or religious changes, by groups often having neither a connection with those factors, nor using violent means. Such acts, while perhaps criminal, cannot and should not fall under the term 'modern terrorism'. That term carries many risks against the person and against democracy; stigmatisation of the player, increased punishments for increased criminal labels, opening the floodgate to further terrorist-related responses to traditional criminal or penal acts, the chilling effect of deterring expression related to interests of public concern such as the environment, etc. Indeed, the expansive use of the notion undermines the credibility of the legal systems we abide by, and the legitimacy of the authorities who enforce them.

Conclusion

The use of the Internet and independent acts, particularly in relation to the environment, represent a new phenomenon of 'modern terrorism' that is much more difficult to prevent with an increasing need to be governed by human rights standards due to its transdisciplinary nature. The same reasoning can be applied to the challenging nature of preventing, countering or de-radicalising violent extremists. This challenge is, in itself, much of the pretext for the proliferation of governance over these issues in Western society today.

The lesson learned is that, while there are many forms of terrorism today posing evolutionary and challenging threats to national security, by introducing "exaggerated emergency measures, [States] court the danger of undermining [their] legitimacy to rule", as well as undermining the human rights of those within their jurisdiction.[56]

[55] Extinction Rebellion, 'About Us', <https://rebellion.earth/the-truth/about-us/> accessed 9 November 2019
[56] Crenshaw (n 46) 183

ii. Violent Extremism

Violent extremism is generally an internal threat. It is a form of resistance more than a form of revolution. In particular, it comprises the risk of development into terrorism and it generally carries the same motives and challenges of terrorism, with less severe immediate consequences, though arguably ones that are longer-lasting and societal-wide. The US Senate, in its March 2019 Domestic Terrorism Prevention Bill under S.894, considers far-right extremism to be synonymous with "domestic terrorism", and the most significant threat of such as well.[57] The same can be said for the UK, who define 'extremism' as:

> [The] vocal or active opposition to fundamental [national] values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs. We also include in our definition of extremism calls for the death of members of our armed forces, whether in this country or overseas.[58]

The legal framework seems not to focus on criminalising or proscribing violent extremism, but rather developing policies to tackle the routes to extremist ideology, with its basis in statute. There are three main frames of tackling violent extremism; countering violent extremism (CVE), preventing violent extremism (PVE), and de-radicalisation. The first clearly addresses the cause, while the latter two address the symptoms. These will be considered.

Countering-Violent Extremism

The main focus of Western governments is on CVE with the aim to respond to the increasing national security threats. The so-called 'CVE-mania' serves as an umbrella term[59] in which States acquire the legitimacy to engage in "outreach; capacity building and development aid; education and training; messaging and public relations campaigns; surveillance partnerships…; and targeted ideological interventions of individuals."[60]

[57] United States of America: Domestic Terrorism Prevention Act 2019 Bill, <https://www.govtrack.us/congress/bills/116/s894/text/is> accessed 4 April 2019, Ss.1(1)
[58] Prevent Strategy (n 7) Annex A: Glossary of Terms, 107
[59] Arun Kundnani and Ben Hayes, 'The Globalisation of Countering Violent Extremism Policies: Undermining human rights, instrumentalizing civil society', (SOURCE: Societal Security Network, February 2018) 3
[60] ibid, 2

CVE attempts to reduce the "number of terrorist supporters" in society as opposed to addressing the terrorists themselves.[61] It is neither a function of criminal prosecution nor a legal obligation of another kind. It is a policy, or rather a series of programmes, in which stakeholders on the local level "related to public safety, resilience, inclusion, and violence prevention", i.e. NGO's, educators, healthcare providers, law enforcement, and even the private sector, can reduce the climate which lends itself to 'radicalisation'.[62]

The UK strategy includes countering extremist ideologies, building partnerships with those opposed to extremism, disrupting extremist activity, and building cohesive communities.[63] Similarly, the US goals are to enhance understanding of violent extremism, raise community awareness and build partnerships, and support and oversee CVE activities.[64] The success of these strategies are questionable. The problems they present for human rights and democracy, on the other hand, are clear. The related intolerance and homogeneity of ideas which CVE aims to share has a clear discriminatory and chilling effect on opinion, expression and assembly, etc. For example, by directing efforts at vulnerable persons such as those stigmatised based on their religion or associations, or at children or people experiencing mental health issues, the Strategies arguable only serve to make people more vulnerable and willing to walk the path to extremism. This will be further criticised with regards to its chilling effect on expression in the fifth chapter.

[61] Alex P. Schmid, 'Radicalisation, De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review', International Centre for Counter-Terrorism (ICCT) Research Paper (March 2013) 58
[62] United States of America: Department of Homeland Security, 'Countering Violent Extremism Task Force', <https://www.dhs.gov/cve/what-is-cve> accessed 5 May 2019
[63] United Kingdom: Home Office, 'Counter-Extremism Strategy' (October 2015) 17
[64] United States of America: Department of Homeland Security, 'Strategy for Countering Violent Extremism' (28 October 2018) 3

Preventing Violent Extremism

Problematically, violent extremism has many causes – political, economic, social, cultural and psychological – and cannot be predicted by one variable alone.[65] Theoretically, PVE, as indicated by its name, should therefore seek to "prevent the emergence of violent extremism before it has fully emerged in a region, community or individual, by addressing the underlying factors that give rise to it."[66]

PVE is more commonly recited in the UK than the US. The UK strategy, literally titled 'Prevent', aims to use communities and local police to identify, pursue and prevent violent extremism and radicalisation.[67] Staniforth provides a successful case study in his analysis of the strategy from 2008, where Andrew Ibrahim was arrested after being reported to the police by members of the Muslim community of Bristol.[68] He was charged with a terrorism offence and a community Conviction Project established. This is, on its face, successful in that it prevented acts of domestic terrorism and established a community project. On the other hand, it failed to address Ibrahim's grievances which created the environment conductive to violent extremism. Further, it criminalised one who, under a 'preventative' scheme, should not be criminally persecuted but rather receive a soft intervention aimed at increasing his resilience to radicalisation.[69]

Another problem of PVE is the wide deference to the judgement of the community and local authorities. Vidino considers PVE the most flawed method of addressing violent extremism. The "central theoretical flaw is that it accepts the premise that non-violent extremists can be

[65] Harriet Allan, Andrew, Glazzard, Sasha Jesperson, Sneha Reddy-Tumu, and Emily Winterbotham, 'Drivers of Violent Extremism: Hypotheses and Literature Review' (16 October 2015) Royal United Services Institute (RUSI) 11
[66] Kundnani (n 59) 3
[67] Andrew Staniforth, *Preventing Terrorism and Violent Extremism* (Oxford University Press, 2012) 179
[68] ibid, 178
[69] Kundnani (n 59) 6

made to act as bulwarks against violent extremists."[70] Of 7,138 persons referred under Prevent in the year 2017-18, only 18% were deemed suitable after preliminary assessment for the Channel.[71] These statistics, which refer to the referral practice under Prevent seven years after its roll-out, clearly demonstrate that this discretion is not being correctly used or understood by the community required to enforce it.

De-Radicalisation

Sedgwick considers 'radicalisation' as "what goes on before the bomb goes off."[72] This is the term more commonly employed in the US. 'Radicalisation' can be considered a synonym of 'extremism'. It is distinguishable from 'extremism', however, both in that it does not employ the use of violence as well as being the relative movement which one undergoes towards that polar.[73] Laws and policies centred around 'de-radicalisation' tend to operate based on the latter sense of the term. For example, the UK Home Office describes radicalisation as a process and not an event[74] of a person in support of terrorism.[75] The US National Institute of Justice considers it the very process by which individuals enter into terrorism.[76] It is a term which makes possible the analysis of the root causes of terrorism and violent extremism, and as such, the capability of 'de-radicalisation' as both a preventative *and* a responsive measure to these national security threats.

The notion arose more recently in parallel with the "emergence of home-grown terrorism in Western Europe."[77] The Lone Wolf Report from 2015 concluded that domestic extremists

[70] Lorenzo Vidino, 'Countering Radicalisation in America: Lessons from Europe, US Institute of Peace', Special Report No. 262 (November 2010), in Schmid (n 61) 11
[71] United Kingdom: Home Office, 'Individuals referred to and supported through the *Prevent* Programme, April 2017 to March 2018', (13 December 2018) 4
[72] Mark Sedgwick, 'The Concept of Radicalization as a Source of Confusion' [2010] Terrorism and Political Violence Journal, Vol.22(4), 479
[73] ibid, 481
[74] Prevent Strategy (n 7) [3.29]
[75] ibid, 'Annex A: Glossary of Terms', 107
[76] Allison G. Smith, 'How Radicalization to Terrorism Occurs in the United States: What Research Sponsored by the National Institute of Justice Tells Us' (National Institute of Justice, June 2018) 1
[77] Sedgwick (n 72) 480

operating independently were the greatest contribution of (domestic) terrorist attacks in comparison to Islamic violent extremism, which draws much greater media attention.[78] This evinces that there is a new phenomenon of radicalisation not only related to terrorism, but also to domestic violent extremism which constitute a national security threat to the State. With the additional capacities for recruitment provided by the Internet, radicalisation is much easier for these groups, and much more challenging to prevent. De-radicalisation is all the more essential in this environment. And it is the environment which must be addressed.

Denmark's Aarhus model focuses on the rehabilitation of terrorist fighters instead of prosecuting them. The numbers show the results: in 2013, 31 individuals left Aarhus for Syria, while in 2014, it was only one.[79] The Mechelen model in Belgium also demonstrates the potential effects of de-radicalization approaches that focus on communication and education. Germany's 'Exit to Enter' programme recognises the socio-economic factors which radicals foster and offers training and employment options. The European Institute of Peace considers these efficacious models of de-radicalisation.[80] Those employed in the UK and the US, however, have received much more criticism by contrast.

Conclusion

Violent extremism is considered both a national security threat in itself – often referred to as domestic terrorism – as well as a threat in its possibilities. It is considered the fertility of terrorism. Different jurisdictions have different threats. To the West, such as in the US and the UK, it is evident that the threat of far-right extremism is much more prominent than that of Islamic terrorism, contrary to national depiction. Arguably, this is a strategic portrayal. Following this, different jurisdictions have invoked different models in response. The three

[78] Southern Poverty Law Centre, 'Age of the Wolf: A Study of the Rise of Lone Wolf and Leaderless Resistance Terrorism', SPLC, (12 February 2015) Executive summary, 4

[79] Camille Schyns and Andreas Mullerleile, 'How to prevent violent extremism and radicalisation?', <http://www.eip.org/en/news-events/how-prevent-violent-extremism-and-radicalisation> accessed 5 May 2019

[80] ibid

broader frameworks being PVE, CVE and de-radicalisation. They should be understood both interchangeably as well as distinctly.

CVE, de-radicalisation and PVE, as a deterrence and a solution to radicalisation to violent extremism and/or terrorism, are perhaps desirable as soft measures. They should focus on the environment in which radicalization occurs and aim to remove such factors from society, as opposed to removing human rights which might facilitate the sharing of such factors. Arguably, the strategies employed by the US and UK focus on the wrong issues. Of concern to this paper is the consequences of these models which can, and do, affect stakeholders other than those intended, and they are unable to be contained to protect other legitimate expression and opinions.

IV. Expression Standards in a Comparative Perspective

While free expression is protected to varying degrees by different and distinct qualifying tests, it is nonetheless a universal concept which every State seeks to protect. Indeed, this interest is not a novel one; the US. in 1789, provided for the absolute constitutional protection of freedom of speech.[81] On the other hand, it is also universally accepted that the freedom of expression is not absolute. This chapter will provide in-depth critical and comparative analysis of the standards of the right to freedom of expression, and the scope of restrictions afforded for the protection of national security, as set within the UN's international framework, the European Convention on Human Rights' (ECHR) regional framework as applicable to the UK, and the US domestic framework. It will lay-out and compare the protection afforded to expression on an international and minimal level as well as how this affects the domestic level in the US and the UK. It will therefore also briefly explain the transposition of regional ECHR standards into British law as well as the difference between State and Federal protection in the US.

This section will give consideration to how these different standards – that is the US's constitutional guarantee and the UK's European application – lend themselves to different capabilities in regulating terrorism and violent extremism on a national level. As such, it will also form the basis for assessing how exactly the US and the UK justify their regulation. Different standards will require different justifications to meet the threshold of expression which the jurisdiction requires to protect free expression.

[81] United States of America: Constitution [United States of America], 17 September 1787, First Amendment

i. UN: Special duties and responsibilities

Preliminary: proliferation of protection

The Universal Declaration of Human Rights (UDHR) was the first global instrument in which the UN General Assembly proclaimed protection of the right to freedom of expression in its 19th Article in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without inference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[82]

This article formed the basis of multiple later binding international, regional and domestic legal protections of the right to opinion and expression. For example, the ICCPR which is ratified by an overwhelming majority of countries and, by virtue of this, "freedom of speech is now considered to be a norm of customary international law."[83] The right to freedom of expression is additionally protected by further UN treaties and conventions, including but not limited to – and subject to further and later prescription – the Convention on the Elimination of all forms of Racial Discrimination,[84] the Convention on the Rights of the Child[85] and the Convention on

[82] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), (UDHR) Article 19

[83] Emily Howie, 'Protecting the Human Right to Freedom of Expression in International Law', Int. J'nl of Speech-Language Pathology, Vol. 20:1, 12

[84] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, 195, Article 5:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> …
> (d) Other civil rights, in particular:
> (viii) The right to freedom of opinion and expression;

[85] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3, Article 13:

> 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
> 2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others; or
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

the Rights of Persons with Disabilities.[86]

Article 19 ICCPR and General Comment 34

The two – opinion and expression – tend to be prescribed together. Under international human rights law, freedom of opinion is absolute, while the freedom of expression carries with it special duties and responsibilities. Article 19 of the ICCPR reads as follows:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it **special duties and responsibilities.** It may therefore be *subject to certain restrictions,* but these shall only be such as *are provided by law* and are *necessary*:
>
> (a) For respect of the rights or reputations of others;
> (b) *For the protection of national security or of public order (ordre public), or of public health or morals.*[87](emphasis added)

The Human Rights Committee, comprised of 18 independent experts on civil and political rights, were given the task of interpreting Article 19 of the ICCPR for the purpose of explanation, clarity, and in its outcome, progress. General Comments are not binding but carry "authoritative legal credibility" and "strong weight" before the domestic executive and courts, as well as having "an important role in setting minimum standards."[88] One member of the

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[86] UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly,* 24 January 2007, A/RES/61/106, Article 21:

> States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:
>
> (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
> (b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
> (c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
> (d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
> (e) Recognizing and promoting the use of sign languages.

[87] ICCPR (n 11), Article 19

[88] Sandra Coliver, 'Article 19: UN Reinforces Right to Freedom of expression and Information', (Open Society Justice Initiative, 28 July 2011), <https://www.justiceinitiative.org/voices/article-19-un-reinforces-right-freedom-expression-and-information> accessed 24 June 2019

Committee considered the outcome "a strong statement."[89] This is debateable. For example, while some aspects of General Comment 34 seemed a natural consequence of the current climate, such as the decriminalisation of defamation, others were considered a significant and perhaps even a radical declaration from regional perspectives, such as the pronouncement of incompatibility of blasphemy laws with Article 19 and even 20 ICCPR.[90]

The General Comment can be understood to provide for the first applicable justification, that of national security, as the exception to the rule:

> Provisions relating to national security… [must be] crafted and applies in a manner that conforms to the strict requirements of paragraph 3 [of Article 19 ICCPR]. It is not compatible, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest [*unless*] it [*does*]… harm to national security.[91] (emphasis added)

The focus always rests on paragraph 3; the so-called three-part test. The question is how this test is to be interpreted – this can have a significant impact upon its application – and whether it is permissive, or restrictive. David Kaye, in a presentation of his works discussing regulation of speech online, identified that Article 19 (3) can be viewed either a tool for restricting expression or a tool for limiting censorship.[92] The interpretation has thus far been to treat paragraph 3 as a mechanism to ensure government's cannot simply rely on the legitimate interests without demonstrating the appropriateness of the measures they choose to invoke towards it. This can therefore be considered a means to limit censorship.[93] In practice, however, it can simply mean the government needs to be more persuasive when rationalising the laws and policies it creates, especially when they are intended to avoid some form of harm.

