Legal regulation of subversive expressions in relation to terrorist travel: the Dutch situation against the backdrop of international human rights law

Noorloos, L.A. van; Capone, F.; Paulussen, C.; Mignot-Mahdavi, R.

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Returning Foreign Fighters: Responses, Legal Challenges and Ways Forward

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Chapter 12
Legal Regulation of Subversive Expressions in Relation to Terrorist Travel: The Dutch Situation Against the Backdrop of International Human Rights Law

Marloes van Noorloos

Contents

Abstract The boundaries of freedom of expression in relation to terrorist speech—incitement, glorification, promotion of terrorism and the like—have been a pressing problem for decades. As the world has been experiencing a wave of people travelling abroad to join terrorist groups, new questions are raised about the role of subversive expressions and their legal regulation. Legal regulation of such speech includes criminal prosecutions, but a tendency can also be discerned to resort to administrative measures such as area bans and prohibiting (persons to speak at) gatherings. What are the potential ramifications for the right to freedom of expression of those domestic measures to regulate expressions inciting to, glorifying, supporting, propagating, provoking, encouraging or recruiting of travel for terrorist purposes? This chapter uses the Netherlands as a case study to show the options and pitfalls involved

This chapter was finalised mid-2021. Newer developments have not been taken into account.

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in tackling such expressions, and then proceeds to analyse how such measures are to be judged in light of the right to freedom of expression.

Keywords Terrorist speech · Freedom of expression · Incitement · Foreign terrorist fighters · Glorifying terrorism · Article 10 ECHR

12.1 Introduction

The boundaries of freedom of expression in relation to terrorist speech—incitement, glorification, promotion of terrorism and the like—have been a pressing problem for decades. As the world has been experiencing a wave of people travelling abroad to join terrorist groups, new questions are raised about the role of subversive expressions and their legal regulation. Such questions, first of all, pertain to *potential* travellers: how have state authorities reacted to speech that promotes travelling abroad for the purposes of terrorism? And to those recruiting others to travel abroad for terrorist violence? One could also think of speech by returnees, who may incite others in their home countries to terrorist violence and/or to travel for such purposes. Legal regulation of such speech includes criminal prosecutions, but a tendency can also be discerned to resort to administrative measures such as area bans and prohibiting (persons to speak at) gatherings.[1]

All of these options to deal with expressions in the context of the foreign fighter threat have attracted critical notes in light of fundamental rights; as the OSCE has stated, "[e]fforts to suppress recruitment of FTFs [foreign terrorist fighters] and influence the environment in which recruiters operate, for example through overly broad and imprecisely framed incitement or 'extremism' laws (...), can have a serious impact on freedom of expression, or on freedom of thought, conscience, religion or belief, and thereby also erode the quality of democracy itself."[2]

What are the potential ramifications for the right to freedom of expression of those domestic measures to regulate expressions inciting to, glorifying, supporting, propagating, provoking, encouraging or recruiting of travel for terrorist purposes? This chapter will use the Netherlands as a case study to show the options and pitfalls involved in tackling such expressions, and then proceed to analyse how such measures are to be judged in light of the right to freedom of expression.

The focus will be on speech that is perceived as directly or indirectly contributing to the problem of persons travelling abroad for the purposes of terrorism. This contribution deals with *state* regulation of expressions (as influenced by international actors): the responsibility of social media platforms for terrorist speech would require a separate analysis, although we will occasionally delve into the way states have themselves tried to interfere with expressions on social media.

[1] Belavusau et al. 2019.

[2] OSCE 2018.

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12.2 The Dutch Way of Dealing with Expressions in the Context of Travel for Terrorist Purposes: Amplifying the Range of Prohibited Speech

12.2.1 Criminal Law: Broad Notions of Indirect Incitement in Relation to Terrorist Travel

The Dutch cabinet has devised a comprehensive approach to dealing with extremist speakers that express radical or anti-democratic ideas,[3] including those who incite to joining the armed struggle (but also expressions such as hate speech). This is regarded as part of a broader approach to dealing with "problematic behaviour from certain salafist individuals and organisations".[4] Criminal law is only one part of that approach. The cabinet stresses that fundamental freedoms shall be respected, whatever measure is taken.

Notably, the comprehensive approach to extremist speakers seems to mainly have jihadism in mind and does not explicitly include other forms, e.g. the increasing threat of right-wing extremism (although attention has been paid to this problem in broader Dutch counter-terrorism policy[5]). Most cases from this chapter also deal with jihadism, as the research focuses on expressions in the context of 'foreign fighting' where this link is often present.

12.2.1.1 The 'Context' Case

A key case on the criminal regulation of expressions related to terrorist travel is the case named *Context*, which dealt with a group that recruited young people in The Hague to participate in the terrorist struggle in Syria from 2012–2014, including by spreading jihadist propaganda via social media and on websites such as *deware religie.nl* (DWR, meaning 'the true religion'[6]). Several group members travelled to Syria to join groups like IS and Jabhat al-Nusra. The District Court initially convicted nine persons[7] for, amongst other things, participating in a criminal and terrorist organisation, incitement to terrorist offences by inciting others to join the terrorist fighting

[3] Minister of Justice and Security 2018; see also *Kamerstukken II* 2017/18, 29 614, nr. 66 and *Kamerstukken II* 2019/20, 29 614, nr. 142. The origin of this approach can be found in the Coalition Agreement of 2017, which states that every effort must be made to prevent offering a platform to 'hate preachers'.

[4] Minister of Justice and Security 2018.

[5] See Minister of Justice and Security 2021.

[6] See also the organisation Die Wahre Religion (DWR), which was banned in Germany.

[7] District Court The Hague, *Context*, Judgement, 10 December 2015, ECLI:NL:RBDHA:2015:14365. English translation: https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:16102. Later, the *Context* investigation led to more prosecutions: in 2016, four other persons were convicted. District Court The Hague, Judgement, 22 July 2016, ECLI:NL:GHDHA:2016:8411; 8412; 8464; 8465.

in Syria and recruitment for the armed struggle. Four cases eventually reached the Supreme Court,[8] where the expressions of the defendants on websites and social media, in relation to freedom of speech, came to the fore.

