



# THE CHANGING FORMS OF INCITEMENT TO TERROR AND VIOLENCE: The Need for a New International Response



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# INCITEMENT TO TERRORISM IN INTERNATIONAL LAW\*

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In September 2005, two months after the 7/7 London bombing, the United Nations Security Council adopted Resolution 1624, dedicated to countering the incitement of terrorist acts motivated by extremism and intolerance. This is the first universal instrument that squarely addresses the issue of incitement to terrorism in terms of criminal law. It represents the third generation of international measures against terrorism. From criminalization of specific conduct from the 1960s to the 1990s, through measures to curb the financing of terrorism, international attention is gradually turning to the sociological aspects of terrorism prevention.

Resolution 1624 was supplemented in 2008 by a report of the UN Secretary-General that offered preliminary guidelines for implementing the resolution in light of human rights law.

This article highlights and critiques some of the basic principles reflected by the resolution and the UN Secretary-General's guidelines, in order to enable an appreciation of the Draft International Convention for the Prevention of Incitement to Terror proposed by Ambassador Alan Baker. I will also refer to another instrument adopted in 2005, the Council of Europe Convention on the Prevention of Terrorism, which has since been also incorporated as an EU directive.

First, however, I would like to make some remarks about the very notion of criminalizing incitement to terrorism.

## ON THE NOTION OF CRIMINALIZING INCITEMENT TO TERRORISM

Is criminalization of incitement an effective tool against terrorism? The assumption that terrorism can be curbed if its incitement is effectively repressed is largely a factual conjecture. The international and domestic legal offensive against inciting speech does not rely on any empirical information as to the causal determinants of terrorism, or as to whether prohibiting incitement is a rational response, capable of countering terrorism.

Incitement may be vital for the success of the terrorist campaign. This is the case when terrorism takes on a wide, decentralized scope, as is the case with groups such as Al-Qaeda, and large-scale mobilization is vital for sustaining it. Moreover, when terrorism is mobilized not against any real cruelty or repression felt immediately by the potential perpetrators, but to advance an abstract ideal, engaging people to serve it is not assured. Since people

do not act on their own initiative in furtherance of abstract goals, they need to be imbued with a sense of rage and hatred to an extent that they would be willing to take violent action that puts themselves at risk. This is what incitement provides. This is also why prevention of incitement may be an effective tool to prevent the terrorist acts themselves.

On the other hand, the perception of terrorism considered here is very specific. It is the terrorism that Western states are currently grappling with, which is based on extremist ideologies that do not always even have a clear objective. But this is not the only type of terrorism that can be envisaged. Indeed, until the 1990s “terrorism” was often associated with political liberation and socioeconomic revolutionary movements. Examples include the German Rote Armee Fraktion (Baader-Meinhof Group), the Peruvian Sendero Luminoso, or the Japanese Aum Shinrikyo (Aleph), not to mention Hizbullah and Hamas. These all clearly reflect a different type of conduct: limited in geographic and contextual scope, and less dependent on wide-scale dissemination of the group’s ideas. For example, it might feed more easily on individual enrollment of members than on mass recruitment. Moreover, the motive for familiar, old-fashioned terrorism could arguably be the acquisition of immediate benefits, in which case there is much less need for a persuasive campaign to mobilize people. Whether incitement is a necessary condition for this type of terrorism is not clear.

So it is important to acknowledge that the current trend in combating terrorism is informed by the motives for that terrorism. This might be a dangerous path, when a generally applicable measure is adopted with only one type of the phenomenon in mind.

## ELEMENTS OF THE CRIME

Resolution 1624 calls on all states to prohibit by law incitement to commit a terrorist act or acts. It also stresses that measures taken to implement the obligation to criminalize incitement must comply with their international human rights obligations, particularly freedom of speech.

To prevent abuse of the criminal prohibition on incitement to terrorist acts in order to repress legitimate speech, a clear delineation is required of the scope of speech that may be prohibited and of the circumstances in which it may be prohibited.