The General Comment never went deeper in explaining the threshold for demonstrating the legitimacy of the aim or the proportionality required to meet it. What constitutes harm to

[89] O'Flaherty, 631
[90] General Comment 34 (n 6) [47] concerning decriminalisation of defamation, [48] concerning incompatibility of crimes of blasphemy.
[91] ibid [30]
[92] David Kaye, Speech, STOP! It's the Speech Police…, London, 9 July 2019
[93] ibid

national security? Problematically, vague and ambiguous language is employed throughout the General Comment merely for consistency with the ICCPR.[94] ARTICLE 19, in its assessment of the General Comment draft, stated that the Committee failed "to assert a clear and unequivocal position" in specific areas of concern to the promotion and protection of freedom of expression. Moreover, the 'for instance' indicates that the examples provided (extremism, encouragement and glorification of terrorism) are non-exhaustive, but where this is the case, a large discretion is left to the authorities to determine the meaning of 'harm'. This facilitates arbitrary laws and roundabout arguments. In most cases, the soft obligation is generally evaded. For example, the new White Paper on Online Harms currently before the UK parliament fails in all its 102 pages to make this definition – the definition of the very problem it seeks to tackle! As such, it will enable the government to address 'harms' which should not be within its scope. From a human rights perspective, 'harms' should be limited to "that which is designed to deny people a voice."[95]

While it is accepted that the Committee was addressing a complex and controversial subject, I argue that this is the very role of the Committee to interpret the ICCPR – in fact, the Committee is the only body positioned to do this – and as such General Comment 34 should have better elaborated and used clearer terms in order to have a real and practical impact. Particularly where, in paragraph 46, the Committee calls on State parties to "ensure that counter terrorism… offences of[, for example, encouragement, extremism, and glorifying terrorism, are] *clearly defined*[, necessary and proportionate]" (emphasis added).[96] As such, the General Comment both elaborates on the problem of clarity, but invokes evasive language in doing so. What is clear is that parties *shall* "prohibit by law" two types of expression; (1) "propaganda for war," and (2) "any advocacy of national, racial or religious hatred that constitutes incitement to

[94] Coliver (n 88)
[95] Kaye (n 92)
[96] General Comment 34 (n 6) [46]

discrimination, hostility or violence," as found in Article 20.[97] This clearly represents the parameters of Article 19 and the point at which discretion is no longer permissible.

The second basis of restriction is public order. The aforementioned rule in the General Comment was prescribed generally, i.e. to apply to both situations concerning national security and public order. The latter, however, is expanded on in the Comment to permit restrictions based on locality, for example.[98]

The third possible basis, with regards to terrorism and violent extremism justification, is public morals. The Committee considers this should not be based on one single tradition – social, philosophical, religious, or otherwise – and should be "understood in the light of the universality of human rights and the principle of non-discrimination."[99] Consequently, the fear of terrorism or violent extremism which, in limited cases, may justify a restriction on speech, cannot be based on the sensitivities or the composition of the population. The law cannot be majoritarian. It cannot be discriminatory.

There is, nevertheless, a clear test here; the requirement of a restriction to be prescribed by law and necessary for the protection of national security, public order, right or morals. The first is easy to satisfy, the second not so easy. This is where the question of balancing costs and risks, protectiveness and arbitrariness, comes into play. The Human Rights Committee has generally favoured a liberal approach – speaking of 'strict requirements of paragraph 3', and 'proportionality to the aim or interest sought to be protected'[100] – favouring a "wide enjoyment of free expression" and narrow restrictions.[101] Restrictions should not be overbroad. Yet this expansive language of strictness and proportionality is best interpreted by circumstance, which

[97] ICCPR (n 11) Article 20
[98] General Comment 34 (n 6) [31]
[99] ibid [32]
[100] ibid [34]
[101] O'Flaherty (n 43) 627

the State party is in the best position to assess. One can say the General Comment thus both clarifies the strict protection of expression in situations of national security, whilst also framing it as a justification for restricting speech based on State party interpretation of the Comment's language. In the end, however, the General Comment is not legally binding and has "acquired a policy recommendation function," meaning States are able to manipulate both the content as well as the nature of the supposed obligations therein.[102]

Conclusion

The right to freedom of expression is protected in wide and ambiguous terms by the ICCPR, as understood by the Committee's interpretation in General Comment 34. This protects opinion and expression together, with expression being subject to limitations. The protection of expression under international human rights law includes to seek, receive and impart information and ideas through any media. Article 19 of the ICCPR considers the freedom of expression to carry 'special duties and responsibilities', thereby permitting restrictions and limitations for certain reasons. These include for the respect of right and reputations of others, and for the protection of national security, public order, public health or morals. Such limitations should follow the three-part test of legal prescription, necessity, and justification. Limitations should be construed strictly and enforced narrowly.

Upon ratifying any of the above UN human rights treaties, "State parties accept two kinds of obligations: (1) to adopt such legislative or other measures… to give effect to the rights [enshrined]…, and (2) to remedy violations."[103] Both the US and the UK are notable parties to the ICCPR and are thereby bound by the aforementioned obligations with regards to Article 19 protection of the right to freedom of expression. As such, legislative and policy measures must conform with the strict and narrow limitations set forth. Otherwise, the State is bound to enforce

[102] Hellen Keller and Geir Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy*, (Cambridge University Press, 2012) 124

[103] ARTICLE 19, 'The Article 19 Freedom of Expression Handbook: International and Comparative Law, Standards and Procedures', (Bath Press, August 1993) 15

the second obligation. The legislative test for the protection of freedom of expression within each of these domestic (and regional) jurisdictions will now be considered.

ii. UK: Three-part test

Preliminary: transposition

British tradition shows a resistance to accepting any absolute freedom of expression. Historically, the British invoked "three [main] forms of restraint…the licensing of the press; the doctrine of constructive treason; and the law of seditious libel."[104] Human rights came to the forefront of common law before the UK ratified the ECHR in 1951. In ratifying the Convention, the UK had to transpose the Convention's application domestically – 'bringing rights home'.[105] Treaties only become part of British domestic law when "incorporated by Parliament."[106] This was done with delay in 1998, albeit with its sovereign clause: Article 4 of the Human Rights Act (HRA) permits the courts to make a declaration of incompatibility – this being to declare domestic law incompatible with the Convention rights – yet it also reserves the right of the British Sovereign to ignore the Convention and the supranational court's application of such by explicitly framing this declaration as non-binding.[107]

[104] Stone (n 14) 1009
[105] Michael Tugendhat, *Liberty Intact: Human Rights in English Law,* (OUP, 2017) 13
[106] ARTICLE 19 (n 103) 33
[107] United Kingdom: The Human Rights Act 1998 [United Kingdom of Great Britain and Northern Ireland] 9 November 1998, (HRA) Article 4: Declaration of Incompatibility

> (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
> …
> (4) If the court is satisfied—
>> (a) that the provision is incompatible with a Convention right, and
>> (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,
>
> it may make a declaration of that incompatibility.
> …
> (6) A declaration under this section ("a declaration of incompatibility")—
>> (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
>> (b) is not binding on the parties to the proceedings in which it is made.

The ECHR is transposed into statute, along with the judgements of the European Court of Human Rights (ECtHR), and in turn, so is the right to freedom of expression as prescribed under this Convention. The HRA is unique, however, in that it does not copy-paste the Convention articles into national law but rather makes reference to the domestic application of the Convention rights and provides for possible remedies where the Court's conclude there has been a breach by public authorities. Barendt considers British courts to "have attached more importance to freedom of expression… than…before [the] incorporation of the ECHR."[108] It is not, however, *technically* a legal obligation for the UK, much as Britain usually does comply. It is prudent to note the potential problem that this raises, particularly given the current (and worrying) desire to revoke the HRA.[109]

Article 10 and ECtHR jurisprudence

Article 10 of the Convention on freedom of expression reads (emphasis added):

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties **as are prescribed by law and are necessary in a democratic society, in the interests of** *national security*, territorial integrity or *public safety*, for the *prevention of disorder or crime*[, or the disclosure of confidential information], for the protection of health or *morals*,… the reputation or rights of others,…or for maintaining the authority and impartiality of the judiciary.[110]

Locke and Blackstone submit that liberty of speech "may be restrained by human laws only in so far as that is necessary and expedient for the general advantage of the public."[111] 'General advantage' is vague and can be widely or narrowly interpreted. This called for the fundamental principle of necessity (and proportionality) as introduced to the British legal system with the ECHR and the HRA. A three part-test was made clear; legality, necessity, and proportionality.

[108] Barendt (n 16) 46
[109] Joanna Dawson, Maria Lalic and Sue Holland, 'Human Rights in the UK, UK House of Commons, 12 February 2019, <https://researchbriefings.files.parliament.uk/documents/CDP-2019-0031/CDP-2019-0031.pdf> accessed 9 July 2019, 2
[110] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, (ECHR) Article 11
[111] Tugendhat (n 105) 199

This is plainly a development of Article 19 of the ICCPR, as would be expected. The expansion indicates an expanded category of permissible restrictions and does not separate the nature of opinion from expression. This indicates both a looser as well as a more specific standard of protection of expression. This protection applies to everyone within the State's (UK's) jurisdiction, citizen or otherwise.[112]

The three-part test means firstly, that the measure which infringes the Article 10 freedom of expression is governed by law which is sufficiently precise that one would reasonably be aware of its existence and the possible limitation to their right.[113] Secondly, that it is necessary in a democratic society. This simply means the government have to claim that the legally-backed measure was in pursuance of (i) protecting national security, territorial integrity or public safety, (ii) for the prevention of disorder or crime, (iii) for the prevention of the disclosure of confidential information, (iv) for the protection of health or morals, (v) for the protection of the reputation or rights of others, or (vi) for maintaining the authority and impartiality of the judiciary. In reality, this requires nothing more than the mere claim. Finally, the measure must be proportionate to this aim. That is, it cannot create a greater limitation on our qualified right to opinion and expression than is strictly necessary to achieve the aim. And it cannot be imposed where there is a "less drastic" alternative or where the right infringed is a greater interest than that sought to be protected.[114]

Member States have a margin of appreciation when applying the Convention. This is effectively the European concept of discretion in its consideration of the three-part test. The margin is considered wider in cases on national security given the level of harm that may

[112] EHCR (n 110), Article 1
[113] *Malone v. The United Kingdom* (1984) [67]-[68], in Council of Europe Research Division, 'National Security and European Case-law', European Court of Human Rights (2013), <https://rm.coe.int/168067d214> accessed 22 July 2019, [19]
[114] *Kenney v. The United Kingdom* (2010), in ibid [31]

result.[115] The qualification of speech deriving from the Convention is firstly determined by the State aim, which can widen or narrow the margin, and then the appropriateness of its application is determined by the courts – national or European – to ensure it is proportionate to the necessity claimed and the level of discretion that goes with it. As such, the protection of free speech is limited with the aim of national security, including that related to broad notions of terrorism and violent extremism. In such cases, the ECtHR have held they will take into account a number of factors including but not limited to 'a) the nature of the interest at issue, b) the incitement to violence, c) the severity of sentencing, and d) the medium used.'[116] Information which is considered in the public interest is given heightened protection and in such instances, the government must prove that its dissemination need be prevented to protect national security. In cases where dissemination has already occurred, the Court tends to rule against the presumption that there will be damage, or any further damage, to national security of public order.[117] Additionally, in cases of surveillance the ECtHR have weighted its exercise not only with the right, but also with the ability to have an effective remedy against potential abuses.[118] In whistle-blower cases, the Court has also held that confidentiality will not always outweigh public interest in information.[119] Therefore, while the necessity test is presumed satisfied, the proportionality of measures must still be proven. It is a test of the most careful scrutiny. And it is a test which can offer greater protection to important social actors.

Conclusion

The standard of protection for free expression in the UK derives from the European Convention itself and is applicable via the Human Rights Act. It has been held to have improved the

[115] ibid, 3
[116] ibid, 17-22
[117] *Observer and Guardian v. The United Kingdom* (1991), and *Sunday Times v. The United Kingdom (no.2)* (1991), in ibid, 17-18
[118] ibid [143]
[119] ibid [144]

standard of protection not only from national law, but also in its advancement of that in Article 19 of the ICCPR.

In its application, precedents from the European Court are varied in their effect on Article 10. In the first instance, they show the strict application of the three-part test, meaning that a government must adduce convincing evidence to show that the limitation on the right was necessary and proportionate. In the second instance, the Court has also held that where the former is for national security aims, the standard of protection is somewhat relaxed. On its face, this is understandable – national security issues are something which can affect the heart of the nation, government or people within and therefore can carry greater risk to the cost on rights. At the same time, this jeopardises the right itself. National security risks can be presumed, meaning the necessity can be more easily accepted. The proportionality, however, should not be so easily accepted. Where there is a well-established three-part test, there is no pragmatic reason that it should not be applied strictly in each case. In particular, in the limitations of expression of public actors and institutions such as press and civil society. The Court has been seen to reduce the margin of appreciation in national security instances related, for example, to those involving article 3 (torture) claims as well as those related to expression and private life of servicemen.[120] Perhaps the same ought to be considered for the expression and information coming from those acting in the public interest.

iii. US: Absolutism

Preliminary: Federal law

It is important to distinguish between federal and state law in the US. Much state law has the potential to affect the standards of free speech protection locally and indeed has been seen to do so. This state-made law, nevertheless, is confined to the remits of US federal law. Federal law is the law that applies throughout all the states in America – it is the law from the top –

[120] ibid [142]

while state law is limited to those that affect only those in their ground.[121] Importantly, this means that while states can make criminal laws, for example, affecting human rights, the limitations on how and the extent to which this can be done come from the government designing the civil rights laws themselves. This includes those related to free expression. Federal law is also the source of national security legislation. As such, this thesis will consider the third jurisdiction from the federal level and not the national. Here is where the power for change and potential for impact rests.

It is important to recall that, like the UK and the communications procedure of the Human Rights Committee, the US is a common law State. This means that, in all three jurisdictions, weight can be placed on the precedents set by Courts. This was seen by the ECtHR jurisprudence applicable to the UK. In the same way, "the Supreme Court [of the US] has formulated a number of distinctive free speech doctrines and principles."[122] These are, in simple terms, different standards for the protection of speech based on categorical situations, such as content-based, hostility and violence. These all must control the way in which the US is required to create national security statute and policy that can limit our speech and will be considered below.

First Amendment: constitutional pillar

When we think of federal law, we must first address the primary administrative law; the Constitution. With the Amendments added in 1791, civil liberties, and most fundamentally speech, was codified in such a way that it cannot be abridged, and unlikely amended. Stone recalls the American Constitutional debate of absolutism vs. interpretation with the words of Justice Black:

[121] United States: Senate, 'Laws and Regulations', <https://www.senate.gov/reference/reference_index_subjects/Laws_and_Regulations_vrd.htm> accessed 19 November 2019

[122] Barendt (n 16) 55

> "The phrase 'Congress shall make no law' is composed of plain words, easily understood. [The] language [is] absolute. [Of] course the decision to provide a constitutional safeguard for [free speech involves a balancing of conflicting interests. [But] the framers themselves did this... Courts neither have the right nor the power [to] make a different evaluation."
>
> …
>
> The Court never accepted Black's view. Rather, it has consistently held that "abridging" and "the freedom of speech" require interpretation, and that restraints on free expression may be "permitted for appropriate reasons."[123]

Barendt determines that there is a difference between 'freedom of speech' and 'speech' in its original interpretation which allows us to rightly understand the First Amendment as permissive of "restrictions on some modes of expression."[124] While plain in its literalism, it is not so in its application. Gerapetritis examples the Patriot Act as a law enacted by government in order to diminish the absolute nature of the First Amendment and control fundamental freedoms, "if not substantively curtail [them]".[125] This is the case where the President seeks to use his powers to combat different social problems and national threats – terrorism and violent extremism being the primary examples. The Patriot Act is a law enacted in 2001 to expand the powers of law enforcement to intercept and obstruct terrorism, for example, and as such, overstepped the 'absolute' constitutional boundaries previously protecting our speech and privacy.

Much of the standards related to free expression in the US are relative to their situation and are developed by common law in the administration of justice. Protection in the US is categorical; it differs in cases of libel, breach of peace, hostile audience, sedition, threats to the life of the nation, etc. In interpreting the standards for protection of free speech, the Courts have been seen to balance the need for restrictions on freedom of expression with expression as a protected interest, having in mind both the value of the Constitution and that of the need in the given national situation. In this respect, the US Supreme Court has, in contrast to human rights

[123] Stone (n 14) 1009
[124] Barendt (n 16) 50
[125] George Gerapetritis, 'Fear over Rights – The Recent Case Law of the US Supreme Court', 56 RHDI 475 (2003) 476

general fear, not been overbroad in its standard-setting. For example, in the precedential case of *Brandenburg v. Ohio*, the Court held that the standard of legitimate punishment over free speech was of incitement to terrorist acts only if it constitutes "imminent lawless action."[126] Similarly, in cases of sedition or breach of peace, the test is one of "clear and present danger."[127] The threshold for meeting these criteria are high.

This has led to a debate concerning the effectiveness of common law standards in relation to the protection of national security – for example, the submission that to protect speech at the so-called eleventh hour fails to address the realities of the threat of terrorism which actually comprises a more gradual process of radicalisation.[128] The Executive has offset this fear with its overzealous legislation addressing both radicalisation and terrorism in different – and I argue inappropriate – contexts. This makes the standards of free speech murky in a State where common law rules, and so does federal law.

Conclusion

The US took an absolutist approach in its framing of the Constitutional protection of free speech which has been consistently regarded as one of the pillars of American law. In the words of Alexander Hamilton, this was, and still is, because of the fear that "any [other] definition which would… leave the utmost latitude for evasion."[129] The outcome was, as Black says, plain and easily understood. Speech protection according to the Convention was absolute.