Under Dutch law, incitement to a criminal offence or violent action against the public authorities is a criminal offence under Article 131 Criminal Code (CC); if terrorist (preparatory) offences are incited, the maximum prison sentence of five years[9] is extended by one year and eight months (Article 131 para 2 CC). A key aspect of the Court of Appeal's argumentation in this case—later affirmed by the Supreme Court—was that inciting others to join the armed jihadi struggle in Syria implies incitement to criminal offences because joining the armed jihadi struggle always entails committing terrorist offences.[10] Furthermore, the Court of Appeal pointed out that in this armed struggle, inspired by the strive for and continuation of the 'caliphate', deadly violence was committed and incited against anyone that did not share the groups' ideas about religion. This line of argumentation is widely used in Dutch case law concerning the preparation of terrorist activities, making it easier to convict travellers whose actual behaviour in Syria or Iraq cannot be proven. Applying this argumentation to a speech offence such as incitement, however, does risk extending the scope of criminalisation rather widely.

The Context case focused, amongst other things, on the question of whether tweets and Facebook messages glorifying the armed jihadi struggle—including by glorifying martyrdom and presenting those deceased as heroes—could be qualified as incitement to terrorist offences. The idea of explicitly criminalising glorification of terrorist acts had already entered the Dutch legal sphere several times, with a legislative initiative by the Christian Democrats pending.[11] So far, the Minister of Justice and Security has renounced this proposal with an appeal to freedom of expression and because the most serious expressions could already be covered by existing law (including the prohibitions of incitement, hate speech and attempted recruitment for terrorism).[12]

According to the Court of Appeal, the decisive factor is whether someone could be brought to participate in the armed terrorist struggle—not whether this actually materialised (after all, Article 131 CC is an endangerment offence). Influencing in an indirect manner by reaping the minds of individuals to commit criminal offences can also be incitement, the Court of Appeal held—if this is done with the intention to

[8] Supreme Court (The Netherlands), *Context*, Judgement, 24 March 2020, ECLI:NL:HR:2020:447; 448; 449; 450. The judgement is available at https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2020:447. See about the Court of Appeal's judgments in these and two other cases: Court of Appeal The Hague, Judgement, 25 May 2018, ECLI:NL:GHDHA:2018:1248 and 1249; see https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Celstraffen-opgelegd-aan-verdachten-van-terrorisme.aspx.

[9] Or a fine of a maximum of 21,750 Euros.

[10] This argumentation is also used in cases concerning preparation of terrorism, making it easier to convict persons whose actual behaviour in Syria or Iraq cannot be proven.

[11] Initiatiefvoorstel-Van Toorenburg Strafbaarstelling van de verheerlijking van terrorisme, *Kamerstukken* 34466.

[12] *Handelingen II*, 18 September 2014, nr 105, item 6, p. 5.

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rouse the temper of those susceptible to it (e.g. if it is directed at an easily impressionable person or a person who already considers travelling to Syria to join a terrorist group). In such a case, according to the Court of Appeal, expressing one's strong appreciation of the armed struggle and of those who have joined it, and glorifying death by martyrdom implies that others ought to follow in the footsteps of the fighters and replicate their actions. The Supreme Court accepted the Court of Appeal's argumentation that an indirect solicitation to a criminal offence can—depending on the circumstances—also be criminal incitement.

The Court of Appeal did draw some concrete lines, e.g. by judging that a YouTube video acknowledging and congratulating the so-called caliphate—while showing the IS flag—did not incite to criminal offences, as it was a very general expression of support for IS which did not mention the idea of travelling to that area to fight.

The Supreme Court followed the Court of Appeal's rejection of the defendants' appeal to the rights to freedom of expression and religion by invoking Article 17 European Convention on Human Rights (ECHR) on abuse of rights. According to the Supreme Court, invoking Article 17 ECHR, which results in the defendants not being able to materially invoke Articles 9 (freedom of thought, conscience and religion) and 10 ECHR (freedom of expression) anymore, should be reserved for exceptional and extreme cases—yet it judged that such was the case here.[13] The Court of Appeal had pointed out that the defendants had aimed at destroying the rights and freedoms proclaimed in the ECHR by—inspired by religious fundamentalism—inciting to join the armed struggle in Syria, which per definition entailed committing terrorist offences. The Court of Appeal had added that a substantive Article 10 ECHR (and Article 9 ECHR) test did not lead to any other findings than its abovementioned conclusion on the basis of Article 17 ECHR,[14] concluding that the interference with the defendants' right to freedom of expression was necessary in a democratic society, as incitement to join the armed jihadi struggle forms a threat to the democratic rule of law or *rechtsstaat*.

12.2.1.2 The Tamil Tigers Case

In an incitement case regarding the struggle by the LTTE (Liberation Tigers of Tamil Eelam) against the Sri Lankan authorities and the activities of Dutch LTTE coordinators, the Court of Appeal took a rather different approach.[15] In the Netherlands,

[13] The Advocate-General advising the Supreme Court pointed to the ECtHR's case law in *Belkacem* and *Roj TV* (see Sect. 12.3) to substantiate this argument.

[14] As well as an Article 9 ECHR-test, however, the Court held that the expressions did not constitute a direct manifestation of religion or belief.

[15] Court of Appeal The Hague, Judgement, 30 April 2015, ECLI:NL:GHDHA:2015:1082. The case reached the Supreme Court, which ruled—without further argumentation—that the Public Prosecution Service's complaint against acquittal could not lead to cassation: Supreme Court of the Netherlands, Judgement, 4 April 2017, ECLI:NL:HR:2017:577 and 578. These two and three other defendants were, however, convicted for participating in a terrorist organisation for their involvement in the LTTE, amongst other things for raising funds.

local LTTE leaders organised—amongst other things—gatherings where victims of their struggle were remembered, and fighters were honoured in order to strengthen the morale and support for the struggle. This included theatre songs and texts positively depicting the violence (e.g. "War is war: we will destroy you", "Stand up to expel the enemy, to gather an army"). Because of the context of remembrance and honouring the deceased, as well as the theatrical aspects, the Court of Appeal did not consider this to be incitement—the expressions did not directly incite to participate in the violence and were expressed during peaceful gatherings.