The different instruments provide a variety of models in this respect. It is worth considering three components of these models: the “terrorism” component, the type of prohibited speech, and the probability of harm.

Resolution 1624 speaks of incitement to “terrorist acts.” Specific acts associated with terrorism have been declared offenses under international treaties. But the reference in the resolution to “terrorist acts” rather than “terrorist offenses” suggests that it was not intended to restrict the prohibition to those offenses already established under international law. The Secretary-General’s guidelines also speak of “terrorism” rather than of “terrorist offenses.” This is a relatively wide scope of target conduct.

On the other hand, Resolution 1624 distinguishes between direct and indirect incitement (*apologie* is loosely defined as the praising of perpetration of a terrorist act). The resolution “repudiates attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts” but calls on states to criminalize only direct “incitement.” The Secretary-General’s guidelines expressly reject the criminalization of *apologie*.

In this respect, Resolution 1624 and its interpretation by the Secretary-General are disappointing. Modern terrorism, by which the resolution is informed, is dependent on winning hearts and minds. This is done by persistent, pervasive vilification and disparagement of the victim, not by direct calls for action, at least not at the early stages. In order effectively to prevent this process, the prohibition must encompass more than direct calls. Accordingly, the type of speech that may be prohibited under the resolution is so narrowly defined that the resolution may fail to address the phenomenon for which it was tailored.

Contrast this, for example, with the 2005 Council of Europe Convention, which criminalized “provocation”—both direct and indirect advocacy of terrorist offenses. This convention, therefore, at least permits the prohibition of any message that is intended to incite the commission of offenses—including praise of perpetration, denigration of victims, calls for funding for terrorist organizations, and presentation of a terrorist offense as necessary and justified.

But the convention speaks of “terrorist offenses,” that is, a narrower category of conduct than the resolution. There is, then, a tradeoff between the two elements of criminal speech: where terrorism is defined more narrowly, incitement is defined more widely.

Ambassador Baker’s draft speaks of “an act of terror” and even of “violence against an ethnic group.” This is obviously a much wider category of speech than in either Resolution 1624 or the Council of Europe Convention.

Ambassador Baker’s draft also calls for criminalization of both direct and indirect advocacy of terrorism. In other words, it calls for a wide criminal prohibition on an extremely wide category of speeches. It thus requires, or at least permits a very wide criminal offense. The question is whether this is balanced by additional requirements that guarantee freedom of speech.

This brings us to the third element in the balance, namely, the requirement of probable harm for speech to be criminalized.

Resolution 1624(2005) does not require any measure of probable harm. Why is the resolution silent? I would like to consider two potential explanations—and reject both as insufficient.

According to the first explanation, the potential for harm is inherent in the speech itself, independently of external circumstances. This would be the case where the potential harm is so grave that even a low probability of its materialization would justify a prohibition, and where the harm may be inferred from the content of the speech.

An example of this approach is that of the prohibition on direct and public incitement to genocide. Genocide has been labeled “the crime of crimes.” When the incitement is public and direct, the risk of genocide materializing can be inferred with sufficient certainty from the speech itself. And even a low risk of it materializing would justify prohibiting the speech.

Does this argument apply also to terrorism, so that direct and public incitement to terrorism should be prohibited altogether?

First, how grave is terrorism? In terms of the harm to bodily integrity, it is less injurious to human lives than genocide. That, however, is not the point. The harm in terrorism is in the sense of terror and the extortion of states. It is in the attempt to undermine the operation of acceptable mechanisms of governance, and even to replace the existing secular, Westphalian state system altogether.

Thus, in the case of extremist religious terrorism, it might indeed be grave enough to justify a presumption of harm.

Nevertheless, a presumption of harm can at best be sustained if the incitement is direct. If the prohibition covers indirect incitement, as is the case in the Council of Europe Convention and Ambassador Baker's draft, a higher threshold of probable harm should be required.