This has, nonetheless, continued to be the central debate in jurisprudence on the topic; how absolute is the First Amendment protection in practice? Protection of speech in the US should be separated by common law and statute. First Amendment rights may be restricted in certain very narrow circumstances defined by the Supreme Court's jurisprudence. For the purpose of

[126] *Brandenburg v. Ohio* 395 US 444 (1969) 449
[127] *Dennis v. The United States of America* 71 S.Ct 857 (1951) 505
[128] Mordechai Kremnitzer, Lecture at Central European University, 'Human Rights in Emergency Situations', 6 June 2019
[129] Stone (n 14) 1012

this thesis, the relevant, prominent and precedential outcome has been the clear and present danger test for sedition, and imminent lawless action for speech related to national security threats. Neither of these deviates far from an absolutist interpretation at all. In fact, Stone holds that this test has "come to mean essentially absolute protection" in line with the Blackstonian side of the debate.[130] In the second form of speech protection, that is by Statute, the US can be seen to deviate further from the Constitutional principle of no abridgement. This is done more so in cases aimed at protecting national interests – security, economy, reputation, etc. – and is therefore generally accepted socially. Ultimately, it is for the courts to apply this law and it is, in any case, the role of the courts to keep Executive power in check also. This does not necessarily, however, offset the chilling effect that such regulation can have on speech.

iv. Comparison

This section will compare the standards of protection of free expression in the UN, UK (or ECHR) and the US. It will consider the source, test and special situations which are involved in the relative standards.

It is useful to distinguish between the two justifications raised under the ICCPR, ECHR and British and American common law standards: (1) protection of national security, and (2) prevention of public disorder. ARTICLE 19 pinpoints the distinction of gravity and proximity:

> National security differs from public order in that, to justify a restriction based on the needs of national security, the government must show a greater gravity of potential harm but does not need to show the same degree of imminence of likelihood of harm.[131]

As such, national security risks must be extreme but not be impending, while public disorder must be imminent but not grave. The first goes to terrorism and the second to violent extremism. It is questionable, however, whether either can be considered proportionate if, for example, grave situations of terrorism are not forthcoming and therefore can possibly be

[130] Stone (n 14) 1096
[131] ARTICLE 19 (n 103) 114

avoided by means other than speech restrictions, or where violent extremism might do little physical harm but nevertheless likely to occur. Particularly where restrictions should be narrow and fear or offence should not be a factor in the assessment. Clearly, however, the framing of legislation at the UN, US and UK all are termed in a way which foresees these criteria being satisfied in a 'proportionate' manner.

Source

The ICCPR is a treaty and therefore its source is the agreement and consent of 173 States, and 74 signatories indicating potential of such.[132] The ECHR follows a similar means; that being of a regional Convention with a current 47 signatories and ratifications.[133] Its application in the UK depends, however, on domestic law, namely the HRA. In the US, the source is the Constitution – the law of the land – and ironically that which is probably much more difficult to amend than the aforementioned international and regional treaties. These are the sources – the foundations – of the protection for freedom of expression in its respective jurisdiction – and these are the greatest protection on offer in its respective jurisdiction also.

All three jurisdictions have used case-law to change the boundaries of the standards set in the respective texts. The UK and the US follow similar common law systems. This is the system of *stare decisis*. In its simplest form, this means that the rationale or principle of a case becomes precedent, or law, and its obligatory on lower courts to follow. Hence why much of common law derives from the Supreme Courts. The UN system is different; it is quasi-judicial. Here, the Human Rights Committee, as the treaty body, is charged with the duty to hear communications, or complaints, from individuals about potential State breaches of the

[132] UN Treaty Collection, 'Chapter IV Human Rights: 4. International Covenant on Civil and Political Rights', Depositary, (9 November 2019) <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND> accessed 9 November 2019

[133] Council of Europe, 'Chart of Signatures and Ratifications of Treaty 005' Portal, (9 November 2019) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=dmiSSHKb> accessed 9 November 2019

ICCPR.[134] The outcome, unlike in the American and British common law systems, is not precedent but rather decisions, or views. These are not binding but certainly authoritative, at least on the State in question. They can also be persuasive upon other States in understanding the Human Rights Committee's authoritative interpretation of the Convention. It is important to bear in mind the difference in effect that the decisions of the Human Rights Committee have in comparison with the courts of the UK and US and what this means – the ICCPR is harder to enforce and hence easier to manipulate.[135]

Test

It is accepted that expression is never absolutely free, despite the US Constitution. Perhaps the use of 'freedom' sounds perverse in this context. The notion of 'freedom' implies, however, as is literally interpreted in the international and European contexts, a greater sense of duties and obligations than that of an individual right, and as such, is inherently limited.[136] In the American context, "it is best characterised as the absence of interference."[137] Either way, freedom is a liberty which may, in some cases, confer a right to expression.[138]

The law in the US diverged from that in Europe and internationally on the question of 'necessity', and when that threshold is met.[139] There is a clear common theme when it comes to the standard of protection in the context of national security threats and public disorder (or, for the Americans, breach of peace); incitement. The UN General Assembly was first to make reference to this as the test in 1966 with Article 20 of the ICCPR which we recall to require prohibition of expression of hatred constituting 'incitement to discrimination, hostility or violence.' A mere three years later, the US set the *Brandenburg v. Ohio* precedent which restricted expression that was likely to produce 'imminent lawless action.' In the European

[134] Keller (n 102) 372
[135] ibid
[136] ECHR (n 110), Article 10 (2)
[137] Barendt (n 16) 104
[138] ibid, 102
[139] Tugendhat (n 105) 125-126

context, there has only been one case to come close to this standard which was much more recently in 2002. This is *Gul and Others v. Turkey* which failed on the necessity test based on the standard that there was no "clear and imminent danger."[140]

While all three jurisdictions make reference to this as a threshold for limiting our liberty or impeding on our right, where it lay, nevertheless, remains scattered and the difference in consistency of enforcement is acute. For example, the fact that only one case in Europe came close to meeting the American standard shows that it is not something which the European Court desires to conform to. The American courts, to the contrary, have applied this high threshold consistently. This falls in line with the European margin of appreciation and the American absolute protection traditions.

Similarly, the US made a declaration against Article 20 of the ICCPR to ensure it could not require them to legislate in a form "that would restrict the right of free speech and association protected by the Constitution and [common] laws of the [US]."[141] Better understood as a rejection of the minimal guarantee offered by the ICCPR which, in its Article 20, actually requires prohibition of certain kinds of speech that would constitute an abridgement of speech as prevented by the Constitution. The UK made no such declaration or reservation. Ironically, international human rights law should be containing the arbitrariness and disproportionality of States but here, the US considers it the other way around. That which the international community saw as just – prohibition of advocacy constituting incitement to discrimination, hostility of violence – the US saw as disproportionate. This is where the US diverges on the question of necessity. Advocacy must, in all cases, not only cause incitement but incitement

[140] *Gul and Others v. Turkey*, App. No. 4870/02, Court (Second Section), 8 June 2010, [42]
[141] OHCHR, 'Status of Ratification Interactive Dashboard', <http://indicators.ohchr.org/> accessed 19 November 2019

likely to produce 'imminent lawless action' or 'clear and imminent danger bringing about substantive evils.'[142]

The test of incitement therefore depends on the proximity, imminency and outcome which bear a higher threshold in the US than in the UK and UN prescriptions.

Public Interest

What is commendable, and perhaps a clear statement as O'Flaherty sought, is the General Comment's protection for "journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information,"[143] even when the information was classified.[144] Moreover, General Comment 34 provides for governments to protect the 'crucial role' of the media and ensure they can act independently and unrestricted.[145] In this way, the general comment provides for an unfettered role of freedom of expression and information in society by highlighting and requiring protection of all actors and individuals contributing to the circulation of information in the legitimate public interest – including on terrorism and violent extremism – that is, so long as it does no 'harm'.[146]

The ECtHR has also fallen back on the ICCPR special duties' notion with regards to the dissemination of information in national security cases. For example, while the Court has consistently held that the press – and now also civil society – have a special watchdog function and therefore should be autonomous,[147] the Court also held that they are reliable for the mode in which they report on extreme views in the news "and should avoid becoming a vehicle for the dissemination of hate speech and promotion of violence."[148] To reiterate, this interpretation is applicable in the UK domestically, and can be exploited in order to restrict the dissemination

[142] *Brandenburg* (n 126); and *Abrams et al v. the United States of America* 40 S.Ct.17 (1919) 627
[143] General Comment 34 (n 6) [30]
[144] Coliver (n 88)
[145] General Comment 34 (n 6) [46]
[146] ibid [30]
[147] *Magyar Helsinki Bizottsag v. Hungary*, App. No. 18030/11, Court (Grand Chamber), 8 November 2016 [166]
[148] *Surek v. Turkey (no 1)*, in Andras Koltay, *Comparative Perspectives on the Fundamental Freedom of Expression*, (Wolters Kluwer Ltd, 2015) 594

of opinions and ideas domestically. At the same time, the UK made clear the importance of freedom of expression in Article 12 of the HRA, in which courts were required to have "particular regard" to its importance and particularly that of journalists, literature or art.[149] This is not to say that the balance cannot and has not weighed against the freedom of expression in national security cases concerning such media.

The US has also applied its categorical case-law approach to address the notion of press functions and public interest. Namely in the infamous *Pentagon Papers Case* in 1971 concerning the government's attempt to prevent the New York Times and Washington Post from publishing a leaked classified report on the US role in the Vietnam war.[150] In this case, the Court departed from the clear and present danger test for factual reasons. The Supreme Court held that there is a narrow category of situations in which free speech can be overridden for national interest reasons, this being when publication will "inevitably, directly, and immediately cause the occurrence of an event kindred of imperilling safety, such as during war" (per Justice Stewart).[151] This case represented a turning point in which the court promoted and prioritised the real watchdog function of the press, with Justice Black arguing that the First Amendment protection of press is essential in protecting the people's right to have access to information and public debates.[152] Justice Douglas went as far as to hold that secrecy of government is undemocratic and an abuse of power.[153]

Freedom of expression may carry its own justifications, but so too does national security constitute a legitimate interest. The identification of a public interest, however, can be seen to add to the balance when it comes to the courts making a judgement on State regulation in practice. As such, democratic actors, including the press, NGOs, academia, and others who are

[149] HRA (n 107), Article 12(4)
[150] *New York Times Co. v. the United States of America* 403 U.S 713 (*Pentagon Papers case*) (1971) 714
[151] ibid, 727
[152] ibid, 717
[153] ibid, 724

working in the national interest, sit in a grey zone where they are at threat of regulation that should have due regard to their functions.

Conclusion

While the UN Human Rights Committee and UK favour a methodological three-part test, which works from the presumption of a legitimate aim, the US follows a polar methodology assuming that speech is absolutely protected and the legitimate aim must be shown. All three jurisdictions rely on a balancing test when it comes to competing interests such as national security and freedom of opinion and expression. "This balancing process need not be incompatible with a strong adherence to the free speech principle," but oftentimes can be.[154] All three jurisdictions have shown due regard for the public interest as a legitimate interest to be factored into this balancing test, potentially tipping the scales in favour of important actors in our democracies.

The US, in theory, is centred by a Constitution which provides stronger protection for speech than does the UN. The UK has also made a provision in its Human Rights Act in the same direction, though certainly nowhere near as secure. There are special circumstances which are likely applicable in situations of terrorism and violent extremism regulation and prevention that may tip the scales event against the public interest weights on the other side, notably where test of incitement – as understood by its respective jurisdictional threshold – is satisfied. This has been demonstrated with case law. Given the discretion permitted under international human rights treaty law under Article 19 of the ICCPR in controlling the limitations on national regulation, the balancing process thus still has the potential to arbitrarily and disproportionately interfere with our freedom to information, of opinion and expression.

[154] Barendt (n 16) 50

V. Counter Terrorism and Violent Extremism Strategies

We now know why we have protection for free expression and also why, in situations of threats to national security, we might favour certain limitations of this right. We also know the standards and control of protection of expression in each jurisdiction and which bodies can enforce and change these standards. This chapter will now address the direct question: how, given these foundations, have the UN, UK and US laws and policies in the field of countering terrorism and violent extremism engaged freedom of expression? More specifically, this chapter will assess the extent to which these laws and policies have had a chilling effect on our legitimate free expression.

This chapter will compare the regulation in the UK and the US, specifically the definitions of the key terms, also with those commentaries and 'guidelines' provided on a UN level. It will consider the laws and policies of counter-terrorism and CVE together – the author considers that these cannot be separated by virtue of the permissibility of laws for subsequent policies and measures, and by virtue of the interconnectedness of violent extremism and terrorism (or radicalisation, if you will). This sub-chapter will lay out first, the source and power of regulation in each jurisdiction. Second, this paper will compare the definitions adopted in each jurisdiction. Third, this chapter will focus on the criminalisation of incitement – a threshold previously established as being a commonality between the jurisdictions – and how it is applied in practice. Fourth, the paper will consider and compare exemptions to these laws and policies criminalising such acts. Finally, this chapter will consider the relationship between State and devolved private regulation of terrorist and violent extremist content.

i. Regulatory Texts

Following 9/11, at least 140 countries adopted legislation to counter terrorism and violent extremism, "often in response to decisions made by the UN Security Council and other

international bodies."[155] It is important to note that Security Council decisions are binding, whereas many others are not, but nevertheless authoritative – in particular, when concerning issues advocating the need for an international response. Unlike the UK and the US, texts coming from the UN have the potential for wider impact on the global scale. They are generally agreed by consensus and majority and can therefore lead to a uniform approach having greater effect. At the same time, they cannot be enforced legally and even in those situations where States can be held accountable for their deviations, they generally are not. One could place a lot of emphasis on the relationship between the UN, UK and US in that these so-called leading Western States should be the ones setting a good example, but often are not. Or rather, are often the bad example; there is less excuse where there are more means. Nevertheless, the majority of States continue to capriciously agree, sign and ratify resolutions to this effect.

Privacy International highlights the topical reforms decided by the Security Council including measures of intelligence sharing, collection of biometric data, mass retention of data and the monitoring of financial activities.[156] In its first Resolution on the topic in 2001 – Resolution 1373 – the Security Council first justifies the terrorist threat to international peace and security under the Charter of the United Nations.[157] Later, the Security Council began to require three main things of States to counter this threat; to 'adopt measures prohibiting by law incitement to commit a terrorist act or acts and prevent such conduct', to respect international law, in particular human rights, and to cooperate with the Counter-Terrorism Committee.[158] Resolution 2178 in 2014 added the need to tackle violent extremism into the agenda; first deploring it, then requiring State action to cooperate and outlaw violent extremism in order to

[155] Privacy International, 'Scrutinising the global counter-terrorism agenda', <https://www.privacyinternational.org/campaigns/scrutinising-global-counter-terrorism-agenda> accessed 8 August 2019
[156] ibid
[157] UN Security Council, *Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts]*, 28 September 2001, S/RES/1373 (2001), preamble
[158] UN Security Council, *Security Council resolution 1624 (2005) [on threats to international peace and security]*, 14 September 2005, S/RES/1624 (2005), [1] – [5]

prevent terrorism.[159] These mere three and seven-page binding documents, respectively, are expanded on by a greater range of non-binding resolutions from the Human Rights Council and General Assembly, more specifically related to the relationship of State obligations towards countering terrorism and violent extremism with their obligations to promote and protect human rights. In 2006, the UN General Assembly adopted the Global Counter-Terrorism Strategy which, in its fifth review, also recognised the importance of the Secretary-General's Plan of Action to Prevent Violent Extremism.[160] Additionally, there exist multiple entities aimed at monitoring and addressing the issue on an international cooperative level, such as The Counter-Terrorism Implementation Task Force (CTITF) and other working groups.

The Global Counter Terrorism Strategy (the Strategy) was adopted by consensus in 2006. This evidences a universal agreement concerning the need to respond to the issue of terrorism on an international scale and with four essential pillars: I) Addressing the Conditions Conductive to the Spread of Terrorism; II) Preventing and Combatting Terrorism; III) Building States' Capacity and Strengthening the Role of the United Nations; and IV) Ensuring Human Rights and the Rule of Law.[161] All that the Security Council requires is a national plan of action, based in law, implementing the four pillars of the Strategy and Security Council Resolutions, with dedicated funding and a monitoring and evaluation mechanism.[162] This is easy to satisfy while missing the point.

For example, the UK invokes all the methods of response to violent extremism in its national Counter-Terrorism Strategy, CONTEST, legally based in the

[159] UN Security Council, *Security Council resolution 2178 (2014) [on threats to international peace and security caused by foreign terrorist fighters]*, 24 September 2014, S/RES/2178 (2014), [15] – [19]
[160] UN General Assembly, *The United Nations Global Counter-Terrorism Strategy Review*, 19 July 2016, A/RES/70/291, [40]
[161] ibid, 9
[162] A/RES/60/288 (n 6), Annex: Plan of Action [2]

Counter-Terrorism and Border Security Act 2015, with the UN Strategy's four levels: (1) pursue to stop attacks; (2) prevent, effectively, PVE; (3) protect, meaning strengthened national security; and (4) prepare, to mitigate the impacts.[163]

Similarly, the US have also developed their National Strategy for Counterterrorism, last updated in 2018, and based in laws such as the US Code and The Patriot Act. This national strategy promises six strategic objectives to address conditions for radicalisation, halt terrorism and increase institutional capacity to this effect.[164] Not having qualified as a strategic objective, however, are the duties to protect international human rights and constitutional principles, as well as undertake independent reviews on a regular basis.