12.2.1.3 Recruitment for the Armed Struggle

Encouraging participation in armed struggle abroad is sometimes also prosecuted under the offence of *recruitment for the armed struggle (or foreign military service)* in Article 205 CC.[16] Recruitment refers to a process of ideologically 'ripening' a person for taking part in the armed struggle, which can take the form of individual conversations where e.g. videos of terrorist groups are shown,[17] but can also involve more general inciteful expressions, e.g. on social media, that aim to influence people to join terrorist groups abroad.[18] In the abovementioned LTTE case, the Court of Appeal acquitted the defendants in relation to recruitment in the Netherlands for the armed struggle against the government in Sri Lanka. It judged that the 'hero gatherings' where terrorist fighters and violent acts were honoured did not point to an intention on the part of the organisation to enact recruitment acts concrete enough to prepare the ground for others to join the fighting.[19] Glorifying or praising the struggle or the attackers does not necessarily imply moving others to join that struggle, the Court held. In other cases, courts judged that there also needs to be a certain stimulation of a person to join the armed struggle, which will usually involve a process rather than one expression:[20] merely making suggestions in a directive manner is not sufficient, and neither is the mere expression of support of one's partner's plans to travel for the armed struggle or the attempt to remove their doubts about such travels.[21] Recruitment of women to go and live in IS territory and marry a fighter does not amount to recruitment for the armed struggle either—the recruitment

[16] See Druijf and van Noorloos 2019, e.g. Court of Appeal's-Hertogenbosch, Judgement, 17 February 2017, ECLI:NL:GHSHE:2017:555; District Court Rotterdam, Judgement, 14 February 2006, ECLI:NL:RBROT:2006:AV1652; Court of Appeal The Hague, Judgement, 2 October 2008, ECLI:NL:GHSGR:2008:BF3987; Court of Appeal The Hague, Judgement, 7 July 2016, ECLI:NL:GHDHA:2016:1979.

[17] *Kamerstukken II* 2003–2004, 28 463, nr. 10, p. 11.

[18] See Supreme Court (The Netherlands), Judgement, 24 March 2020, ECLI:NL:HR:2020:447, Conclusion Advocate-General Hofstee, ECLI:NL:PHR:2019:1235, paras 81–84.

[19] Court of Appeal The Hague, Judgement, 30 April 2015, ECLI:NL:GHDHA:2015:1082.

[20] District Court The Hague, Judgement, 1 December 2014, ECLI:NL:RBDHA:2014:14648; Court of Appeal The Hague, Judgement, 2 October 2008, ECLI:NL:GHSGR:2008:BF3987; Court of Appeal The Hague, 7 July 2016, ECLI:NL:GHDHA:2016:1979.

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should be aimed at direct deployment in the armed struggle, not just at providing moral, ideological or financial support of that struggle.[22]

12.2.2 *Administrative Measures (When Criminal Law Is Thought to Fall Short): Hindering Movement or Hindering Ideas?*

So far, there has been one case in which the Dutch authorities have used legislation on administrative measures to combat terrorism—adopted in 2017[23]—to deal with expressions that were thought to contribute to persons radicalising and travelling abroad for terrorist purposes. This legislation enables the Minister of Justice and Security to enact 6-month (albeit renewable) requirements to regularly report to the police, as well as area bans and contact bans. These measures can be taken against persons who—based on their behaviour—can be linked to terrorist activities or the support thereof; the measures need to be necessary to protect national security.[24] The Minister thus devised an area prohibition against Fawaz Jneid,[25] a controversial Muslim preacher who had been banned from his mosque and continued his activities in other places. Jneid was notorious for several expressions, including for having cursed Ayaan Hirsi Ali and Theo van Gogh in a 2004 sermon—Van Gogh was killed by a jihadist in 2004. In more recent years, Jneid has been active in an Islamic bookstore in The Hague that was said to be used mainly as a prayer room. After plans transpired that a foundation to which Jneid was connected intended to buy the property where the bookstore was based—thus giving him a more permanent presence—the authorities became particularly concerned about his role in the area. This, after all, was a part of The Hague where relatively many people radicalised who then travelled to Syria and Iraq to join terrorist groups. The Minister thus prohibited Jneid from entering two adjacent neighbourhoods in The Hague where the property was based because, according to the authorities, he had already been influential in spreading jihadist ideas in these areas. The Minister motivated the area prohibition by stating that Jneid "has a prominent role in the salafist movement, makes frequent use of salafist rhetoric which is also used by jihadists and creates a climate where jihadists can thrive"—by depicting a hostile image of atheists, seculars, shi'ites, jews and the Western world and stressing the victimhood of the Sunni Muslim community, letting his listeners draw the conclusion that they have an obligation to act and to defend

[22] Ibid.; see also Supreme Court (The Netherlands) Judgement, 12 June 2018, ECLI:NL:HR:2018:897.

[23] Temporary Law on Counterterrorism Administrative Measures 2016. The legislation is, as the title indicates, temporary: after 5 years it will automatically expire.

[24] Moreover, a prohibition to leave the Schengen area can be enacted if there is a reasonable suspicion that a person will travel outward with the aim of joining a terrorist organisation.

[25] Council of State (Administrative Jurisdiction Division), Judgement, 30 May 2018, ECLI:NL:RVS:2018:1763.

their faith. The Minister, in this case, found it plausible that many of his listeners had, in part as a result of his influence, become convinced of their obligation to participate in or facilitate the violent struggle.