A different explanation for the absence of probable harm is that the incitement is harmful not merely because of the risk that a terrorist act be carried out, but because of the immediate effect of the speech. This is in fact the rationale for prohibiting discriminatory and racist speech: it acknowledges that the harm in incitement is immediate. Again, in the case of genocide, for example, there is a clear overlap with discriminatory speech.

Terrorism and discrimination, however, are separate issues, although the Secretary-General's guidelines suggest a linkage between the two (noting that "proscription of incitement to terrorism could also be considered as an integral part of ensuring national security and public order through a strict prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence").

Ambassador Baker's draft also suggests a link between terrorism and discrimination. It specifically mentions ethnic and racial hatred in the preamble, drawing partly on Resolution 1624 but also on the Durban Review Conference against racism. The introduction specifically refers to anti-Semitism. And it defines incitement not only by reference to terrorism but also by reference to "violence against a religious, national or ethnic group" (Article 1(4)(d)).

This linkage reflects the same specific perception of terrorism noted before, namely an ideological conflict between civilization groups. But neither the resolution nor Ambassador Baker's draft is limited to such terrorism. Therefore, the assumption of immediate and inherent harm is inappropriate.

In view of my conclusion that there is no basis for automatically assuming a level of harm that justifies prohibiting speech, it is appropriate that the UN Secretary-General's guidelines, the Council of Europe Convention, and Ambassador Baker's draft all make the prohibition of incitement to terrorist acts dependent on a certain probability that the terrorist act will occur.

The Secretary-General's guidelines provide that incitement is a speech that "is directly causally responsible for increasing the actual likelihood of a terrorist act occurring," and that it "is likely to result in criminal action."

The Council of Europe Convention and Ambassador Baker's draft prohibit speech that "causes a danger that" a terrorist offense or act may be committed.

Given that these instruments call for criminalizing speech very widely, including indirect speech, for example, this threshold has been criticized as excessively low. It may be applicable in Europe, where there is some internal consensus on human rights restrictions. But at the universal level, at which Ambassador Baker's draft operates, it is much too open to abuse. So here I suggest that a higher probable harm must be demanded for the criminalization of incitement to be legitimate.

The following table summarizes the different standards.



	Resolution 1624	Council of Europe Convention	Ambassador Baker's draft
Conduct	Terrorist act	Terrorist offense	Act of terror or violence against an ethnic group
Speech	Direct incitement	Direct or indirect	Direct or indirect
Probable harm	"directly causally responsible for increasing the actual likelihood," and "likely to result in..."	Causes a danger that...	Causes a danger that...

The standards that are more speech-restrictive are colored dark yellow. The table illustrates that in Resolution 1624 and the Council of Europe Convention, there is a tradeoff between the type of speech, the type of target conduct, and the probability of harm. Ambassador Baker's draft opts for the lower standard for prohibition on all three counts. I would also be surprised if Western states subscribe to this formula. There is already criticism within Europe that their own formula is too speech-restrictive. For the United States this seems utterly unrealistic. I would caution against a formula that might serve states that attempt to repress legitimate speech under the guise of preventing incitement to terrorism.

## CONCLUSIONS

First, concerning linkage, the linkage between terrorism and extremist ideology may result in the use of "terrorism" as a cover for prohibiting hate speech. Although it might be a good idea to prohibit hate speech, the route through terrorism is unnecessary and therefore dangerous.

Second, concerning fragmentation, the focus on a specific manifestation of terrorism (e.g., fundamentalist religious vs. political) may appear reminiscent of the general strategy of international action against terrorism. However, the piecemeal fashion of dealing with terrorism in the past was rooted in political controversy, not a legal one. The fragmented treatment of a criminal offense of incitement may have substantive consequences, that is, blanket prohibitions on speech that are justified only in specific circumstances. This carries a risk that the battle against terrorism be used as a cover for abuse of power.

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## ENDNOTES

\* This lecture draws on my article "Incitement to Terrorist Acts and International Law" 23 *Leiden Journal of International Law* 645-674 (2010).