



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

BEYOND RADICAL LIBERTARIANISM: INTERNET FREEDOM AND THE RULE OF LAW

Michael Mertes

The fight against terror requires intellectual and moral clarity. Terror is a crime, and legal systems make incitement to a crime a criminal offense in itself. Therefore, seemingly the criminalizing of incitement to terror by an international convention should receive broad support within the community of nations. This, however, might prove difficult. Very roughly speaking, the camp of opponents presumably falls into two categories.

The first category consists of states that sponsor terrorism, and of states where certain forms of hate speech—from Holocaust denial to incendiary propaganda—are seen as acceptable or even true statements.

The second consists of states where a libertarian public opinion is averse to regulations that appear as an infringement on free speech. In his introduction to the Draft International Convention for the Prevention of Incitement to Terror, Alan Baker puts it this way: “[C]onstitutional provisions for freedom of speech in national legislation have restricted serious discussion of prohibiting or criminalizing incitement to terror through some form of international instrument.”¹

As a former representative to the German Federal Council, the legislative body through which the German federal states participate in our national legislation, I can confirm that this is an accurate description of the objections the anti-incitement project will face in my country, as well as in many other European societies.

Of course I am not advocating defeatism. One has to know these objections, however, to be able to counter them. The example I am referring to is the so-called Budapest Convention on Cybercrime,² a treaty that was elaborated under the aegis of the Strasbourg-based Council of Europe and opened for signature in 2001. It was also signed by the non-European countries Canada, Japan, South Africa, and the United States, and it entered into force in 2004. Summarizing the “London Conference on Cyberspace” in November 2011, British foreign secretary William Hague came out in favor of further expanding support for the Budapest Convention beyond the sphere of Council of Europe member states.³

In 2003 the Budapest Convention was complemented by an “Additional Protocol...concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.”⁴ It came into force in 2006. The Additional Protocol defines as “racist and xenophobic material...any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence,

against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.” It bans the dissemination of racist and xenophobic material through computer systems, racist- and xenophobic-motivated threat and insult, as well as denial, gross minimization, approval, or justification of genocide or crimes against humanity.

THE LIMITS OF SPEECH

When the Budapest Convention and the Additional Protocol were to be ratified by the German Federal Parliament and the German Federal Council, both instruments were criticized on the ground that some of their regulations gave too much power to security authorities at the expense of citizens’ freedom. The “Big Brother” argument should indeed be taken very seriously. In countries without a strong liberal and democratic tradition, there is a clear danger that Internet regulation is, and will be, used as a gateway to surveillance and censorship. Yet the rule of law does not stop at the entrance to cyberspace, as radical Internet libertarians would have it.⁵ The opposite is true: “[T]hat behaviour that is unacceptable offline is also unacceptable online.”⁶

One may justify that statement by quoting one of the fathers of modern libertarianism, John Stuart Mill. In his book *On Liberty*, published in 1859, he articulated what became known as the “harm principle.” It says that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”⁷

There can be no doubt that incitement to terror harms others, for it is more than a mere expression of opinion. It is a willful action that aims to injure and kill human beings. Admittedly, it can be very difficult to draw a clear demarcation line between hate speech and incitement. That debate was conducted in Europe after the Norwegian right-wing extremist Anders Behring Breivik killed over seventy people in a bombing and shooting rampage in July 2011. Breivik described his militant ideology in a compendium of texts, titled “2083—A European Declaration of Independence,” which he distributed electronically on the day of the attacks. His manifesto is, among other things, replete with anti-Muslim propaganda he had compiled from various Internet sources.

Apart from John Stuart Mill, another relevant liberal philosopher is Karl Popper. In his seminal work *The Open Society and Its Enemies*, written during World War II, Popper deals with what he calls “the paradox of tolerance.” Popper is a most convincing crown witness; he had no illusions about the rise of Nazism and the threat of the Anschluss, and he emigrated from Austria to New Zealand in 1937. The passage is worth quoting in full length:

Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them. – In this formulation, I do not imply, for instance, that we should always suppress the utterance of intolerant philosophies; as long as we can counter them by rational argument and keep them in check by public opinion, suppression would certainly be unwise. But we should claim the right to suppress them if necessary even by force; for it may easily turn out that they are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; they may forbid their followers to listen to rational

argument, because it is deceptive, and teach them to answer arguments by the use of their fists or pistols. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant. We should claim that any movement preaching intolerance places itself outside the law, and we should consider incitement to intolerance and persecution as criminal, in the same way as we should consider incitement to murder, or to kidnapping, or to the revival of the slave trade, as criminal.⁸

Incitement to terror is the symptom of a severe intellectual and moral illness, which means that combating incitement is not enough. As far as the Middle East is concerned, Israel is by far its most successful country, and that seems to arouse strong feelings of envy among its less successful neighbors. Israel has achieved greatly in the economic, cultural, scientific, and many other spheres. It is a vibrant liberal democracy where no one, not even the president, is above the law, and where everyone enjoys the right to raise their voice against injustices and whatever they think has gone wrong.

In July 2011, the Washington-based Pew Research Center published the results of its international public opinion survey on Muslim-Western relations. Particularly striking was that 53 percent of Muslim publics blame American and Western policies for the lack of prosperity in their countries, while only 49 percent identify government corruption and only 42 percent lack of democracy as the main causes of domestic failure.⁹

As someone less pessimistic about the Arab Spring than Israeli public opinion seems to be, I am convinced that the Arab Spring can be the beginning of a success story if the Muslim publics abandon self-pity. Self-criticism instead of self-pity is the key to success. Democracy means that there is no excuse; you have a choice; you get the government you deserve. It is essential to stop blaming others: the Zionists, the Americans, the West, and so on.

Finally, it will apparently take a good deal more time until a convention against incitement to terror enters into force, especially in those countries where such provisions are badly needed. It is, however, well worth the effort to promote such a convention.

Michael Mertes is a German lawyer, state secretary (ret.), and journalist. He was a political adviser to Chancellor Helmut Kohl from 1987 to 1998. Thereafter he became foreign editor of the weekly *Rheinischer Merkur*. From 2006 to 2010 he served in the State Government of North Rhine-Westphalia as the state's representative to the German federal institutions in Berlin and to the European Union in Brussels. Since June 2011 he has been Resident Representative of the Konrad-Adenauer-Stiftung to Israel in Jerusalem.

ENDNOTES

- 1 <http://jcpa.org/wp-content/uploads/2012/07/Prevent-Incitement-to-Terror.pdf>.
- 2 <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=185&CL=ENG>.
- 3 <http://www.fco.gov.uk/en/news/latest-news/?view=Speech&id=685839582>.
- 4 <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=189&CM=8&DF=05/11/2011&CL=ENG>.
- 5 See John Perry Barlow's seminal "Declaration of the Independence of Cyberspace" (1996), http://w2.eff.org/Censorship/Internet_censorship_bills/barlow_0296.declaration.
- 6 Quoted from "London Conference on Cyberspace: Chair's statement," <http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=685663282>.
- 7 See <http://www.seop.leeds.ac.uk/entries/freedom-speech/#HarPriFreSpe>.
- 8 Karl R. Popper, *The Open Society and Its Enemies*, vol. 1 (The Spell of Plato) (London: Routledge, 1945), 265.
- 9 See <http://www.pewglobal.org/files/2011/07/Pew-Global-Attitudes-Muslim-Western-Relations-FINAL-FOR-PRINT-July-21-2011.pdf>, 2.