This measure was condoned by the highest general administrative court in the Netherlands, the Council of State.[26] Whereas experts criticised the use of these administrative measures against the spreading of ideas,[27] according to the Council of State, what matters is that this measure was still primarily based on hindering his physical presence in a certain area (notwithstanding that it was motivated by reference to the ideas he spread).[28] Jneid's appeal to Articles 9 and 10 ECHR also failed, amongst other reasons because it was a limited measure in the sense that only two areas were prohibited for a limited time. However, renewal of the 6-month prohibition is possible after a fresh assessment, and Jneid's area prohibition has been renewed six times since then. According to the Minister, there was still a risk of Jneid spreading jihadist thought to vulnerable youth, especially now that people were returning home to these The Hague neighbourhoods from the fighting in Syria in increasing numbers, thus heightening the risk of radicalisation. The area bans obviously did not obstruct Jneid from continuing to spread his ideas online—his messages and sermons on Twitter and Facebook and their relation to political salafism were indeed part of the authorities' argumentation for prolonging his area bans.

In a court case concerning the second, third and fourth prolongation of Jneid's area ban,[29] the defence criticised the way Jneid's expressions were presented by the Minister—in an allegedly decontextualised manner that left out excerpts that would prove his rejection of violence and that could not substantiate the Minister's bold conclusions.[30] Adding to the complexity, the administrative report (drafted by the police) underlying the Minister's decision contained information that remained secret to Jneid.[31] The District Court of The Hague, which did get an insight into the secret documents, did not accept the decontextualisation argument. The defence argued furthermore that the relationship between Jneid's behaviour and terrorist activities

[26] Ibid. The issue has been taken up by the ECtHR, *Jneid v the Netherlands*, Fourth Section, 29 September 2020, Application No. 57264/18 (*Jneid*).

[27] Brouwer and Schilder 2018.

[28] On a different note, the government elsewhere also discussed the idea of *digital* 'area bans'—prohibiting a person from using a certain digital platform to spread their ideas—but concluded (in my view rightly) that these would amount to prior censorship of expressions. Minister of Justice and Security 2018.

[29] District Court The Hague, Judgement, 31 March 2020, ECLI:NL:RBDHA:2020:2919. The first prolongation was also declared unfounded by the same Court: District Court The Hague, Judgement, 10 July 2018, ECLI:NL:RBDHA:2018:8172.

[30] Kouwenhoven A (2020) Hoe de overheid een 'haatimam' de mond probeert te snoeren. NRC. https://www.nrc.nl/nieuws/2020/02/17/hoe-overheid-een-haatimam-de-mond-probeert-te-snoeren-a3990732). Accessed 28 July 2021.

[31] The possibility to withhold certain information is provided for in legislation (Article 8:29 AWB), if necessary for national security. This system has been criticised in light of the right to a fair trial and the principle of equality of arms: see Van Gestel et al. 2020, pp. 31 and 43. Moreover, according to lawyers, it is not transparent how the administrative report has been constructed and to what extent opposing views have been considered and exculpating material has been included.

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was too loose, as the Minister spoke about him creating a climate for jihadists to thrive and could not substantiate how he was actually spreading violent jihadist (rather than merely salafist) thought. The Court noted—referring to the reports by the Dutch National Coordinator for Security and Counterterrorism (NCTV)—that currently in the Dutch context, the relationship between salafism and jihadism is ambiguous, whereas Jneid's salafist rhetoric forms a fertile ground for radicalisation and plays an important role within the *jihadist* movement, considering his influence. In the salafist ideology that he preaches, Muslims are being incited to turn their backs on non-Muslims and Muslims disagreeing with them and to only acknowledge theocratic authorities, the Court argued. Moreover, the Court pointed to the risk—as identified by the Dutch General Intelligence and Security Service (AIVD)—of salafists tempering their message to the outside world while preaching in a more extremist manner in inner circles. The Court thus considered Jneid's prolonged area bans to be proportionate restrictions on his freedom of expression and religion.

In December 2020, however, the District Court of The Hague judged that the Minister had insufficiently substantiated the fifth and sixth area bans of Jneid with new facts and circumstances related to the person and area concerned.[32] Merely pointing to his presence on social media, to his salafist ideas and to the fact that the two areas were still vulnerable to radicalisation, without making clear what his own current link was with the two areas, was not enough. This is especially relevant in light of the far-reaching fundamental rights ramifications that could, in theory, lead to all political salafists being prohibited from entering areas that harbour people vulnerable to radicalisation.[33]

The Public Prosecution Service has thus far considered Jneid's speeches to fall just outside the scope of criminal law.[34] Administrative measures then enable the government to act against expressions that do not pass this criminal law threshold.[35] This could lead to a situation where criminal law, with its strong due process guarantees, is circumvented by using measures that have to conform to less strict guarantees, e.g. the use of secret information while also having a far-reaching impact on persons' lives. Also, it is possible to act even further in the 'pre-phase' than is already possible in criminal law, increasing the risk of widening the net too broadly. It is thus particularly important that these administrative measures conform to comparably strict freedom of expression standards as in criminal law. In the Dutch legislation, rather broad language is used—"persons who can be linked to terrorist activities or the support thereof". The Council of State judged that the scope is hard to further specify beforehand and is still in line with the 'prescribed by law' criterion in Articles 9 and 10 ECHR. However, the abovementioned case shows that it is difficult to

[32] District Court The Hague, Judgement, 30 December 2020, ECLI:NL:RBDHA:2020:13885.

[33] District Court The Hague, Judgement, 30 December 2020, ECLI:NL:RBDHA:2020:13885, para 6.4.

[34] See Minister of Justice and Security 2018, pp. 9–10 and *Handelingen II*, 2017–2018, 27 maart 2018, nr. 65, item 2.

[35] Although it must be noted that the *Jneid* case is a bit of an odd one out: the administrative measures have mostly been used *after* the person had already served their criminal sentence, in cases where no criminal law monitoring options were open anymore. Van Gestel et al. 2020.

predict who will be included and what kind of expression of political salafist ideas is still within the bounds of the law.