But key components of the UN's required regulation are missing: effective, and in accordance with human rights – even given under the HRA, there is a provision embodying the principle that human rights should guide the legislature.[165] This is also missing at the UN level; the fourth pillar devoted to protecting human rights while countering terrorism – while welcomed as a fundamental pillar of the Strategy – attracted merely one page of tokenistic language encouraging States to support UN activities and to reaffirm, in effect, the existence of human rights obligations. This duty is reflected in the UK and US national counterterrorism strategies in the same way; it is merely symbolic. More recently, there is a tacit permissiveness in the General Assembly resolutions. For example, in Resolution A/RES/73/174 which emphasises its condemnation of terrorism as opposed to its concern about the counterterrorism strategies with human rights,[166] the General Assembly "*urges* States to do all they can, in accordance

[163] Tore Bjorgo, *Strategies for Preventing Terrorism*, (Palgrave Pivot, 2013), preface. x
[164] United States of America: National Strategy for Counterterrorism of the United States of America', (October 2018), The White House, (NSCT) 3
[165] Tugendhat (n 105) 196
[166] Ben Saul, 'United Nations Backslides on Human Rights in Counterterrorism', Lawfare, 16 October 2019, <https://www.lawfareblog.com/united-nations-backslides-human-rights-counterterrorism> accessed 13 November 2019

with their obligations under international law."[167] This obligation essentially has two conflicting parts; to do all possible to prevent terrorism and violent extremism, and to respect international law. Where the international human rights law is to be interpreted domestically, States will generally prioritise the former obligation to the detriment of human rights.

Conclusion

While the treaty obligations and decisions of the Security Council are binding, UN human rights bodies, such as the Committee, can only produce non-binding but authoritative interpretations of that binding law in the form of General Comments, reports or recommendations, for example. These soft-law outputs are generally more concise, but their effect nevertheless depends on the State's willingness – and not a legal obligation – to give effect to them. In effect, the UN, as a collection of reinforcing bodies with different mandates and powers, has devised a mere guideline of a national strategy which the UK and the US, and most other States, have transposed almost exactly into law. But this guideline is soft; either in its obligatory nature or in its willingness to define the scope of the problem. As such, it weakens our human rights in the process.

ii. Definitions

Saul provides reasons for criminalising and defining terrorism; criminalising it "symbolically expresses the international communities desire to condemn and stigmatise 'terrorism'," while defining it can "help to define the scope" which otherwise can lead to "unilateral, excessive and unpredictable counterterrorism measures."[168] International criminalisation of terrorism is evident. The definition – and hence the 'confining' of the crime – however, is not.

[167] UN General Assembly, *Terrorism and Human Rights: resolution / adopted by the General Assembly*, 17 December 2018, A/RES/71/174, [20]
[168] Ben Saul, *Defining Terrorism in International Law*, (Oxford University Press, 2008), 12

Of great concern is the Security Council's binding definition of 'terrorism' – or at least the closest the UN has come to a universal definition – which clearly has not felt the need for update, regardless of civil society criticism:

> Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.[169]

There are three elements found here: criminal acts, intent, and purpose. Each consisting of its own broad possibilities, such as any crime against civilians, intention to cause serious injury, and for the purpose of intimidation of any kind. Without further explanation, I think we can conclude that a self-serving and/or authoritarian government can squeeze many unwarranted acts into this definition. Regardless of whether the Security Council has a more exhaustive list of necessary cumulative elements, the non-binding but authoritative and non-exhaustive but discretionary wording of the General Assembly's most recent review of the Strategy renews its unwavering commitment to:

> Preven[ting] and combat[ting] terrorism in *all its forms and manifestations*, and reaffirming that any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed.[170]

'All its forms and manifestations' opens the door for States, when implementing the resolution domestically and in legally binding form, to invent forms and manifestations of terrorism. The discounting of justifications also permits governments to provide no exception of exemption

[169] S/RES/1566 (n 12) [3] Full text:

> 3. Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;

[170] See most recent examples in the preambles of UN General Assembly, *Enhancement of international cooperation to assist victims of terrorism*, 29 May 2019, A/73/L.88; and UN General Assembly, *The United Nations Global Counter-Terrorism Strategy Review: resolution / adopted 26 June 2018,* A/RES/72/284

for social actors required to investigate terrorism and violent extremism as part of their job. For example, acts against the animal industry or committed by activists and journalists.[171]

This is the problem of definitional foundations following 9/11, just over 18 years ago. This is still, however, considered the representation of the threat of modern terrorism. The UN Office of Counter-Terrorism openly indicates that "terrorist groups such as ISIL, Al-Qaida and Boko Haram have shaped our image of violent extremism and the debate about how to address this threat."[172] Three potentially controversial things can be read into this. First, that violent extremism (and terrorism) has a changing and non-exhaustive definition. Second, that the contemporary definition considers these threats to be of an international nature and sourcing from Islamic groups. Finally, that there is disagreement with regards to how to counter this threat which naturally leads to a delayed, weak and fragmented international response. Fragmentation almost literally referring to those who implement the aforementioned definition in its narrow sense, and those States implementing it in its broadest and most chilling sense.

One such example is that of violent extremism. So much so that the Secretary-General's Plan of Action has not been implemented but merely 'noted' and 'welcomed' by the international community. This "diverse phenomenon" is nevertheless something which the Secretary-General seeks to respond.[173] And respond to it "in all its forms and wherever it occurs… [without justifications]," much like the non-exhaustive and vague definition of terrorism in the Strategy.[174] It is therefore not unreasonable to assume that the UN General Assembly would pass a resolution on CVE "without clear definition."[175] Indeed, this is seen in Human Rights Council Resolution 30/15 (2015) which substituted any real definition for a list of "acts resulting from violent extremism," together with terrorism, such as unlawful killings, forms of

[171] Animal Enterprise Terrorism Act 2006 (n 8)
[172] UN General Assembly, *Plan of Action to Prevent Violent Extremism*, 24 December 2015, A/70/674 [2]
[173] ibid [2]
[174] ibid [2]-[3]
[175] ibid [2]

violence, and targeted persecution.[176] No distinction was drawn between the two. This resolution passed with only three opposing States.

Indeed, the international community was more likely to accept such a loose resolution. Much of the problem at the UN is the forced choice between having weak law and/or guidance, or none at all. Generally, the State-centric UN bodies such as the Security Council and General Assembly favours the former which then means that States' have the ability to pass draconian domestic laws and policies using the UN's open definition as a legitimate scapegoat. Another distinct difference between the regulation of terrorism and violent extremism of the UN with that of the UK and US is precisely its international nature and consent-based power; UN bodies, excluding independent mechanisms such as Special Procedures, literally need to please each State – those accused of terrorism and those decrying it – in order to pass a unanimous and thus credible resolution. One might say the UN is caught between a rock and a hard place (or a terrorist and the victim!)

One of the concerning elements of the Plan of Action to Prevent Violent Extremism is its focus, or rather promise not to 'venture into the questions of definitions'. In its fifth paragraph, the Secretary-General highlights:

> Definitions of "terrorism" and "violent extremism" are the prerogative of Member States and must be consistent with their obligations under international law, in particular international human rights law.[177]

While the mere mention of human rights obligations might be a 'practical' way to ensure State compliance,[178] it is rather, in practice, a pragmatic way for the UN Secretary-General to circumvent the issue and in turn, for States to circumvent their obligations. In short, UN bodies refuse to provide definitions of the very threat they are requiring States to address, holding

[176] UN Human Rights Council, *Human rights and preventing and countering violent extremism: resolution / adopted by the Human Rights Council*, 12 October 2015, A/HRC/RES/30/15, preamble
[177] Plan of Action to Prevent Violent Extremism (n 172) [5]
[178] ibid [5]

rather that this is at their discretion so long as no other international law is breached. A key distinction between the UN and the UK and US as Member States is therefore the prerogative that the latter have with regard to defining the problem and thereby shaping the purpose and meaning of the resolution – problematically, this can then take different shapes in each State.

Saul argues that it is the role of UN bodies to define terrorism in international law – human rights and humanitarian – given that "the 'outer core' of terrorism – such as acts that would not be contrary to international humanitarian [or human rights] law – is more susceptible to justification."[179] I agree, both because this could contain the potential for conflicting, weak and/or overbroad definitions as well as for procedural reasons; these limits can only be drawn by the bodies empowered to make international law and not unilaterally based on the prerogative of Member States.

One clear example is the fact that "pillars I and IV of the Strategy have often been overlooked" by States.[180] Those being tackling conditions conducive to terrorism and ensuring respect for human rights and the rule of law in the process. Rather States consider themselves to have satisfied the obligations handed down from the UN by preventing and combatting terrorism and building their capacities to do so. This can be translated to defining terrorism in its broadest form and then preventing it by increasing their capacity, i.e. powers, to do so. Incongruously, however, the Secretary-General continues to assume the responsibility of States and devotes a mere three paragraphs to the issue of human rights and rule of law in the Plan of Action.

While the Secretary-General clearly feels he can "count on Member States to translate our common commitment and political will to effect real change into new ways of formulating

[179] Saul (n 168) 69
[180] ibid [7]; see also the reports of Special Rapporteurs, such as the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 'Annual Report', (21 February 2017) UN Doc A/HRC/34/61, [8] and [44] – [47]

public policy so as to prevent violent extremism,"[181] the Special Rapporteurs on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Special Rapporteur on Countering Terrorism) and on the Promotion and Protection of the Right to Freedom of Opinion and Expression (Special Rapporteur on Expression) thankfully have not relied on such blind faith. One could equivocate the Special Rapporteurs as the independent and effective monitoring and evaluation mechanism for the UN's regulation that is required domestically of States.[182] Unlike States, however, Special Rapporteurs are appointed by a public nomination process and a have a strict code of conduct requiring independence, impartiality, personal integrity and objectivity.

The Special Rapporteur on Countering Terrorism indicated in his first report on the Strategy that, while it presents human rights and counter terrorism as complementary, this is not often translated into practice, neither by UN bodies nor States.[183] At the centre of this concern was that "calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, can give rise to adverse consequences for human rights."[184] This an ever more pressing problem in light of the fact that the UN, excluding the Security Council, has little legislative power. Only the Security Council could rectify this, but with nine of fifteen council members needing to agree and none of the veto powers, including the UK and US, putting forwards their veto, this is unlikely. On the other hand,

> It [is] problematic for binding permanent measures to be imposed by the Council on all Member States on the basis of hypothetical future acts falling under such a controversial and internationally undefined notion as terrorism.[185]

The Special Rapporteur considered the UN, much like the State actions it professes to contain, has posed little opposition to actions "openly in opposition with international human rights

[181] ibid [43]
[182] ibid [44]; see also A/RES/60/288 (n 6), Annex: Plan of Action, 9, [8]
[183] UN General Assembly, Compliance by the United Nations with international human rights law while countering terrorism, 6 august 2010, A/65/258, [21]-[22]
[184] ibid [25]
[185] ibid [37]

standards" in the name of countering terrorism and/or violent extremism.[186] In accusing the Counter-Terrorism Committee of being insensitive and wilfully blind, the Special Rapporteur highlights that the UN "may risk providing… States with further pretexts to crack down on human rights defenders" as well as other important social actors.[187] While the UN, in its various platforms, regularly condemns terrorist acts, it has little public record of speaking out against "politically inspired over-inclusive national definitions of terrorism posing a threat to human rights and to the efficiency of proper counter-terrorism measures."[188] This is, however, something which the unfunded and independent mandate-holders speak loud and clear of with little institutional backing.[189] It is clear that the tensions between the various UN expert and political bodies are reflective of broader controversies across and within States.

Even recommendations by States through UN mechanisms, such the Universal Periodic Review, including the 2017 recommendations to the UK from Botswana and Peru to ensure laws and policies adopted by the UK in the fight against terrorism and extremism are in conformity with international law, and Malaysia, Mexico and the State of Palestine's recommendation to ensure at the very least regulation is not discriminatory and is overseen.[190] The same was seen in the Working Groups summary of recommendations to the US in 2015 where both Russia and Malaysia noted the inconsistency of the US policies with international

[186] ibid [44]
[187] ibid
[188] ibid
[189] OHCHR news which generally source from a coalition of Special Procedures and call for action of UN bodies. See for example, OHCHR, 'UK must stop disproportionate use of security laws after conviction of Stansted 15, says UN rights experts', (6 February 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24141&LangID=E> accessed 10 November 2019; OHCHR, 'UN human rights experts concerned about EU's online counter-terrorism proposal' (12 December 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24013&LangID=E> accessed 10 November 2019; OHCHR, 'UN human rights experts says Facebook's 'terrorism' definition is too broad', (3 September 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23494&LangID=E> accessed 10 November 2019
[190] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland*, 7 September 2017, A/HRC/36/9/Add.1, [3]

human rights standards, with regards to the use of torture and extrajudicial killings.[191] As is visible, this is another non-binding mechanism of the UN system which has little impact. The UK pressed forward in adopting counter-terrorism legislation a year later which was criticised for its inconsistency with international human rights law[192] and appointed an independent reviewer of its extremism policy – PREVENT – who has been clearly and publicly criticised for his partiality.[193] The US, on the other hand, reversed the previous administration's decision to shut down Guantanamo Bay[194] and vowed to tackle 'terrorist propaganda' by "deny[ing] terrorists the freedom to travel and communicate."[195]

Per the prediction of countless UN mandate-holders, the US and the UK have adopted definitions which are purposefully vague, exploitable, and often counter-productive. The US defines terrorism as:

> Violent acts or acts dangerous to human life that are [or would be] a violation of... criminal laws, [and] appear intended to" intimidate civilians, influence government policy, or "affect the conduct of government by mass destruction, assassination, or kidnapping.[196]

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[191] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: United States of America,* 20 July 2015, A/HRC/30/12, [176.241] and [176.246]

[192] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Communication to the UK on the Counter-Terrorism and Border Security Bill, 17 July 2018, Ref: OL GBR 6/2018, <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-GBR-6-2018.pdf> accessed 20 September 2019

[193] Liberty, 'Public Statement on the Appointment of Lord Carlile of Berriew as Independent Reviewer of RPEVENT', (18 august 2019) <https://www.libertyhumanrights.org.uk/issue-type/prevent > accessed 20 September 2019

[194] Julian Borger, 'Donald Trump Signs Executive Order to Keep Guantanamo Bay Open', (31 January 2018) <https://www.theguardian.com/us-news/2018/jan/30/guantanamo-bay-trump-signs-executive-order-to-keep-prison-open> accessed 20 September 2019

[195] NSCT (n 164) 2

[196] United States of America: 18 U.S.C ss.2331, (2002), Code, s.18, Definitions.

(1) the term "international terrorism" means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

Additionally, the US Patriot Act of 2001 expanded the definition to include domestic terrorism – having the same definitions, merely occurring 'primarily within' as opposed to 'primarily outside or transcending' the border of the US.[197]

The UK has taken a slightly different approach to its definition of terrorism in its Terrorism Act 2000 – subject to multiple amendments. Terrorism, according to the British definition, is:

> The use or threat of… serious violence against the person, damage to property, endangering life, creation of serious risk to public health or safety, or serious interference with an electronic system… designed to influence the government or to intimidate the public... for the purpose of advancing a political religious, racial or ideological cause… or the use of firearms or explosives.[198]

The cumulative elements of the legal definitions are nevertheless similar, requiring first criminal activity, second which endangers the life or integrity of the government or public, and third, which has the intention to 'intimidate' or 'influence'. It is the final factor which is in issue.

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(5) the term "domestic terrorism" means activities that—
(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
(B) appear to be intended—
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
(C) occur primarily within the territorial jurisdiction of the United States;

[197] United States of America: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act) [United States of America] 26 October 2001, s.802

[198] United Kingdom: The Terrorism Act 2000 [United Kingdom of Great Britain and Northern Ireland] 20 July 2000, s.1, Interpretation.
(1) In this Act "terrorism" means the use or threat of action where—
(a) the action falls within subsection (2),
(b) the use or threat is designed to influence the government [F1or an international governmental organisation] or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious [F2, racial] or ideological cause.
(2) Action falls within this subsection if it—
(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.
(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

Two problems can be deduced from the definitions prescribed by the US and the UK; the prior problem and the post problem. The prior problem is that Security Council resolution 1566 (2004) requires an intent to cause death or serious bodily injury.[199] This is not present in this definition. The use of 'appears to be intended' in the American context and 'designed to' in the British are both capable of evading the need for actual proof of intent and rather satisfy themselves with appearances. In no criminal law – much less in the common law systems of the US and UK – has appearances been an acceptable burden of proof. The same must apply of the cumulative elements for terrorism and these are clearly circumvented by the wording of the definition, much more so in practice. As such, States show total disregard for even the binding instruments of the UN.