Occasionally, other administrative measures have been used in the context of jihadist speech. In 2015, the mayor of Eindhoven prohibited the organisers of an Islamic conference in a mosque from letting a number of guest preachers speak there, based on Article 172, para 3 of the Municipalities Act, which enables the mayor to give orders necessary for maintaining public order in case of (serious threats of) disturbances to the public order. The local authorities had received information from the Immigration and Naturalisation Service and the NCTV that the speakers had, in the past, expressed anti-semitic, anti-homosexual and anti-Shia speech that showed hatred for secularists and glorified the violent jihadi struggle and denied terrorism.[36] According to those institutions, one of them had fought in Syria with Islamic (possibly jihadist) armed groups. The authorities feared that those receptive to the speakers' ideas, including youth, could be influenced to embrace jihadism. Five speakers had Schengen Information System alerts, and their Schengen visas were withdrawn because of public order risks. In the end, the conference took place without these speakers. The District Court judged that the mayor's measures to ban these speakers violated the fundamental rights to freedom of association and assembly. According to the Court, the Dutch legislature had explicitly designed a system where no preventive action against public manifestations[37] was possible other than in emergency situations. Only if speakers were to actually express themselves in a manner contravening the law, the government could take action (in particular, by criminal prosecution). This leaves unaffected the migration law conditions under which non-EU nationals who are considered to be a threat to public policy or internal security are not allowed to enter or stay in the Schengen area. From 2015–May 2019, in the Netherlands, fifteen visas have been refused or withdrawn of persons that were known to have incited enmity, hatred, or violence against persons or groups.[38]

12.3 International Human Rights Law

12.3.1 The European Convention on Human Rights and 'Terrorist Speech'

The right to freedom of expression in Article 10 ECHR can be restricted if provided for by clear laws and if the measure is necessary in a democratic society with an eye to a legitimate interest, such as protecting the rights of others, public safety

[36] District Court Oost-Brabant, Judgement, 30 January 2017, ECLI:NL:RBOBR:2017:415.

[37] Based on the Wet Openbare Manifestaties (WOM) 1998 (Public Manifestations Act). The Municipalities Act was not meant to form an additional basis for preventing such manifestations, according to the District Court.

[38] *Handelingen II* (Aanhangsel) 2018/19, 2 May 2019, nr. 2523, https://zoek.officielebekendmakingen.nl/ah-tk-20182019-2523.html.

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and national security. The European Court of Human Rights (ECtHR) will look at proportionality, whether the state has adduced relevant and sufficient reasons for the restriction and whether there is a pressing social need for the restriction at issue. In terms of proportionate restrictions, criminal law is viewed as a far-reaching means that should not be lightly used.

In the more extreme cases, the ECtHR will declare a complaint inadmissible referring to Article 17 of the Convention on 'abuse of right'; this is reserved for those engaging in activities aimed at the destruction of any of the rights and freedoms the ECHR provides. Thus, if expressions are incompatible with the values proclaimed by the Convention, they are not protected by Article 10 ECHR, and the Court does not perform an elaborate Article 10-test. In two recent cases concerning criminal convictions for extreme speech in the context of terrorism, the Court has considered that the speaker thus abused their right to freedom of expression as meant in Article 17 ECHR.

The spokesperson and leader of *Sharia4Belgium*, Fouad Belkacem, has been the subject of a range of criminal convictions in Belgium as well as a measure depriving him of his Belgian citizenship. In 2015 he was convicted to twelve years' imprisonment for founding and leading *Sharia4Belgium*, which was classified as a terrorist organisation that recruited many Belgians to join IS. By means of trainings and lectures, in a process of indoctrination and isolation, Belkacem was judged to have recruited them to join the armed struggle. However, it was another case against Belkacem that reached the ECtHR in 2017,[39] a case in which he was convicted for incitement to hatred, discrimination and violence against non-Muslims. He had posted several YouTube videos in which he said, amongst other things, that "we have to fight against nonbelievers", "Today we have to talk about Jihad. Today we have to talk about sharia. How we must dominate" (words that were uttered after a shot was heard in the background of the video), and in which he called on listeners to join the group of salafist jihadists, "whose members believe that Islamic countries should be liberated by an armed jihad and the taking up of arms against nonbelievers, and that non-believers should repent or be eliminated." Taking into account the content, tone, explicit character, décor, presentation and repetitive character of his messages, the Belgian courts found him indisputably inciting discrimination, segregation, hatred and violence against non-Muslims. The Court pointed to the markedly hateful nature of Belkacem's views and concluded that such a general and vehement attack on a group (in this case, of non-Muslims) is in contradiction with the Convention's values. Whereas this is indeed among the more extreme cases, it would still have been valuable to see how a full contextual Article 10 ECHR-test would play out in this case.

A full-fledged assessment in light of the right to freedom of expression would also have been useful in the case of *ROJ TV A/S v Denmark*,[40] where a Danish-based TV channel that broadcast Kurdish programmes throughout Europe and the Middle East

[39] ECtHR, *Belkacem v Belgium*, Second Section, 27 June 2017, Application no. 34367/14.
[40] ECtHR, *ROJ TV A/S v. Denmark*, Second Section, 17 April 2018, Application no. 24683/14 (*ROJ TV A/S*).

was convicted for promoting PKK terrorist violence. The ECtHR judged that the applicant could not rely on the protection of Article 10 ECHR by virtue of Article 17 ECHR, as it followed the domestic courts' findings that the channel's programmes—which were broadcast to a wide audience—contained "one-sided coverage with repetitive incitement to participate in fights and actions, incitement to join the organisation/the guerrilla, and the portrayal of deceased guerrilla members as heroes", thus amounting to propaganda for a terrorist organisation (the applicant company had also been financed to a significant extent by the PKK).