Second, the post problem. This is that which is of the main concern for the thesis; that these definitions are "broad enough to encompass the activities [namely the expression, opinion and access to information] of several prominent activist campaigns and organisations", as well as of academics, journalists and media workers, and other interested persons.[200] The purpose of legislation and the process of its scrutiny is to avoid such vagueness and discrepancies. As required by Article 19 of the ICCPR to which all three jurisdictions should enforce, the law must be sufficient and precise enough to avoid any such elusiveness in practice. As such, one can be fearful of how a law is intended to be applied when this criterion is loosely satisfied, if considered satisfied at all.

The Patriot Act is but one example of how Presidential power can be used with the aim of combatting terrorism and violent extremism by way of regulating fundamental freedoms "through a widening definition of the notion of combat against terrorism: since the spectrum

[199] S/RES/1566 (n 12) [3]
[200] ACLU, 'How the USA PATRIOT Act Redefined "Domestic Terrorism"', <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism> accessed 25 September 2019

of issues falling under [that] umbrella is broadened, it becomes obvious that the federal powers are extended considerably." This is clear also from the National Strategy, which effectively outlines the measures taken under the legislative definition, which raises a novel – at least textually – threat of "terrorists motivated by other forms of extremism also us[ing] violence to threaten the homeland and challenge the US interest[s]."[201] This includes motivations of race, animal rights, environmental, sovereign citizen, and militia extremism.[202] This is evident from the US Animal Enterprise Terrorism Act 2006. Not much more than the title needs to be given for explanation; you are considered a terrorist for intentionally causing the loss of records used by an animal enterprise.[203]

Similarly, and without the need for such great constitutional powers, the UK in CONTEST identified right-wing extremism as the new threat following five attacks in 2017, effectively equating this with the threat of terrorism[204] and opening up the possibility of other 'motivations', such as animal rights or environmental issues which may require a counter-terrorism response.[205] The US and UK can therefore both be seen to expand their legislative definitions of terrorism to include any act which demonstrates a link between mere violence and undefined national interests. This being with the support of the UN's definition of terrorism 'in all its manifestations'.

This has been reinforced by the current mandate-holder's more recent report in February 2019 which focused on the effects of terrorism and violent extremism State regulation on civil society and human rights defenders.[206] Front Line Defenders, a human right organisation working to protect human rights defenders, provided telling statistics that a minimum of 26%

[201] NSCT (n 164) 1
[202] ibid, 10
[203] Animal Enterprise Terrorism Act 2006 (n 8), s.43
[204] United Kingdom: Home Office, Counter-terrorism Strategy, (20 August 2018) Cm 9608, (CONTEST), [5] and [53]
[205] ibid [63]
[206] A/HRC/40/52 (n 54)

of defenders, and up to 37% in 2018, were charged under security-related legislation.[207] The Special Rapporteur highlights how political rhetoric has led to an increase in branding new groups – peaceful groups undertaking peaceful activities – as terrorists, including LGBTI and environmental activists and journalists.[208]

Conclusion

The imprecise definition is the main problem sourcing from UN bodies which spills over into the national context and exasperate the chilling effect of regulation of terrorism and violent extremism on expression. The "proliferation of entities and norms – importing language from one another – [which] contributes to increased fragmentation of global counter-terrorism regulation in ways that are not fully appreciated."[209]

The evidence is clear that globally, States are beginning to insert new and problematical categories of persons into the definition of terrorist or violent extremism. The effects are that States are beginning to charge and condemn individuals playing an important role in the countering of these threats under the very legislation which prescribed to do so and at the same time, to protect such persons human rights.

iii. 'Incitement'

The most pressing issue, which has become widespread in the regulation of terrorism and violent extremism, both nationally, regionally and internationally, is the threshold of incitement which presents the transition from protection expression to unprotected expression, as detailed in the earlier chapter. The problem being that this threshold has become blurred. In particular, by the proliferation of legislation which prohibits or seeks to prohibit expression seen as "glorification, justification, advocacy, praising, or encouragement of terrorism."[210] General

[207] 17% national security; 9% terrorism; and 11% other. Front Line Defenders, 'Front Line Defenders Global Analysis 2018', (2018) <https://www.frontlinedefenders.org/sites/default/files/global_analysis_2018.pdf> accessed 25 September 2019, 11
[208] A/HRC/40/52 (n 54) [8]
[209] ibid [30]
[210] ibid [37]

Comment 34 requires such terms, if used, to be clearly defined.[211] They are so often not. These criminalised acts, along with a wide definition of 'terrorism' as action advancing any 'political, religious, racial or ideological cause', clearly can encompass and therefore has "a chilling effect on free speech surrounding, for example, foreign policy."[212] Additionally, the Special Rapporteur report on human rights defenders' argument is that this lacks the essential elements of both intent and danger to constitute incitement – that being which is prohibited expression under international law.[213] I vehemently agree. On the surface, so does the executive in all three jurisdictions, as evidenced by their protection of expression. Even within the preface of the national counterterrorism strategies do the authorities concede that "the stark reality is that it will never be possible to stop every attack."[214] Further, that we do not want to live under State surveillance and or to be secretive or disproportionate in our response to these threats.[215]

What is true is that there is no such thing as a zero-risk policy when it comes to terrorism and violent extremism. What is clever about the wording of this statement, as just one example, is the deception. We do not *want* to be, but we are a State of surveillance. This is clear with the laws and policies enacted by the UK and US, and the lack of effective condemnation by the UN.

The Counter Terrorism and Border Security Act of 2019 all but admitted that the UK will be employing internet surveillance as a means to criminalise expression which constitutes expression in support of proscribed organisations, publications of images, the viewing of material online and the encouragement and dissemination of terrorist publications.[216] This

[211] ibid [46]
[212] Liberty, 'Overview of Terrorism Legislation', (25 September 2019) <https://www.libertyhumanrights.org.uk/human-rights/countering-terrorism/overview-terrorism-legislation> accessed 25 September 2019
[213] A/HRC/40/52 (n 54) [37]
[214] CONTEST (n 204) 5
[215] ibid
[216] United Kingdom: Counter-Terrorism and Security Act 2015 [United Kingdom of Great Britain and Northern Ireland] 12 February 2015, Chapter 1. Terrorist Offences.

presents two problems – both of which contradict the former Home Secretary's wishes – first, there will be widespread and uncontained surveillance. Second, there will be criminalisation of expression not meeting the threshold of 'incitement' as required by not only international law, but also domestic law. This is merely an extension to the already vague and disproportionate crimes established in the Terrorism Act 2000 of support – actually, merely 'expressing an opinion or belief that is supportive… and reckless… [to encourage]' – for proscribed organisations.[217] Moreover, organisations 'concerned with' terrorism.[218] Now one can be liable for "collecting [or just viewing] information likely to be useful to a person committing or preparing an act of terrorism," with a lifetime maximum sentence.[219] This is contrary to article 19 ICCPR in that "excessive restrictions on access to information must… be avoided," as well as in its chilling effect on the sharing of information.[220] This is particularly concerning where national courts have shown a reluctance to "cut down" or "imply some sort of restriction" to the wide definition of 'terrorism' in Statute, "despite the undesirable consequences."[221]

In the US, such language is not invoked in law. In fact, the *Brandenburg* test – requiring intent, imminence and likelihood – firmly outlaws the criminalisation of speech which does not incite violence.[222] There are, however, substandard crimes in legislation. The Patriot Act 2001, for example, prohibits material support to proscribed organisations. To do so 'engages' you in terrorist activities. The Immigration Nationality Act "provides a list of forms of conduct that *can* amount to material support, [but] the provision is expressed in terms that are not exclusive and thereby renders the expression "material support" too vague" (emphasis added).[223] This

[217] Terrorism Act (n 198) s.12
[218] ibid, s.3(4)
[219] Counter-Terrorism and Border Security Act (n 212) s.3; Terrorism Act (n 198) s.58
[220] General Comment No 34 (n 6) [46]
[221] *R v. Gul (Mohammed)* [2013] 3 W.L.R 1207, see [23] and [38]
[222] *Brandenburg* (n 126) 447
[223] Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, 22 November 2007, A/HRC/6/17/Add.3, [40]

can cause problems for humanitarian organisations who provide 'material support' to alleviate crises which may comprise part of the war on terrorism. This was seen in the case of *Holder v. Humanitarian Law Project* where the Supreme Court held that the wording was not vague,[224] at least in its application to the applicants in hand, and that there was a sufficient interest in restricting speech – though this latter part was met with some dissent.[225] Again, the two problems are first, that the activity prohibited falls foul of that required by domestic and international law protection of expression as well as Security Council's cumulative criteria of intention, purpose and effect. And second, the proportionality of such action is cosmetic at best – even the Supreme Court judges cannot agree – and as such, it carries the possibility to be applied arbitrarily in some cases. This clearly affects the social actors who are most likely to need to access such information in the process of countering the conditions and narrative conducive to terrorism and violent extremism.

On the other hand, one can argue that to wait for the 'incitement' threshold fails to address the threat in itself; to wait for an act which actually has a proven intention, likelihood and/or effect of terrorism or violent extremism is to go too far. It is the State's obligation to prevent this. Problematically, this view seems to be supported, at least as seen in the UK, on a regional level. For example, the Council of Europe Memorandum concerning the 2019 Act held that such crimes satisfied the ECHR three-part test of legality, necessity and proportionality, including those which did not require intent or harm.[226] The Council of Europe refers to a 'fair balance' between rights and interests of the community, holding that:

> The gravity of the risk posed by terrorist groups to the public at large is such that it is proper to curtail the Article 8, 9 and 10 rights of persons whose expression of opinions which are

[224] *Holder v. Humanitarian Law Project et al.* 561 U.S. 1 (2011) 21
[225] ibid, 12
[226] UK Home Office, 'Counter-terrorism and Border Security Bill: European Convention on Human Rights Memorandum', 6 June 2018, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713837/20180601_ECHR_Memorandum.pdf> accessed 26 September 2019 [19]

> supportive of a terrorist group are made reckless as to the consequence of others being encouraged to provide support to the group.[227]

This may be so. Nevertheless, a line must be drawn. If not merely to remind governments that they are not omnipotent and above the law – international or their own. Moreover, this paper sustains that:

> Governments that exhibit repressive and heavy-handed security responses in violation of human rights and the rule of law, such as profiling of certain populations, adoption of intrusive surveillance techniques and prolongation of declared states of emergency, tend to generate more violent extremists.[228]

This is particularly the case where States have defined terrorism as any 'manifestation' of activism against State 'interests', regardless of intent, and violent extremism as 'opposition' to 'values', as is evident from the British and American definitions previously laid out. The heavy-handed security responses in this context is even heavier. It is clear that such definitional failures on the part of States fails to address the threat – though it arguably addresses another perceived government threat of dissenting organisations and persons – and in this sense it can be counter-productive. It is also clear that there is fragmentation between the oversight of the UN, in particular the Human Rights Council and Special Procedures, and the ECHR, which further grants States the room needed to make their own definitions.

Article 5 of the Council of Europe Convention on the Prevention of Terrorism, to which the UK is a signatory, requires States parties to criminalise the public provocation to commit acts of terrorism, "whether or not directly advocating terrorist offences."[229] In effect, this Convention disregards both the law on protection of expression and laws on prevention of terrorism. This is considered a proactive approach to countering terrorism and preventing

[227] ibid [17]
[228] A/RES/60/288 (n 169) [27]
[229] Council of Europe, Convention on the Prevention of Terrorism, [2005] CETS 196, 16.V.2005, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016808c3f55> accessed 27 September 2019, Article 5(1)

radicalisation. I submit it is only consistent in a fragmented system willing to backbench human rights for an impossible aim and which synonymises 'proactive' with 'illegal'.

This thesis submits that States and inter-governmental organisations should not impede our expression, thereby possibly also reducing the potential to tackle the threat. The counter-argument to this is, while there is no zero-risk policy, we must nevertheless come as close as possible for our own sakes. The answer depends on where your value system lies. From a human rights perspective, the first presents the greatest route when undertaking a cost and benefits analysis. The cost being that there remains a risk. But this cost exits either way. The benefits being that we maintain a high standard of human rights, and with this also comes the benefit of being able to tackle to conditions in society which are proven to be conducive to radicalisation such as poverty, discrimination, and hate speech, particularly with the widespread and effective assistance of human rights defenders, the media and academics.

Conclusion

Regardless of where your value-system lies, we are forced to accept some level of risk. Regulation of terrorism and violent extremism, and in particular incitement to such forms of violence, often falls short of the threshold required of human rights standards and counterterrorism limits. The consequence of this is that such regulation does not only disproportionately interfere with our freedoms, it also fails to address their legitimate aims as a result of this interference. Regulation may be excessive, discriminatory, counter-productive or generally weak and inconsistent. The outcome being a chilling effect on expression, the absence of any positive effect on enhancing national security, and even its undermining.

On the question of criminalised incitement, the US has been much more rigorous in maintaining that free speech threshold protection, while the UK has expanded the meaning of incitement to include language amounting to synonyms of 'support', as prohibited by international law. Nevertheless, US free protection remains threatened. Expression encompasses much more than

speech. It includes the ability to access and share information. This being one of the primary functions of the press and human rights organisations. Yet this functional expression is undermined by vague prohibitions of 'material support'. In fact, the addition of 'material' does not really distinguish the US from the UK, or speech from expression, when both jurisdictions are subject to the same international human rights obligations.

iv. Exemptions

Following from the previous conclusion, it is not justifiable that the UN, UK or US fail to define and delimit their powers to protect human rights in the name of national security. The law should be sufficient and precise and strictly proportionate to legitimate aims. Additionally, it is submitted that regulation of terrorism and violent extremism should have adequate safeguards. This means, for example, justifications, excuses or exemptions in order to protect actions which may fall within the wording of the laws and policies and yet were not intended to – or at least should not be intended to.

An important exception – as has been long protected in the British and American common law free speech traditions – is that of public interest. Information is necessary in order for people to participate in public debate and criticise the government. The Joint Declaration on Freedom of Expression and Countering Violent Extremism 2016 (Joint Declaration) explicitly holds that public interest information "includes issues relating to violence and terrorism."[230] As such, it is foreseeable that the so-called public watchdogs, which include the press, human rights organisations and activists, have a duty to share that information. In turn, we all have a right to access that information. Vague definitions of terrorism and violent extremism, accompanied by criminalisation of expression not constituting incitement, therefore has the potential to limit

[230] United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and Countering Violent Extremism 2016*, OSCE, 3 May 206, (Joint Declaration), s.1(a)

the ability to impart and receive information in the public interest, as required by Article 19(2) ICCPR. Worryingly, it also has the potential to stigmatise and punish actors seeking to promote freedom of expression and access to information. Where no distinction is drawn in the definition of the terms of the criminalised acts, one must be drawn in a separate clause to protect legitimate acts.

This can be seen, for example, in the exceptions of the Counter-Terrorism and Border Security act of the UK for the "purposes of… [journalism], or academic research", notably following civil society intervention.[231] Nevertheless, the clause remains problematic; it omits any requirement of terrorist intent, definitions of journalism and academic research, and thus continues to chill expression of the press and civil society. For example, is a non-professional, freelance journalist protected under this provision, or just registered journalists? Are media workers protected or just functional journalists? Is independent research protected, or just research projects? These questions should be made clear in order for such persons to be able to carry out their work without fear of repercussions. The distinction made in the Joint Declaration concerns the nature and intent of the reporting, holding that access to reports of "acts, threats or promotion of terrorism and other violent activities unless the reporting itself is intended [and likely] to incite imminent violence" should not be restricted.[232] Further, the UN Human Rights Committee interprets journalism, with its distinct 'watchdog' role, as a function and not a profession "shared by a wide range of actors, including professional… bloggers and others."[233] The journalism defence fails to make explicit these other legitimate actors engaging in defensible reporting and sharing of information online. This definition should be employed in

[231] Reporters Sans Frontiers, 'New UK Counter-Terrorism legislation contains some journalistic protections, but threatens press freedom', 5 February 2019, https://Reporters Without Borders.org/en/news/new-uk-counter-terrorism-legislation-contains-some-journalistic-protections-threatens-press-freedom accessed 2 October 2019
[232] Joint Declaration (n 230), s.2(d)
[233] General Comment 34 (n 6) [44]

legislation. "Journalists should not be penalized for carrying out their legitimate activities,"[234] particularly where the penalties are disproportionately high.