In many cases, however, the Court has dealt with expressions in relation to terrorism under the Article 10 framework, thus elaborately assessing whether prohibition of expressions was necessary in a democratic society.[41] From these cases, a number of considerations can be discerned—which are not directly linked to terrorist travel but can give some guidance on how to deal with incitement in that context. If expressions are part of a debate on a matter of general and public concern—e.g. a debate about state violence or the rights of minority groups—restrictions on freedom of expression are to be strictly construed. Nevertheless, states have a large leeway to prohibit speech that incites violence, hostility or hatred against individuals, groups or officials and calls to violence, armed resistance or uprising.[42] It is not necessary that an expression *directly* incites violence; the provocative wording is one of the factors to be taken into account, and depending on other circumstances, prohibition of indirect calls for violence—including glorification or justification of violence—may or may not lead to a violation of Article 10. The Court looks at several factors, including the position of the applicant, the medium by which the expressions are disseminated, the nature of the articles and their wording, as well as the context in which they were published.[43] If expressions are published in a region that is sensitive to conflict and tension—and/or at a time when tensions are high (e.g. shortly after a terrorist attack), certain restrictions of freedom of expression are more easily allowed, even if the wording of the expressions is not directly inciteful.[44] The criminal conviction of a cartoonist for publishing a cartoon in a Basque newspaper on 13 September 2001, depicting the Twin Towers attacked with the caption—"We've all dreamt of it...Hamas did it", did not overstep the bounds of Article 10. According to the Court, the depiction of the attacks as a dream that finally came true was particularly offensive and shocking for the victims and their family. The timing of the publication two days after the attacks also played a role, as well as the fact that the magazine was published in the Basque region with its own terrorism threat. Notwithstanding these factors, it is questionable whether the link between this cartoon and its potentially harmful consequences was strong enough to justify criminal sanctions.

[41] See for a more elaborate overview of case law until 2011: van Noorloos 2011.

[42] ECtHR, *Ali Gürbüz v. Turkey*, Second Section, 12 March 2019, Application no. 52497/08.

[43] ECtHR, *Dmitriyevskiy v. Russia*, 3 October 2017, Application no. 42168/06 (*Dmitriyevskiy*).

[44] ECtHR, *Zana v. Turkey*, Grand Chamber Judgement, 25 November 1997, Application no. 18954/91 (*Zana*).

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What effect the speech could potentially achieve also depends on the role and authority of the speaker.[45] Yet, in *Dmitriyevskyi v Russia*, the Court judged that an editor's conviction for publishing articles that were presumably uttered by leaders of a Chechen separatist movement—who were wanted in Russia for serious criminal charges—was not a justified interference with the right to freedom of expression.[46] The Court found no incitement to violence or instigation of hatred or intolerance liable to result in violence. Though one of the articles was strongly worded, suggesting that the Russian authorities imposed a continuing genocide on the Chechen people, the Court noted that it was important to debate allegations of such atrocities and that "the fact that statements contain hard-hitting criticism of official policy and communicate a one-sided view of the origin of and responsibility for the situation addressed by them is insufficient, in itself, to justify an interference with freedom of expression".[47] There is thus much room for strong criticism of the government under Article 10—especially if this is meant to draw attention to real human rights abuses. Such criticism may be very harsh and even immoderate, but it may not amount to promoting, justifying and glorifying terrorism by dehumanising the other party to a conflict or representing it as absolute evil. With regard to terrorist travel, we can assume that if such criticism—even if legitimate in itself—within its context can be interpreted as a call to engage in violence, then interferences with freedom of speech are more readily accepted.

In the case of *Gürbüz and Bayar v Turkey*,[48] a statement by Abdullah Öcalan calling for a gathering of patriots under the banner of the PKK (although his threat of resuming violence was in a conditional form: *if* no Turkish-Kurdish dialogue would be developed) amounted to recruitment for terrorism, according to the ECtHR, considering the nature, purpose and previous violent actions of the organisation. The Court also took account of the position of Öcalan as an imprisoned leader giving instructions through his lawyers, and the sensitive context of a proposed ceasefire, in coming to the conclusion that the criminal conviction of the owner and editor-in-chief of a newspaper publishing these statements did not violate Article 10.[49]

As to the medium by which the expressions are spread, an academic book or biography may be less directly inciting people to violence than a call that is spread

[45] Ibid.; ECtHR, *Hogefeld v. Germany*, Fourth Section, 20 January 2000, Application no 35402/97 (*Hogefeld*).
[46] *Dmitriyevskiy*, above n 43.
[47] Ibid, para 106. See, rather similarly, in the case of *Stomakhin v Russia*: ECtHR, *Stomakhin v Russia*, 9 May 2018, Application no. 52273/07.
[48] ECtHR, *Gürbüz and Bayar v Turkey*, Second Section, 23 July 2019, Application no. 8860/13 (*Gürbüz and Bayar*).
[49] See also *Hogefeld* above n 45, and ECtHR, *Bidart v. France*, Fifth Section, 12 November 2015, Application no. 52363/11: the role of the speaker in past terrorism was also important in these cases, where the applicants were themselves imprisoned and released on licence respectively.

more widely among the public.[50,51,52] Criminal proceedings against media owners or editors are looked at critically in light of the right to freedom to receive information. For instance, in the abovementioned *Gürbüz and Bayar* case, the court criticised the systematic conviction of media publishing statements by terrorist organisations without an analysis of the content or the context in which the statements are written.[53] However, if statements effectively amount to incitement to violence, criminal measures against media owners or editors can justifiably come into play as the right to impart information cannot be a pretext for spreading statements by terrorist groups.[54]

In a case where the applicants had sent letters ending with the wording "'*sayın*' Abdullah Öcalan", an attribute placed before a person's name meaning 'respected', this mark of respect could not, as such, justify prohibition under Article 10. The letters in question contained neither incitement to violence or terror nor propaganda for a terrorist organisation—the Court held that no clear and imminent danger existed that could justify a conviction.[55] If provocative slogans are expressed during non-violent demonstrations, they cannot too easily be interpreted as a call for violence or an uprising.[56]

Calls for separatism—in the absence of incitement to violence—may also fall within the protection of Article 10. A conviction for publishing an article about the "battle for the liberation of the Kurds" resulted in a violation of Article 10: notwithstanding the reference to a 'battle', the ECtHR held that it did not amount to incitement to violence or armed resistance.[57] A battle can also refer to a struggle to have a minority group's rights recognised.