Again, this problem is less severe in the US. Anti-terror measures here are somewhat less sophisticated due to the nature of their origin in the US – though perhaps more chilling given their impulsive and "ad hoc" nature –[235] while the UK has been developing these laws long before 9/11 to tackle domestic terrorism in Ireland. Nevertheless, both jurisdictions felt the need to created so-called Watch Lists of proscribed terrorist organisations; something which also needs attention concerning its exemptions. For example, in the US, Trump publicised that Antifa and MS-13, antifascist and pro-immigration organisations respectively, were being considered terror organisations even though most tactics of the pro-left are considered violent against property only.[236] Ironically, these are also organisations which are antithesis to Trump's manifesto. Regardless of whether the groups fit the criteria of a terrorist organisation or not, the narrative surrounding their designation and the lack of consensus evidences the chilling effect this can have on other organisations who go beyond peaceful means of protests or expression, even without intent to incite violence. Activists and human rights defenders are in limbo and will be fearful of taking action against national interests, or rather the head of State's interest, for fear of repercussions which are not only personal but for the organisation as a whole. Criminal criteria such as groups "concerned with terrorism" who "express an opinion or belief that is supportive… reckless[ly]" not only allows a State to criminalise and mislabel groups with such disproportionate results, it actually empowers them to do so.[237] It may be more difficult in the US to exempt groups based on the content-neutral requirements under

[234] ibid [46]
[235] Richard Falk, 'Human Rights: A Descending Spiral', in Richard A. Wilson, *Human rights in the 'War on Terror',* (Cambridge University Press, 2005) 233
[236] Conrad Duncan, 'Antifa: Trump says he could declare antifascist movement a terrorist organisation', Independent, 28 July 2019, <https://www.independent.co.uk/news/world/americas/us-politics/trump-antifa-anti-fascism-terrorist-organisation-ted-cruz-a9023816.html> accessed 2 October 2019
[237] Terrorism Act (n 198), s.12(1A)

speech protection, but this does not exclude consideration of additional factors which will respect the functions of such groups necessarily 'concerned' with terrorism and violent extremism. Action should therefore be taken in the UK and US, and certainly required of them by the UN, to ensure that there is a strict criteria for designation of terrorist groups which have due regard to the nature of the groups' work as well as the chilling effect it can have on theirs, other organisations as well as the general public's ability and willingness to practice their rights, in particular to expression, association and assembly. This was seen, for example, in the case against the Stansted 15 in the UK who were exercising their right to protest peacefully at an airport and then charged under an aviation offence, also listed under the 2006 Terrorism Act.[238] This means that, without being a proscribed obligation, you can face the need to defend yourself from terrorism-related offences in the public eye. Such use of security laws is disproportionate.[239]

It is useful here to draw on the specific example of news. Journalism has been under attack for decades and the threat of terrorism has merely provided a new avenue to make this attack more direct and more aggressive. As Richard Danbury says, "the news is what someone somewhere doesn't want you to know, the rest is just advertising."[240] Danbury considered news gathering a form of expression before speech. This is important because it brings into the scope not only the journalist but the source. The expanded use of surveillance techniques and reduced oversight of surveillance operations, which exert a chilling effect on freedom of expression, also undermine the right of journalists to protect their confidential sources.[241] Additionally,

[238] OHCHR news: Stansted 15 (n 189)
[239] ibid
[240] Richard Danbury, De Montford University, at the 2018 Justice for Free Expression Conference, 'Around the World in 7 Decisions', available at Global Freedom of Expression, '2018 Justice for Free Expression Conference', Columbia University, April 2018, https://globalfreedomofexpression.columbia.edu/about/2018-justice-free-expression-conference/ accessed 2 October 2019
[241] The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human

there are both formal and informal pressures on the media not to report on terrorism on the grounds that this may promote the objectives of terrorists.[242] This expansion seems to have been accepted in the European States but not in the US. For example, it is clear from the case law that both the US and UK promote and prioritise the function of the press, they differ on how far they are willing to protect journalistic sources which is, of course, central to the functioning of the press.

In the 1971 Pentagon Papers Case, the US Supreme Court held that the injunction of publication of leaked top secret Defense Department studies constituted prior restraint. The Court held that there is a presumption of constitutional invalidity of such actions with the First Amendment due to the fact that any system of prior restraint of expression carries a heavy burden of showing justification for the imposition of such a restraint.[243] The Court justified that the fact that the government has the power to protect national interest does not overrule freedom of expression protection. There is one narrow case when this can be overridden; when publication will inevitably, directly, and immediately cause the occurrence of an event kindred of imperilling safety, during war. Douglas' view was significant in inferring that secrecy of government is itself an abuse of the First Amendment. The case did, as a result, promote the real function of the press.

However, a year after this in the US case of *Branzburg v. Hayes* [1972], the Supreme Court held that unless the government was acting in bad faith, reporters would be required to share information they obtained from confidential sources, including the source itself. In effect, reporters in the US have no privilege and sources are unprotected. This is clear when you examine the response of the US in comparison with that of the UK to the Assange

and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade',* (2010), 8(d)
[242] ibid, 8(c)
[243] *Pentagon Papers* (n 150) 714

whistleblowing case. The US has made clear that his acts were illegal – with 17 additional charges revealed this year – while the UK is still considering whether to comply with the American or the international interpretation of protection of expression.[244] When it comes to the press and official secrets, the US is more heavy-handed than the UK. And in this respect, the chilling effect goes further and results in 175 years in prison for someone like Assange.[245] It therefore seems that while the function of the press is protected, the sources of the press are not. And therefore, while there is a high threshold for the government to prove a particular national security risk from publication, the chilling effect remains that, if they do, the source will be unprotected.

In a substantially similar UK case, *Observer and Guardian v. the UK* (1991), challenging an injunction preventing publication of the Spycatcher book, the European Court effectively held that the chilling effect which arises from prior restraints and the dangers it poses with regards to information or news as a "perishable commodity" is so significant, any delay "may well deprive it of all its value and interest."[246] As such, the Court called for "the most careful scrutiny."[247] In this case, therefore, the European Court seemed to rule similarly to the Court in Pentagon Papers; that the function of the press is so important in society, that it should be protected as well as the prior-speech of their sources, and any prior restraint of the government subject to strict scrutiny, in order to enable its material effect.

The European court and UK depart from the US on the second point; the protection of sources. In the case of *Goodwin v. the UK*, the applicant received confidential information concerning the financial plan of a company, Tetra, experiencing financial problems. Tetra sought to require

[244] Jon Swaine, 'New US charges against Julian Assange could spell decades behind bars' Guardian, 24 May 2019, <https://www.theguardian.com/media/2019/may/23/wikileaks-founder-julian-assange-with-violating-the-espionage-act-in-18-count-indictment> accessed 9 October 2019
[245] ibid
[246] *The Observer and Guardian v. The United Kingdom*, 51/1990/242/313, Court (Plenary), 24 October 1991, [60]
[247] ibid

the journalist to release the source so that they could bring proceedings. This was upheld in the Supreme Court of the UK based on the notion that it was in the interest of justice. The European Court, however, decided against this. First, that it was not necessary because an injunction against publication had already been issued. Second, because there is a high presumption in favour of press freedom and source protection with an overriding public interest test.[248] In essence, the European Court conducted a balancing test between Tetra's rights and the sources. It is important to note, however, that the sources rights feed into the protection of press functions, i.e. news gathering, and it would therefore require such serious injury for this to be impeded. This clearly separates the protection of press freedom on the issues of national secrets and national security in the US with the UK. The US protects the press, while the UK (or Europe) protects the press as a function – the real function – which necessarily includes the protection of their source's speech and confidentiality.

Another category of persons which States should consider exemptions for are children and vulnerable persons. States, in their counter-terrorism and CVE models, have required other organisations and departments to monitor and enforce the national Strategy. The Counter-Terrorism and Border Security Act 2015 also designated other authorities with duties under Prevent, the second limb in the mission to identify so-called 'pre-criminal space', in order to prevent crime and radicalisation. This is problematic in two ways. First, it requires untrained and often unwilling persons to interpret and implement vague requirements. Second, it means everyone is subject to surveillance – I reiterate, uninformed and unobjectively – including children in schools and patients in hospital beds. For example, the UK Prevent Strategy requires the NHS and schools to refer students and patients who are believed to show extremist or terrorist signs, or who are believed to be at risk of radicalisation. Liberty, a national human rights organisation in the UK, conducted Freedom of Information requests to gain statistics of

[248] *Goodwin v. United Kingdom*, App. No. 28957/95, Court (Grand Chamber), 11 July 2002, [39]

such referrals. The information, reported from October this year, revealed that there were 7318 referrals to Prevent last year alone, and that 90% of these were not found to qualify for Channel, the Government's deradicalization programme.[249] This means 90% of people were incorrectly referred, and two thirds of those concerned were youths.[250] This portrays a much wider chilling effect of regulation in society. For example, in one case a four-year-old boy who drew a picture of his father cooking in nursery and said the word "cucumber", mistaken for "cooker bomb", was referred to Channel.[251] When the referral was rejected by the boy's mother, the nursery reported it to the police and social services.[252] The effects of stigmatisation or being subject to any kind of Strategy or law enforcement, on the part of a child or other vulnerable people, is even more profound than it is for adults. It can lead to discrimination, bullying, decelerated education, and distrust of the authorities. The risk of radicalisation is correctly recognised as higher for these categories of persons, but the response is certainly disproportionate and perilous. Additionally, Prevent can be said to play directly into the hands of terrorist and extremists by marginalising people of certain characteristics from an extremely young age. "Terrorists rely on feelings of alienation and isolation from our society. It is their most potent recruiting tool."[253]

If States consider this a necessary limb of their counterterrorism or CVE Strategies, then they must do better to train and oversee those required to engage in the process to ensure human

[249] Liberty, 'Liberty Uncovers Secret PREVENT Database', 7 0ctober 2019, <https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/liberty-uncovers-secret-prevent-database> accessed 7 October 2019

[250] ibid

[251] Tal Fox, 'Four-year-old who mispronounced 'cucumber' as 'cooker bomb' faced terror warnings, family says', Independent, 12 March 2016, <https://www.independent.co.uk/news/uk/home-news/four-year-old-raises-concerns-of-radicalisation-after-pronouncing-cucumber-as-cooker-bomb-a6927341.html> accessed 7 October 2019

[252] ibid

[253] Rob Price, 'When my school received Prevent counter-terrorism training, the only objectors were white. That say it all', Independent, 29 March 2016, <https://www.independent.co.uk/voices/when-my-school-received-counter-terrorism-prevent-training-the-only-objectors-were-white-that-says-a6957916.html> accessed 7 October 2019

rights are complied with and to prevent such a chilling effect. This can have many more social disadvantages for already vulnerable persons.

Conclusion

Legislation in the UK directly regulates expression which can clearly encompass persons or organisations carrying out legitimate activities, such as the press and human rights defenders. In the US, while the connection is not so direct, legislation which threatens to criminalise the name of groups for material support or for functions which are against the 'national interest' can also have a chilling effect on the rights of such groups, as well as the public in general. In response to this, the first step is to re-define the crimes which can have this effect. Second, to ensure that there are adequate safeguards including not only oversight but express exemption clauses for such groups – or for such functions – which are to be strictly enforced. Additional training and oversight of the process which either concerns categories of vulnerable persons, or requires untrained or unwilling departments or services, or both, should be provided to maintain human rights and prevent the evident chilling effect which has much wider social repercussions.

v. Online Regulation

The application of regulation is both difficult and necessary in contemporary times. Paradoxically, however, States fail to concern themselves properly with such threats in the online sphere. This has only recently caught the attention of the British and American governments, as well as being the topical focus of the Special Rapporteur on Expression.[254] Yet States are still relying on, and actually requiring, online platforms to tackle this issue. In

[254] See for example the UK's Online Harms White paper: UK Home Office, *Online Harms White Paper,* 26 June 2019; and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression annual reports of 2018 and 2019: UN General Assembly, *Report of the Special Rapporteur to the General Assembly on Artificial Intelligence technologies and implications for the information environment,* 29 August 2018, A/73/348, UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression to the Human Rights Council on online content regulation,* 6 April 2018, A/HRC/38/35, and UN General Assembly, *Report of the Special Rapporteur to the Human Rights Council on surveillance and human rights,* 9 October 2019, A/74/486

fact, they are relying on the public to tackle the issue by flagging content which may satisfy not the government definitions of terrorist and extremist content, but the online regulators definition.

For example, the group British Revival, an environmental group led by far-right extremist Michael Wrenn, known to the British Committee of Countering-Extremism, only had their Facebook accounts shut down when the BBC reported them.[255] This evidences three things, all of which prove that delegation of responsibilities is not the solution to this problem: 1) that the definition of extremism fails to encompass groups that actually incite violence; 2) that not only are States fragmented with their definitions but also internally, the online and offline definitions do not function in parallel and this can increase the threat, at least online, and 3) that actors such as the press are fundamental for identifying, discouraging and tackling the threat.

A recent threat following the live-streamed extremist attack in Christchurch, New Zealand, is the live-streaming online of violent extremist material. While New Zealand's approach was a hasty and harsh requirement of online processors and controllers to take down a broad term of 'abhorrent violent material',[256] the UK has been seen, at least on the surface, to take more controlled measures. For example, Facebook is now working in partnership with metropolitan police to conduct training to enable Facebook to develop tools to identify live violent extremist content – like the ones the Metropolitan police are recording examples of – and then remove it efficiently.[257] Other big tech companies, including Amazon, Facebook, Google, Microsoft and Twitter, also made declarations that they intended to review their platforms and introduce

[255] Helen Daly, 'It's 'beyond a joke': Fury at BBC Countryfile over political segment on rise of far-right', Express, 30 September 209, <https://www.express.co.uk/showbiz/tv-radio/1184225/Countryfile-Charlotte-Smith-far-right-extremism-BBC-video-presenters> accessed 10 November 2019

[256] New Zealand: Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019, No.38

[257] Metropolitan Police, 'Met teams up with Facebook to tackle live streaming of terrorist attacks', Met news, 17 September 2019, <http://news.met.police.uk/news/met-team-up-with-facebook-to-tackle-live-streaming-of-terrorist-attacks-381707> accessed 10 November 2019

artificial intelligence to more 'efficiently' take down violent content.[258] The US, on the other hand, was recently seen to reject a global partnership initiative following the same event geared towards tackling online terrorist content in the name of free speech.[259] This raises the question of whether free speech is at risk in a phenomenon of online content policing. Either it is, and the US remains a saviour of speech, or it is not, and the US is an architect of online violence.

The UN Special Rapporteur on freedom of opinion and expression submits that laws should not 'require "proactive" monitoring and filtering of content, which is both inconsistent with the right to privacy and likely to amount to… censorship.'[260] This is further complicated where online companies act as intermediaries, and there is little transparency and no State-level redress. As such, where the right to access or share information is violated, it cannot be remedied. This would constitute a violation of end-user's free expression and due process rights. The only way to avoid this, in simple, is to not subject Internet intermediaries to mandatory orders to remove or restrict content not meeting this threshold.[261] To support this is the Human Rights Committee's General Comment, which provides that penalties themselves should be compatible with the requirements of the Covenant, including proportionality. States should 'refrain from imposing… heavy fines or imprisonment on Internet intermediaries' specifically.[262] Penalties of this nature can have a chilling effect on the functions of services providing the principal platform of expression and information. Particularly where intermediaries should not be liable for third party content. It is these same corporations whom

[258] Amazon, Facebook, Google, Microsoft and Twitter, 'The Christchurch Call and steps to tackle terrorist and violent extremist content', Microsoft blog, 15 May 2019, <https://blogs.microsoft.com/on-the-issues/2019/05/15/the-christchurch-call-and-steps-to-tackle-terrorist-and-violent-extremist-content/> accessed 10 November 2019

[259] Tony Romm and Drew Harwell, 'White House declines to back Christchurch call to stamp out online extremism amid free speech concerns', The Washington Post, 15 May 2019, < https://www.washingtonpost.com/technology/2019/05/15/white-house-will-not-sign-christchurch-pact-stamp-out-online-extremism-amid-free-speech-concerns/> accessed 10 November 2019

[260] A/HRC/38/35 (n 254) [67]

[261] ibid, (2)(e)

[262] ibid [66]

society relies on the most for their services, which necessitates their significant role in providing information to its users. This important function may be risked where States require intermediaries to police their platforms, particularly where the distinction between lawful and unlawful content is so vague and fragmented. The requirement of intermediaries to control content has the potential to open up new avenues for censorship. It is, in short, another potent instrument for governments to control journalistic and expressive freedom.[263]

In answer to the previous question, therefore, expression *is* at risk from online regulation. This risk is excessive where the policing is undertaken by intermediaries as opposed to the State. An example of this is the UK's Online Harms White Paper which has already been the subject of considerable debate.[264] This has been criticised by ARTICLE 19 on all the levels above, regardless of good intent, on four main issues:

First, in that content is being policed by competing digital platforms. This means platforms actions will be dictated by both marketplace competition and their risk-averse nature, prioritising economic advantage and avoiding legal repercussions over the original purpose of their platforms; a marketplace for speech.