The ECtHR is critical towards excessively broad legal definitions of 'extremism' as a basis for repressive measures. Since such definitions—broad as they are—may also cover indirect incitement or recruitment in relation to terrorist travel, it is worth delving into this discussion here. The Court has focused in particular on the Suppression of Extremism Act in Russia, under which courts may declare books or other materials extremist. As a result, it is prohibited to publish or distribute such works. 'Extremist activity/extremism' under Russian law can include, amongst other things, "the stirring up of social, racial, ethnic or religious discord", "the public justification of terrorism and other terrorist activity", and "propaganda about the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion" (including public appeals to

[50] ECrtHR, *Polat v. Turkey*, Grand Chamber, 8 July 1999, Application no. 23500/94.

[51] ECrtHR, *Erdoğdu and İnce v. Turkey*, Grand Chamber, 8 July 1999, Application nos. 25067/94 and 25068/94.

[52] ECrtHR, *Öztürk v. Turkey*, Grand Chamber, 28 September 1999, Application no. 22479/93.

[53] *Gürbüz and Bayar*, above n 48.

[54] Ibid., para 44.

[55] ECtHR, *Yalçınkaya and Others v. Turkey*, Second Section, 1 October 2013, Application nos. 25764/09 et al.

[56] ECtHR, *Gül and others v. Turkey*, Second Section, 8 June 2010, Application no. 11976/03.

[57] ECtHR, *Asli Güneş v. Turkey*, Second Section, 27 September 2005, Application no. 11976/03.

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8 June 2010, Application no. 11976/03.
September 2005, Application no. 11976/03.

carry out such acts, organising, preparing, inciting to, funding or assisting such activities); 'extremist materials' are "documents intended for publication or information in other media calling for extremist activity to be carried out or substantiating or justifying the necessity of carrying out such activity".[58] In the ECtHR case *Ibragim Ibragimov and others*,[59] the publication of certain editions of a well-known commentary on the Qu'ran by the scholar Said Nursi, which was widely used in mosques and schools, was prohibited by the Russian authorities. According to the domestic court—which based its judgment on experts in linguistics and psychology from the Russian Academy of Sciences—the works contained statements that aimed to incite religious discord between believers and non-believers, depicted non-believers in a negative and humiliating way and propagated superiority over non-believers. According to Islamic studies scholars, however, these works belong to moderate mainstream Islam. The ECtHR interpreted freedom of expression in light of freedom of religion (Article 9 ECHR) and concluded that there was a violation—the domestic courts had merely quoted the 'experts' and had failed to assess the nature and wording of the text, but also the context in which the works were published and their potential to lead to harmful consequences. With regard to the second applicant, the text described non-Muslims as "idle talkers" and "little men" and suggested that not following Islam was an "infinitely big crime" (para 114). According to the ECtHR, however, the domestic court quoted these passages out of their context and without considering that statements in religious books proclaiming the superiority of that religion's worldview were common in monotheistic religions. The ECtHR held that these statements could not be regarded as promoting violence, hatred or intolerance, nor did they insult, hold up to ridicule or slander non-Muslims. Moreover, the authorities had not argued that the book "advocated any activities going beyond promoting religious worship and observance in private life of the requirements of Islam, or sought to reorganise the functioning of society as a whole by imposing on everyone its religious symbols or conception of a society founded on religious precepts."[60] The ECtHR pointed to the Venice Commission's Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation,[61] which warned that definitions were so vague as to risk arbitrary interferences with freedom of expression and freedom of religion or belief, using definitions of extremism that did not contain any element of violence.

[58] Federal Law no. 114-FZ on Combatting Extremist Activity of 25 July 2002, Section 1(1).
[59] ECtHR, *Ibragim Ibragimov e.a. v. Russia*, 28 August 2018, Third Section, Application nos. 1413/08 and 28621/11.
[60] See in this regard also the Court's case law on Article 11 ECHR, including ECtHR, *Hizb Ut-Tahrir v Germany*, Fifth Section, 12 June 2012, Application no. 31098/08. See also ECtHR, *Gündüz v. Turkey*, First Section, 4 December 2003, Application no. 35071/97.
[61] European Commission For Democracy through Law 2012.

12.3.2 *Other International Law*

Other relevant international bodies have also been critical of legislation targeting extremism: the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism[62] has criticised the worldwide use of extremism as an offence in itself, which has been used against non-violent groups, journalists and political activists. The OSCE has recommended to "[a]void in law, policy and practice the use of vague or imprecise terms that are prone to arbitrary application, such as 'extremism', disconnected from specific violent conduct or incitement to violence".[63] The OSCE has also warned against "overly broad offences in criminal lawsuch as apology, glorification or condoning of terrorismthat frequently fall short of the threshold of incitement to discrimination, hostility or violence and lead to impermissible limitations of freedom of expression" and has stressed that criminal responsibility should not be "based solely on association with terrorist groups, or expression of opinions about their activities".[64] These kinds of laws are used to target political opponents, human rights activists and journalists worldwide.

The Human Rights Committee is critical not only of 'extremism' offences, but a broader range of speech restrictions: it stated that "offences such as 'encouragement of terrorism' and 'extremist activity' as well as offences of 'praising', 'glorifying', or 'justifying' terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression."[65] The UN Secretary-General has indicated (in relation to terrorism) that "[i]ncitement must be separated from glorification. If the first may be legally prohibited, the second may not... for States to comply with international protections of freedom of expression, laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action."[66]

Such a critical stance towards offences on glorifying, encouraging and justifying terrorism is in marked contrast with the approach of the ECtHR on this matter and with some international 'positive obligations' requiring states to criminalise expressions such as encouragement or glorification of terrorism that do not pass the threshold of direct incitement. Under Article 5 of the EU Directive on combating

[62] Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2016).

[63] OSCE 2018.

[64] OSCE 2018.

[65] CCPR 2011.

[66] UN Secretary-General (2008) The protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/63/337, paras 61–62.

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terrorism,[67] Member States shall prohibit public provocation to commit a terrorist offence, meaning

> the distribution, or otherwise making available by any means, whether online or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (i) of Article 3(1), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed (...)

—thus introducing the controversial term of 'glorification' and stressing that indirect advocacy is included as well.[68] The 'public provocation' offence in Article 5 of the Council of Europe (CoE)'s Convention on the Prevention of Terrorism does not mention 'glorification', although it does suggest that *indirect* advocacy should be criminalised too.[69] The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in his model offence of incitement to terrorism, has suggested using the words "whether or not expressly advocating terrorist offences" rather than "whether or not directly advocating terrorist offences", to make clear that incitement in coded language can be criminalised but without opening the door for prohibiting a large range of expressions.[70] Furthermore, the Special Rapporteur stressed that vague terms such as 'glorifying' or 'promoting' terrorism should be avoided.

As regards the relationship to 'foreign terrorist fighters', it should be noted that the public provocation offence in both the CoE and EU instruments is limited to actual acts of terrorism and does not include provocation of preparatory offences. However, the EU Directive on combating terrorism—apart from its provision on public provocation also calls upon states to criminalise *incitement* to several terrorist offences (Article 14(2)), including *incitement to travelling* (in- and outward travel) for the purpose of terrorism and *incitement to organising or otherwise facilitating travelling* for the purpose of terrorism (referring to Article 10 of the Directive—an offence which is in itself already broadly formulated). In contrast, the CoE's Additional Protocol to the Convention on the Prevention of Terrorism ('Riga Protocol'),

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[67] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (2017) OJ L 88/6.

[68] The term '*thereby* causing a danger' may sound confusing (is this still an independent requirement?) but this is explained further in the Preamble (under 10): 'Such conduct should be punishable when it causes a danger that terrorist acts may be committed. In each concrete case, when considering whether such a danger is caused, the specific circumstances of the case should be taken into account, such as the author and the addressee of the message, as well as the context in which the act is committed. The significance and the credible nature of the danger should be also considered when applying the provision on public provocation in accordance with national law.'

[69] Council of Europe Convention on the Prevention of Terrorism, opened for signature 16 May 2005, CETS no. 196 (entered into force 1 June 2007): "'public provocation to commit a terrorist offence' means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed."

[70] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism 2010, para 32.

which calls upon States Parties to criminalise (amongst other actions) travelling abroad for the purpose of terrorism, does not oblige criminalisation of incitement to such travels.

In addition, positive obligations to criminalise *recruitment of terrorism* may also be relevant, as indicated in Sect. 12.2 on the Dutch case law. In the EU Directive, recruitment for (organising or facilitating) such travels is not explicitly included (Article 6), but considering the breadth of offences such as "otherwise facilitating travel" (Article 10) and the possibilities for cumulation of these offences, it will probably be covered anyway. Consider also Security Council Resolution 2178 (2014), which calls for prohibition of "the wilful organization, or other facilitation, including acts of recruitment" of a broad range of actions amounting to (outbound) terrorist travel (para 6(c)).

12.4 Conclusion

The legal regulation of expressions related to terrorist travel raises pressing freedom of expression concerns. In the Netherlands, it is notable that messages that do not directly incite terrorism or terrorist travel, but rather glorify the armed jihadi struggle—including by glorifying martyrdom and presenting those deceased as heroes—were qualified as incitement to terrorist offences (although very general expressions of sympathy are not sufficient). This shows how tying broad notions of indirect incitement (including glorification) to terrorist *travel* is likely to amplify the range of prohibited speech. Nevertheless, the broad interpretation of the Dutch incitement offence in the Context case may be a temporary issue connected to the specific situation as it existed several years ago, of (mainly) youngsters at risk of travelling to the 'caliphate': in the judgment, regard was had to the targeted audience that was considered to be easily impressionable by such messages.[71]

Although Dutch criminal law, through the incitement offence (and less so through the recruitment offence), already allows for prohibiting a wide range of expressions in relation to travelling abroad for terrorism, the authorities have nevertheless found it necessary to use administrative measures where criminal law was thought to fall short. Because the requirements for such area bans (and the like) are relatively vague, this has enabled the authorities basically to act against spreading political-salafist thought (with the argument that this creates a climate for jihadists to thrive). This was specifically tied to the vulnerable situation in particular areas at risk of youth travelling to or coming back from terrorist areas; the question is how long this contextual aspect can continue to play a role. Meanwhile, the vagueness of the criteria for these administrative measures and the secrecy about what such measures are based on makes it difficult to predict who could be targeted.

[71] See the very different interpretation of incitement and recruitment in the *Tamil Tigers* case.

Considering some of the ECtHR's recent case law (*Belkacem* and *ROJ TV*), it is perhaps not so surprising that the highest Dutch courts in the criminal and administrative cases mentioned could reject freedom of expression claims—in one case even by invoking 'abuse of rights' (Article 17 ECHR).

The ECtHR has, in many other cases on terrorist expression, made a full assessment based on Article 10 ECHR, and the different factors that the Court takes into account provide a rich framework for assessing such expressions in a nuanced manner; it has also been very critical of 'extremism' offences because of their breadth and vagueness. It is striking, however, that the Court does not employ such criticism against 'glorification/justification of terrorism' offences—in marked contrast to other international bodies that have strongly criticised such laws. Regulation of such expressions is especially problematic because definitions of terrorism themselves are still contested and diverging, and utterly political. Thus, prohibitions containing vague notions of glorification or encouragement with regard to such a political matter risk chilling a wide range of expressions that do not conform to the dominant view.

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