Second, that the platforms' duty of care in this regulation is undefined. These consist of mere Codes of Practice as opposed to legal duties and responsibilities of the platforms effectively enforcing law. This effectively means that it does not exist, which in turn means that companies will be excessively risk averse as there is no clarity where that risk lies, and that end-users will have no legal requirement to reference for redress if and when their content is either wrongly taken down, or where it is wrongly not.[265]

[263] Lee. C. Bollinger, in Global Freedom of Expression Conference (n 240)
[264] Online Harms White paper (n 254)
[265] ARTICLE 19, 'Response to the Consultations on the White Paper on Online Harms', June 2019, <https://www.article19.org/wp-content/uploads/2019/07/White-Paper-Online-Harms-A19-response-1-July-19-FINAL.pdf> accessed 23 October 2019 [15]

Third, that the definitions of harms are 'sorely lacking in clarity'.[266] The White Paper contains a list of 'online harms in scope' which includes child exploitation, organised immigration crime, pornography, hate crimes, and other illegal activities. In focus of this thesis is the 'harm with a clear definition' of 'terrorist content and activity', which encompasses also 'harms with a less clear definition' such as 'extremist content and activity.'[267] Given the previous analysis on the vagueness of the terms of terrorism, it is unclear how 'terrorist content and activity' can be considered to have a clear definition, much less extremism content – as acknowledged. Yet this is not considered problematic enough that the State can defer the interpretation to private companies to identify such elusive content and de-platform it. This itself has a chilling effect on the companies and it renders the right to freedom of expression itself elusive for the platform's users.

And finally, that 'it is also highly unclear that the proposed solutions would be… effective.'[268] ARTICLE 19 considers the sanctions – comprising of fines for social media companies – as disproportionate. The NGO instead recommends a scheme of incentives as opposed to a punitive scheme.[269] This has a chilling effect on social media platforms which have been accepted to play a similar important role as the media. Particularly where there is no system of appeal or judicial oversight.

While "terrorists are undoubtedly taking advantage of an open and free internet", the Representative on Freedom of the Media, Dunja Mijatovic, maintains that:

> Even in difficult times, governments must create environments conductive to the free flow of information and should take particular care not to adopt restrictive measures… This can

[266] ibid [5]
[267] Online Harms White paper (n 254) [Table:1]
[268] ARTICLE 19 (n 265) [5]
[269] ibid [19]

> fundamentally limit access to pluralistic information on issues directly affecting the public's right to know.[270]

If States are determined to make law on online content, it should ensure that doing so does not abridge fundamental freedoms such as expression. In fact, these should be at the centre of regulation. This means the four issues identified in the White Paper should be addressed: terms should be clearly defined; legal obligations should be clearly defined; there should be a lawful, independent and impartial mechanism of oversight, and mechanisms of redress; sanctions should be removed and, if maintained, proportionate; and finally, all regulation should be transparent. This may not prioritise freedom of expression, but it ensures it is a competing and proportionate principle in the regulation of online terrorist and violent extremist content. As such, it removed the chilling effect present in the unknown.

Conclusion

ARTICLE 19 draws on the fact that the White Paper not only addresses unlawful and harmful speech, but also encompasses 'legal but harmful online content.'[271] This is both vague and can result in companies over-policing their platforms to the detriment of legitimate expression, particularly where companies can be held liable for not doing so. This has a direct impact on one's freedom of expression, and one another's access to the marketplace and (even controversial) ideas and information. It is submitted that the law is the law – it is a separate question whether this is 'good' law or 'bad' law – and as such, no space can or should be given to private companies – regardless of 'good intent' – to effectively make new law in the online realm which so directly and so clearly impedes societies freedom of expression on the platform which society relies most to obtain its information and to express oneself.

[270] Dunja Mijatovic, ‚Communique by the OSCE Representative on Freedom of the Media on free expression and the fight against terrorism', OSCE, Communique No.6/2016, <https://www.osce.org/fom/261951?download=true> accessed 24 October 2019, 2

[271] ARTICLE 19 (n 265) [12]

The fact that governments such as the UK are making laws delegating private companies the responsibility of regulating such fundamental human rights is extremely concerning. It is a clear message to one's citizens and others within one's jurisdiction that fundamental freedoms, such as expression, information and privacy, are overly-ready to be backbenched in the name of vague national security concerns without scrutiny or oversight by independent, impartial and lawful authorities. The fact that intergovernmental organisations, such as each of the organs of the UN and in particular the Special Rapporteur on Expression, have sent a clear warning against such measures only emphasises this disregard for human rights. The UK should consider reflecting on its priorities in the same way as the US has done, most notably with the right to free speech in the online realm.

VI. Filling the Gaps

This chapter will identify the common and chilling features of counter-terrorism and CVE regulation in the UK, US and at the UN. It will briefly recall how such regulation has a chilling effect on freedom of expression, particularly of actors in society we have understood to be central to the protection and promotion of freedom of expression as well as other values. This chapter will use the analyses from prior chapters to highlight the common missing elements which could be utilised to ensure that human rights cannot be arbitrarily impaired. Finally, this chapter will propose elements which universal definitions of the terms (terrorism and violent extremism) would require in order to protect national security while satisfying the freedom of expression standards. It will then make recommendations to each jurisdiction, having this in mind, in order to bring their current counter-terrorism and CVE models in line with international human rights law.

vi. The Chilling Consequence

The Special Rapporteur, in a single-sentence list of crimes – "killings,… intimidation, threats, smear campaigns and verbal abuse, physical attacks, excessive use of force, censorship and the adoption of restrictive legislation" – can hardly reflect the long list of human rights defenders, journalists, and other people killed in the recent period under the spectre of national security legislation.[272]

It is easy to point out a number of cases in which terrorism and violent extremism led to attacks on expression of key players in British society, including the deaths of politician Jo Cox[273] and

[272] A/HRC/40/52 (n 54) [2]

[273] Jo Cox, British Labour Party Member of Parliament for Batley and Spen, killed on 16 June 2016 in West Yorkshire after being stabbed and shot by Thomas Alexander Mair, linked with far-right extremist movements of the National Front. See Ian Cobain, 'Jo Cox killed in 'brutal, cowardly' and politically motivated murder, trial hears', Guardian, 14 November 2016, <https://www.theguardian.com/uk-news/2016/nov/14/jo-cox-killed-in-politically-motivated-murder-trial-thomas-mair-hears> accessed 29 March 2019

journalist Lyra McKee.[274] It is just as easy, however, to point to the use of anti-terrorism and CVE regulation that has had the same effect of attacking expression, for example, of civil society representatives like the Stansted 15.[275] This invidious cycle demonstrates both the need for regulation and the threat of regulation, in the protection of the right to freedom of expression in our so-called leading democracies. A common feature of the UK, US and UN is that of 'leadership'. They all act as examples for other States to follow – or excuses – and have thus far:

> Approached the situation as though they are at war with another nation, as opposed to merely catching criminals who do heinous acts of murder in the name of religion. As such, people who are merely exercising their rights to expression… may be mistaken for "the enemy."[276]

As analysed previously, the UK leads the bad examples of the three subject jurisdictions of this thesis. The Terrorism Act 2000 and more so recent legislation, such as the Counter-Terrorism and Border Security Act, which set disproportionately low thresholds for criminalising expression or online activities loosely connected to terrorism. This nature of regulation in the UK can, and will, capture the legitimate expression of those actors contributing significantly to countering terrorism and as such, is likely to have the "opposite of its intended effect."[277] Additionally, while citizens and democratic actors in the UK feel no source of protection coming from the UN or other State such as the US – allegedly leading the way in freedom of

[274] Lyra McKee, journalist and LGBT activist, killed 26 April 2019 in gunfire of the latest dissident republican group; New Irish Republican Army. See BBC, 'Lyra McKee: 'New IRA' admits killing of journalist', BBC N. Ireland, 23 April 2019, <https://www.bbc.co.uk/news/uk-48018615> accessed 29 March 2019

[275] The Stansted 15, activists convicted under terror-related offences for peaceful protests against an illegal removal (Charter) flight at London Stansted airport in March 2017. See Damien Gayle and Diane Taylor, 'Stansted 15 conviction a 'crushing blow for human rights in UK'', Guardian, 10 December 2018, <https://www.theguardian.com/uk-news/2018/dec/10/activists-convicted-of-terror-offence-for-blocking-stansted-deportation-flight> accessed 29 March 2019

[276] Christina C. Logan, 'Liberty or Safety: The Implications of the USA PATRIOT Act and the UK's Anti-Terror Laws on Freedom of Expression and Free Exercise of Religion, (2007) 37 Seton Hall L Rev 863, 890

[277] UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association at the Conclusion of his Visit to the United Kingdom, 21 April 2016. See UN General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his follow-up mission to the United Kingdom of Great Britain and Northern Ireland*, 8 June 2017, A/HRC/35/28/Add.1, [14]

expression protection – the chilling effect is only exasperated. Those who create such laws are the cause, those who remain silent are guilty of complicity.

The chilling effect of counter terrorism and violent extremism agendas can derive from many different effects of regulation, including:

- Businesses such as civil society, academic platforms, or media outlets being shut down or investigated;
- Individuals, professionals or organisations being labelled terrorist or violent extremist, or to support terrorism or violent extremism, officially or unofficially;
- Professionals and businesses having their finances, donors and/or resources limited;
- Being personally, or having your workers or sources, surveilled, officially or unofficially; and/or
- Being at risk of any of the above.[278]

The outcome of all the above is a risk of repercussions, lawfully or socially, including criminal liability and stigmatisation. These threats are so intrusive and have such a severe impact on our feeling of security and dignity that one may rather self-censor than carry the risk. That is, the chilling effect for the everyday person. Regulation has the potential to significantly limit the right to access of information of end-users and the capacity of actors whose functions are to share such information to carry out their activities, including the media and human rights defenders. Where there is a chilling effect, not only can we not speak, but we cannot be heard. This is the chilling effect of counter-terrorism and violent extremism regulation not only in these three jurisdictions, but internationally. It is chilling of our rights to opinion and expression, but also for our right to privacy, liberty and security.

[278] Developed from the analysis of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in A/HRC/40/52 (n 54) 17-19

vii. Definition Proposals

The 2011 Handbook of Terrorism Research revealed that there were no fewer than 260 definitions of terrorism at that time.[279] Eight years later, this has certainly proliferated. This is more than countries recognised, meaning each State is committed to addressing a national security threat which, even within their discretion, they most likely have more than one official definition of. Problematic is an understatement.

The correct balance must be struck, but our analyses of the UK, US and even UN as a moderator, can be seen to favour a zero-tolerance approach which, besides not being feasible, also disproportionately impedes our free expression. How do they do this? By making regulation of the so-called threats – terrorism and violent extremism – without defining, or with an overbroad definition of the terms so that they can be quickly and easily extended to cover persons and situations which one would not ordinarily consider to fit into that definition. And rightly so.

Defining Terms

Definitions should be accessible, formulated with precision, non-discriminatory and non-retroactive.[280]

> Unclear, imprecise or overly broad definitions can be used to target civil society, silence human rights defenders, bloggers and journalists, and criminalize peaceful activities in defence of minority, religious, labour and political rights.[281]

Below are the proposals for definitions, or the minimum required elements of, terrorism, violent extremism, and incitement to either.

[279] Joseph J. Easson and Alex P. Schmid, '250-plus Academic, Governmental and Intergovernmental Definitions of Terrorism', Appendix 2.1, in A.P. Schmid (Ed.), *The Routledge Handbook of Terrorism Research* (London & New York: Routledge, 2011), 99-157

[280] UN Human Rights Council, *Human Rights Council report on Ten areas of best practice in countering terrorism*, 22 December 2010, A/HRC/16/51, [47]

[281] UN General Assembly, *General Assembly Report on the Impact of counter-terrorism measures on civil society*, 18 September 2015, A/70/371, [14]

Terrorism

The UN Security Council, in its resolution 1566 (2004), uses three cumulative criteria to characterize terrorism: (i) intent; (ii) purpose; and (iii) specific conduct.[282] Intent means intention to "cause death or serious bodily injury, or taking of hostages."[283] Purpose means that of "provoke[ing] a state of terror in the general public or in a group of persons or particular persons, intimidate[ing] a population or compel[ling] a government or an international organization to do or to abstain from doing any act."[284] And specific conduct refers to those that "constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."[285]

The Special Rapporteur on Terrorism and Human Rights identifies a model offence of incitement (to terrorism) which this paper endorses:

> *An action or attempted action where: 1. The action: (a) Constituted the intentional taking of hostages; or (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and 2. The action is done or attempted with the intention of: (a) Provoking a state of terror in the general public or a segment of it; or (b) Compelling a Government or international organization to do or abstain from doing something; and (3) The action corresponds to: (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or (b) All elements of a serious crime defined by national law.*[286]

Violent Extremism

These criteria, while referring to terrorism, can also be applied to violent extremism. It is submitted that the threshold will adapt only slightly; it must have a violent element requirement. The intent should be of a serious criminal nature, including death or injury to life or limb, or an act criminalised in law which causes serious mental or physical suffering, such

[282] S/RES/1566 (n 12) [14]
[283] ibid [3]
[284] ibid
[285] ibid; See also OSCE, 'Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing approach', (OSCE ODIHR, 2014) 29-30
[286] A/HRC/16/51 (n 280), Practice 7

as the taking of hostages or rape. The purpose must be to provoke terror or violent extremism, or to 'intimidate a population or compel a government or an international organization to do or to abstain from doing any act. And the specific conduct should be any act which is constitutes an offence within the national penal code. It is submitted that these criteria should be explicitly laid out in the definitions, supported by a direct and imminent relationship between the speech and the acts sought to be avoided.

An example definition might look as follows:

> *An action or attempted action where: 1. The action: (a) Constituted a national violent crime; or (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and 2. The action is done or attempted with the intention of: (a) Elevating the status of one group or ideology such as gender, religion, culture and ethnicity, or of excluding or dominating other groups; or (b) Compelling a Government or international organization to do or abstain from doing something; or (c) Destroying existing political and cultural institutions; and (3) The action corresponds to: (a) The definition of a serious offence in national law.*[287]

Incitement

The accepted crime of incitement to terrorism and/or violent extremism should be practical, focusing on whether the impugned actually, imminently and directly incites violence. It is recalled that this is often where the definitions of terrorism and violent extremism fall short or fall vague. Incitement goes beyond mere support, advocacy or praising. It means to intentionally, actually or potentially – potentially meaning with an identified and objectively, substantially, probable causal link – lead to violence, of an imminent and specific nature, of not just oneself, but others.

The Special Rapporteur on Terrorism and Human Rights identifies a model offence of incitement (to terrorism) which this paper adds to and endorses:

[287] Developed from A/HRC/16/51 (n 280), Practice 7; see also Mathias Bak, Kristoffer N. Tarp and Christina S. Liang, 'Defining the Concept of 'Violent Extremism': Delineating the attributed and phenomenon of violent extremism', (August 2019) Geneva Paper 24/19, 8

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 or violent extremist offence, where such conduct, whether or not expressly advocating terrorism or violent extremism,, causes a danger that one or more such offences may be committed.[288]

Interpretation

With a view to filling the huge gap that is left of interpreting and applying these definitions, thus removing discretion for arbitrary application, it is submitted that three key questions should be answered by the definitions:

1. There should be a leading question of how far the challenged decision engages 'speech'.[289] It should be noted that there is a distinction here between what is considered protected expression in the US and UK, as well as the Human Rights Council. Freedom of expression here should nevertheless be non-exhaustive to include "every form of idea and opinion capable of transmission."[290] This is both protective and pragmatic. In the first instance, speech has been acknowledged even in the American courts under the narrow wording of the First Amendment to include physical actions and art, as well as offensive words. As such, speech in legal definitions should encompass both expressive actions as well as offensive actions. In the second instance, speech as a social construct is ever-changing. To ensure that legal definitions are pragmatic, it is wise for States to include a non-exhaustive list of speech which can then be interpreted by the government, who is in the best position to do so, but also then overseen by the Courts who can act as a safeguard and oversight mechanism. Where speech is identified in the impugned act, then the government must carry out a proportionality and necessity assessment in line with the subsequent questions.

[288] A/HRC/16/51 (n 280), Practice 8
[289] Barendt (n 16) 108
[290] General Comment 34 (n 6) [11]

2. A second question should be how far that speech is in the public interest, speaker's interest, and/ audience's interest. It has been noted throughout this thesis that the public interest is already a common law exemption in the US and UK. It is, however, balanced against the interest of national security. The same goes for protection of the press and their sources. And the outcomes are different in each jurisdiction. It is submitted that where there is a public interest in accessing information, then there is also a speaker's interest in sharing it and an audience's interest in hearing it. It is submitted also that where there is a conflicting national interest, this is no more than a public interest. I think language here can play a role in the assumption that a national security interest will automatically outweigh a public interest. Both are public interests. In short, the second question is one of balancing two competing public interests; to security, and to freedom. Ironically, both are human rights and both feed into the protection of the other. The point of the second question, however, is to ensure that the national security question does not remove the question of speech. Just because there is a national security threat, this does not mean that protection of speech should not be engaged. In particular, where speech can be shown to counter the threat rather than promote it. States should not act on a zero-tolerance or risk-averse approach, rather they should have mechanisms in place to outline the different outcomes of different speech in situations of possible terrorism or violent extremism. As such, civil society and others should be heavily involved. They can contain the spread of violent extremism and terrorism with their strategies, information and data, civic outlets for addressing grievances, by promoting equality, peace, human rights and social justice, and humanitarian assistance.
3. The final question should be whether, in restricting or removing this expression, there will be conflicting repercussions. First, the State should question whether the

> incitement can be outweighed by potential counter-speech or other mechanisms. Second, the State should consider whether there will be other effects of their response. This includes, for example, inciting reactive violent extremism or terrorism, or reprisals, by silencing that person or those persons; whether there will be a chilling effect which can undermine democracy, promote the causes and vulnerability required of terrorists and violent extremists and thus lead to recruitment, or increase the State challenge of identifying those terrorist and violent extremists by sending them underground.

It is appreciated that these three questions put a heavy burden on the State to conduct a three-step necessity and proportionality assessment, and often in situations which require an immediate response. "The different understandings of 'terrorism' and the different types of terrorism (regime terrorism, vigilante terrorism, insurgent terrorism, left-wing terrorism, right-wing terrorism, ethno-nationalist terrorism, jihadist terrorism, lone wolf terrorism, single issue terrorism, cyber-terrorism, etc." make the search for a universal definition a difficult one.[291]

The purpose of this subchapter, however, is to put forward these elements as essential features in the national definitions of terrorism and violent extremism. Further, these elements are no more than that which is already suggested in the current definitions, they are just more concise. For example, at present there is no requirement of terrorist intent or of a causal link between expression and violence. The inclusion of such references can assist in further narrowing the scope of application of the definition of terrorism.[292] This must be had to ensure lawful and peaceful expression remains protected. And by making this a requirement within the definitions themselves, we can also ensure accountability for decision-making. This is an undisputed condition of effective governance. As a result, the State will be obliged to establish mechanisms

[291] Schmid (n 61) 17
[292] A/HRC/16/51 (n 280) [27]

to carry out this three-step analysis. Including consultations with security and civil society organisations and agencies, as well as to implement an independent and effective oversight mechanism for the decisions made, preferably by the Courts. Bollinger correctly holds that transparency and accountability must be ensured as always. They are the bedrock conditions of democracy. These three questions therefore require the State to reveal its three-step analyses and implement a system for carrying it out in the hope that our rights and freedom will emerge as ever more robust global norms.

viii. Recommendations

This paper has highlighted concerns for the enjoyment of the rights to free expression, due process and privacy. Regulation of terrorism and violent extremism sourcing from the UN, UK and US has been shown to have a serious chilling effect on the freedom of expression in their respective jurisdiction. This, in turn, has the potential to significantly limit the right to access of information as well as the capacity of actors whose functions are to share such information in a democratic and free society.

The UN, UK and US are therefore urged to make changes to their regulations to ensure that there is no excessive chilling effect of regulation on our free expression. To do so, this paper proposes that each jurisdiction implement, or at the very least engage in serious consideration, the following recommendations. These recommendations seek to bring regulation of terrorism and violent extremism in conformity with international (and domestic) human rights standards. These recommendations aim to address the issues highlighted throughout while respecting the objective and purpose of regulation: national security.

Recommendations to the UN

1. The UN presents a platform which should not be used for mere discussion, but for accountability. Each segment of the UN has a role to play in this regard. But this should be complementary, and not conflicting. As such, the UN should establish a Counter

Terrorism and Counter Violent Extremism Cooperation team which is made up of an expert member of each relevant faction or task force, who can together ensure the workings of each section compliments that of another. A joint report on developments should also be produced yearly for clarity on the issue of national security;

2. Jointly, the UN Human Rights Council should adopt a definition of terrorism and violent extremism to be endorsed and legally codified into a Convention by the Security Council;
3. The Human Rights Committee should review its General Comment 34, having regard to the findings of this thesis – deriving from information from States and UN Special Procedures – to implement a more focused section on implications of national security and freedom of expression. It is expected that this should highlight the threats of overbroad regulation as well as endorse the Security Council's three-pronged requirements for criminalisation of speech;
4. The Security Council should continue to adopt resolutions and decisions on topical aspects of terrorism. It should expand its powers to include violent extremism. It should reiterate in its preamble the universal definitions of terrorism and violent extremism in all of its texts. And it should turn its attention away from joint or international enterprises concerning data, intelligence and financing, towards national regulation of terrorism as an international crime as understood by the Security Council, and required of their definition of terrorism as an international security issue and therefore within its scope;
5. The UN Consolidated List of terrorist entities should be amended on an institutional level to resolve procedural inequalities. At a minimum, to be listed as a terrorist entity there should be reasonable and factual grounds that the entity has committed a terrorist offence. There should also be an accessible mechanism to have this decision appealed

or reviewed, with the prospect of compensation upon the finding that the entity was incorrectly listed, or maintained on the list;[293] and

6. Special procedures, and in particular Special Rapporteurs, should continue to assess and report on issues in their field. It is recommended that the Special Rapporteur on the promotion and protection of opinion and expression should dedicate a report to the issue of national security annually, preferably in cooperation with others such as the Special Rapporteur on Counter Terrorism and Human Rights, on the Right to Privacy, and on the Rights to Freedom of Peaceful Assembly and Association, as appropriate, as well as the Counter Terrorism and Counter Violent Extremism Cooperation team.

Recommendations to the UK and US

1. To engage in a regular legislative process in consultation with all stakeholders – including policy-makers, end-users, civil society, functional journalists and service providers – to assess the impact of the provisions with international human rights standards;
2. To implement a legislative definition of 'terrorism' and 'violent extremism' in line with the aforementioned recommendation, ensuring the highlighted ambiguities in the provisions are defined in a way which is sufficient and precise and can enable their practical realisation, while also enabling the free expression and access to information. Counterterrorism law should be consistent with human right, humanitarian and refugee law; all subject to minimum international standards, inclusive of effective, independent and impartial legislature law-making and judiciary law-enforcement, as well as clear exhaustive provisions, the non-impairment of the essence of rights, and the principle of the least intrusive measure. It is recommended that this be part of the aforementioned legislative process to ensure the definitions are informed by the stakeholders carrying

[293] ibid [10]

out the responsibilities defined therein, including schools, NHS staff and government departments;

3. To review the defences and penalties – as part of a consultative process with all stakeholders – to ensure the provisions are sufficiently wide to protect all forms of expression based on a necessity and proportionality assessment of the public interest, having particular regard for the rights of actors carrying out important democratic and social functions such as the media, academia and human rights defenders, as well as persons considered particularly vulnerable, such as children;
4. Provide for sufficient safeguards, namely by creating mechanisms for oversight and transparency. This should include publishing a code of practice concerning the three-step assessment to be made, as well as data on the enforcement of the law. Oversight should be designated for all stages of the process, for legislation and policies alike. Oversight needs not only to be independent but also impartial, including by judiciary when necessary, and therefore persons considered having displayed a bias on the issue should be immediately reconsidered;
5. To provide effective remedies for violations of human rights, inclusive of an appeal and review mechanism before the Courts of any decision made against oneself, as well as the prospect of damages should this be found in the positive. Should it be found in the negative, then any punitive consequence should be accompanied by rehabilitation;
6. The establishment of a mechanism for the provision of assistance to victims of terrorism and violent extremism, including damages and medical assistance;[294]
7. The requirement for proscription of persons, entities or organisation should be laid out in a policy, the test of which should be reasonable and clear. As for the UN, to be listed as a terrorist entity, there should be reasonable and factual grounds that the entity has

[294] ibid

committed a terrorist offence. There should also be an accessible mechanism to have this decision appealed or reviewed, with the prospect of compensation upon the finding that the entity was incorrectly listed, or maintained on the list;[295]

8. To ensure that the arrest and interrogation of terrorist and violent extremist suspects is in line with international human rights and humanitarian law;
9. Consider regulation of conduct of corporate bodies under a business structure and to remove the potential of criminal liability for internet intermediaries. Online regulation should be sourced from law and the definition of online harms in law should be required in intermediaries' terms of conduct. These should be published and accessible on the platform so that users are aware of the requirements. There should also be training provided for such persons assessing pre-criminal space and the threat of incitement, online and physically, such as NHS or medical personnel and school staff as well as designated online platform monitors;
10. To play its role in promoting their amended laws and policies as a good example at the UN Human Rights Council (and their respective continental) level, including by providing regular reports, as well as holding other States accountable for national security regulation which falls outside the Security Council's recommendations in resolution 1566 (2004); and
11. States should encourage and promote open debate on issues which are closely associated with terrorism and violent extremism, including but not limited to race, nationality, politics and ethics. Additionally, "politicians and other leadership figures in society should refrain from making statements [or acting in a way] which encourages or promotes racism or intolerance [to such values or to speech]."[296]

[295] ibid
[296] Joint Declaration (n 230) [h]

ix. Academic Reflections

As a British citizen, I have experienced terrorism on my doorstep and its evolution from national terrorism of the IRA, to international terrorism, to lone wolf terrorism. More recently, I have witnessed the rise in populism and extremism on all fronts; political, cultural and ethical. News is often avoided until it becomes unavoidable in the events of 9/11 and those closer to home, such as the 7/7 bombings which killed 52 people and injured 700.[297] A series of stabbings, parcel bombings and vehicle attacks followed on both small and large scales in the following two decades. I am aware, however, that on a comparative level, I live in complete safety and security from these threats.

I am also aware, however, from my studies and my experiences, that different people in society are less safe and secure. This includes those people I have focused on in this paper, those who use their rights and freedoms, who promote the rights and freedoms of people we perceive as the 'others' or the 'enemy', and who have their rights and freedoms restricted or controlled on this basis. After reading Freedom of Expression in different settings, I became interested in how international human rights standards and a prominent intergovernmental organisation like the UN could overlook or have little impact on States acting in such a way. While there has been much academia on the problems of counterterrorism regulation, there has been little which considers this in common with violent extremism and which utilises a comparison of States which have different reputations in an attempt to source the point at which expression becomes a liability and not a freedom. I therefore sought to further my academic knowledge by comparing UN bodies with the UK, and another State deriving from British traditions but renowned for its heightened constitutional speech protections.

[297] Lucy Rodgers, Salim Qurashi, Steven Connor, '7 July London bombings: What happened that day?', BBC news, 3 July 2015, <https://www.bbc.co.uk/news/uk-33253598> accessed 1 November 2019

What I found was that US constitutional protections does and will continue to make a difference. It is clear that the UK has been both more able and more willing to sacrifice expression to make the job of preventing attacks – both terrorist and violent extremist attacks as well as attacks on the interests of the government – easier. I also discovered that the UN has little power to challenge this. The majority of condemnation and realistic recommendations come from Special Procedures, rather than the governmental platforms. In fact, the more a State has control over the UN entity, the less effective the texts are that are produced.

There are still many questions to be asked, and many deficiencies with this paper and its final proposals. For example, the practicalities of implementing these recommendations must, and can only be, understood by the State in question which depends on factors such as who is in government, the economic and social conditions, as well as the resources available. I hope, however, that this paper will encourage States to ask this question. I hope also that I will see further academic developments on issues which this paper has not addressed, or has only addressed in brief, such as the impact of counterterrorism measures on children (particularly in the UK), the competency of States or even the UN Security Council or Human Rights Council to address online harms in law, and the real possibility to define a universal concept of terrorism and violent extremism in a world of relativity.

VII. Conclusion

Freedom of expression is a human right – a civil and political right – widely endorsed by the international community in soft law and binding law. How far one defends the right to freedom of expression, particularly in the face of such serious national security threats as terrorism and violent extremism, depends on your value system. Many of the arguments for freedom of expression are theoretical, above practical or technical. For example, the rationale that only free expression can lead to truth, effective political and democratic participation and self-fulfilment, or the protection of the speaker, audiences or public's interest, or as a means to protect personal values such as liberty or social values of tolerance and pluralism. I, as a Westerner and student of law and human rights, consider that expression is nevertheless fundamental and foundational to every other right and freedom, and therefore an important right worthy of protection.

Many of the arguments against freedom of expression are, however, based on the same point of theory. For example, that self-fulfilment might be damaging to democracy, or that the speaker's interest might restrict the liberty of another. Freedom of expression can be self-damaging. This paper has found, however, that it can also be self-sufficient if a test of balancing interests is used. Public interests of protection of our rights and freedoms, and that of evading national security threats. Terrorism is a threat which has been on the international agenda for decades, and which came into the Security Council and domestic agendas following 9/11. More recently, terrorism has become more highly practice in a 'lone wolf' or national fashion. As such, the threat has become more intimate and arguably more widespread. This can be understood also in the context of violent extremism, a recognised and accepted potential avenue to terrorism affiliation, not least of inciting acts of a violent nature. These are all accepted national security threats and must be addressed by way of regulation. But this paper submits

that these threats should not be exaggerated, nor should they be used as a guise for overzealous restrictions on our fundamental freedoms, such as expression, merely because the exercise of those freedoms challenges the government.

The UN General Assembly protects expression in the ICCPR, an international treaty, which is applicable to all States, including the US and UK. The UK also transposes the ECHR protection of expression into national law which follows the same characteristics; that of a three-part test of necessity, legitimacy and proportionality, while the US protects speech nationally in a narrower and categorical approach, but a more absolute protection, under its Constitution. A key factor in all three jurisdictions, however, is the test of incitement and the public interest justification. Incitement is a threshold codified in text by the Human Rights Council, but which has different applications in the US and UK. In the US, the threshold is 'imminent lawless action', or 'clear and imminent danger bringing about substantial evils', while in the UK, the test is 'clear an imminent danger', without further qualification. Protection of speech in situations concerning incitement to action which comprises a national security threat is higher in the US than the UK and Europe, and the UN texts. Public interest is a common theme for all three jurisdictions, and one which for all three jurisdictions sources from British traditions. It is a concept based on a second limb of the right to freedom of expression, and generally an understated limb, that of the right to access information. It generally correlates also with press freedom. It is the principle that if there is a public interest in expressing, or having access to information, then there is a higher burden on the government to demonstrate that the restriction of the right was in a greater public interest.

Many of the direct problems can be seen in practice to derive from policies such as CONTEST and the US National Strategy. These, however, are all permissible by vague and open-ended legislation such as the Terrorism Act's and the Patriot Act. Further, the Courts only have an opportunity to challenge this where a case is brought, and often there may be reluctance to do

so might it result in public stigmatisation against someone accused of not only a terrorist act, but merely of having viewed terrorist material or having shown support of such. Reporting on or writing about such government conduct can also put you in a position of vulnerability. As such, there is little accountability for States, or for the regulation which fails to define the acts which they are protecting and those which they are preventing. Exuberating this problem is the lack of concrete exceptions or justifications for those made vulnerable by such regulation, including the media, academia, human rights defenders, online platform controllers, and even children and persons experiencing mental health issues. The law must be sufficient and precise, and the government must be transparent and accountable to it. Neither is seen in practice.

There is a clear silencing effect of counter-terrorism and countering violent-extremism regulation in the UK, and a chilling effect in the US. The problem is predominantly based on divergent and vague definitions of 'terrorism' and 'violent-extremism' as opposed to a direct consequence of how the jurisdictions deviate from the transposition of UN prescribed freedom of expression standards, such as the ICCPR and General Comment 34 as well as the UN Strategy for Counter-Terrorism, within their own jurisdictions. It is submitted that it is nevertheless the role of the UN Security Council and Human Rights Committee to provide some clarity by ensuring that all of its bodies' functions centre around the enforcement of one concise and legally binding definition, and the role of the UN Human Rights Council and Special Procedures to hold States accountable to this.

> If we are to use the [terms] to good effect[, that being to ensure regulation respects our human rights in appropriate balance with its national security goals], we must specify more clearly how [terrorism and violent extremism are] to be understood. In [their] bare formulation… [they are] a mere convenient abbreviation for a complicated statement that includes, among other things, moral judgements and value weightings of a variety of kinds. The simple English word[s are] well chosen for the role of stand-in for this more complicated statement.[298]

[298] Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law*, (OUP, 1984) 32

Looking forward and doing so practically, resolutions on this issue have taken two chains: "resolutions on 'human rights and terrorism' from 1993 to 2005, and resolutions on human rights and *counterterrorism* from 2002 to 2017."[299] From 2018, however, Saul implies that recent resolutions – and one to be seen from the 74th General Assembly session in December 2019 – are 'backsliding' on earlier norms and standards set in the realm of human rights and counterterrorism – even if they were weak – and this "not only harms human dignity and basic values but also threatens international and national security."[300] This is State-driven. The UN provides little help in this regard and clearly has little power to. It is unfortunately not something this thesis can change. What I hope this can do – and it is something more of an educational or awareness-raising feat – is to identify the problems not only with enforcement but also in the foundations of that which we seek to be enforced. And not only to be a problem pointer, but a solution proposer.

As such, this paper has proposed definitions of the three terms which are considered so ill-defined that they are a direct cause of an unnecessary and disproportionate chilling effect. Additionally, the paper has sought to propose three key considerations for the States in applying and interpreting these definitions. Finally, this section has made six recommendations to the UN, as well as 10 recommendations to the UK and US (applicable to other States also) to ensure that these definitions are effective, and to ensure that counter-terrorism and counter-violent extremism regulation conforms with international human rights standards, and in particular that of freedom of expression which acts as the foundation for other rights and freedoms.

[299] Saul (n 166)
[300] ibid

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