The Digital War on Human Rights: Guilty Until Proven Innocent: In Light of the Counter-Terrorism and Border Security Act of 2019

Dr. Fatemah Albader*

INTRODUCTION

As new technologies continue to emerge, so do new violations of human rights. While new technologies have made it possible for state governments to use more advanced tools to counter violations of human rights, these tools have also made it possible for state governments to use them to commit violations of human rights. Where previously inaccessible, state governments now have the power to tap into the digital arena to utilize more sophisticated means of censorship and surveillance. This is most often viewed in the context of state government responses to combating terrorism.

In recent years, state governments have justified deeply invasive actions on their citizens on the basis that national security concerns so require them in order to efficiently combat terrorism.[1] Such actions, which overshadow justifications furthered by the international law principles of proportionality and necessity, are growing in number and are seen in democratic and undemocratic States alike.[2] To combat terrorism, many governments have implemented mechanisms that limit the public's right to access information on the Internet, which clearly

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1. Jeremy Sarkin, *Balancing National Security and Human Rights: International and Domestic Standards Applying to Terrorism and Freedom of Speech*, *in* GOAL 16 OF THE SUSTAINABLE DEVELOPMENT GOALS: PERSPECTIVES FROM JUDGES AND LAWYERS IN SOUTHERN AFRICA ON PROMOTING RULE OF LAW AND EQUAL ACCESS TO JUSTICE 195, 195–96 (Anneke Meerkotter & Tyler Walton, eds., 2016).

2. *See id.*; *see also* HUMAN RIGHTS WATCH, "ERADICATING IDEOLOGICAL VIRUSES" CHINA'S CAMPAIGN OF REPRESSION AGAINST XINJIANG'S MUSLIMS 1–3 (2018), https://www.hrw.org/sites/default/files/report_pdf/china0918_web2.pdf.

violate an individual's right to freedom of speech and expression.[3] Most recently, the government of the United Kingdom has proposed a law that criminalizes the act of merely viewing terrorist material online.[4] As for the issue of surveillance, new technologies have made it easier for state governments to monitor the movement of individuals on the fear, however unsubstantiated, that these individuals may be linked to terrorist activity.[5] Again, the United Kingdom has criminalized the mere viewing of terrorist material online in an attempt to prevent potential terrorist activity and indoctrination.[6] Such actions depart significantly from the well-known presumption of innocent until proven guilty.[7]

Combating terrorism, while necessary, is no easy feat. Governments should be applauded for their contributions and commitment to combating terrorism in the digital context. The actions of the British government, however, far exceed justifiable purposes. Rather, the British government's Draconian measures have the potential to violate the rights of individuals to be free from human rights abuses. These new security measures provide a new form of repression, aided by the use of digital technology. It seems, then, that the advent of technology could lead to the downfall of the basic human rights framework. It thus becomes ever so necessary to reinforce human rights principles in the context of the digital arena, which is what this article will aim to accomplish.

This article will focus on the issue of censorship and surveillance, specifically in the context of the United Kingdom's recently enacted legislation: The Counter-Terrorism and Border Security Act of 2019. In hopes to resolve the perceived tension between freedom of expression and combating terrorism, this article will first delve into a discussion of the Act at issue, assessing its legality under both national and international law. This article will then analyze the balancing framework that

3. *See* Lizzie Dearden, *UK Government Straying Towards 'Thought Crime' by Criminalising Viewing Terrorist Material, UN Inspector Says*, INDEPENDENT (June 29, 2018, 6:33 PM), https://www.independent.co.uk/news/uk/politics/thought-crime-uk-un-terrorism-government-viewing-material-offence-law-a8423546.html.

4. *Id.*

5. *See id.*

6. *Id.*

7. *See UK: Amend Flawed Counterterrorism Bill*, HUM. RTS. WATCH (Oct. 15, 2018, 3:00 AM), https://www.hrw.org/news/2018/10/15/uk-amend-flawed-counterterrorism-bill.

reconciles the human rights framework with national security concerns in accordance with the international law principles of necessity and proportionality, most aptly applied in the context of human rights. In rejecting this balancing test, this article will suggest an alternative test in which human rights and national security concerns are viewed; not as false dichotomies but, rather, as complementary to one another. Without one, the other cannot be achieved, as this article will show. With that in mind, let us turn to the Act, which will constitute the bulk of the discussion in aiming to resolve the tension between human rights and national security concerns in the context of counter-terrorism.

I. LEGALITY OF THE COUNTER-TERRORISM AND BORDER SECURITY ACT OF 2019

The Counter-Terrorism and Border Security Act of 2019 ("The Act") came into force after the United Kingdom ("UK") witnessed four deadly terrorist attacks in 2017, resulting in significant support for cracking down on terrorist activities in the region.[8] These efforts, however, transcend the lofty goal of combating terrorism and instead infringe on the human rights of UK residents. The Act, for one, effectively curtails citizens' ability to view information online, as well as their right to freedom of expression, on the misguided basis that national security concerns necessitate limitation.[9]

The Act, which was awarded royal assent and entered into force on April 12, 2019, makes it a crime to express "an opinion or belief that is supportive of a proscribed organization," where doing so would be considered "reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organization."[10] By attaching the test of recklessness to speech crimes, the legislation has, in effect, removed the

8. *See* DAVID ANDERSON, ATTACKS IN LONDON AND MANCHESTER BETWEEN MARCH AND JUNE 2017 1–2 (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664682/Attacks_in_London_and_Manchester_Open_Report.pdf (independent report utilized by UK central government); Jamie Grierson, *Counter-Terror Bill is a Threat to Press Freedom, Says Campaigners*, GUARDIAN (Oct. 24, 2018, 7:01 PM), https://www.theguardian.com/media/2018/oct/25/counter-terror-bill-is-a-threat-to-press-freedom-say-campaigners.

9. Counter-Terrorism and Border Security Act 2019, c. 3, § 3(2) (Eng.), http://www.legislation.gov.uk/ukpga/2019/3/pdfs/ukpga_20190003_en.pdf.

10. *Id.* c.3, § 1.

element of criminal intent from the generally agreed upon elements of crime. Now, even if one does not intend to express an opinion supporting a proscribed organization, that individual may still be criminally liable if such speech was made recklessly.

Additionally, the Act, which amended the already existing Terrorism Act of 2000, unveiled a new offense in which criminal liability will attach for merely viewing or accessing information online that is "likely to be useful to a person committing or preparing an act of terrorism."[11] Before, criminal liability only required downloadable material resulting in a permanent record being formed.[12] With the new Act, however, this offense extends to materials that are simply viewed or streamed online.[13] While the newly enacted legislation does bar criminal liability for individuals who: 1) did not know or have reason to know that the material was likely to contain terrorist propaganda, or 2) are exempted, such as journalists or academic researchers,[14] the majority of citizens could still find themselves facing criminal charges for simply exercising their rights to freedom of expression and privacy. The law is therefore broad enough to hold responsible those who are merely interested in furthering their knowledge on the topic of terrorism for personal purposes.[15]

After his two-week visit to the UK, the first United Nations Special Rapporteur on the right to privacy, Professor Joe Cannataci, reported that the law is leaning more towards thought crime.[16] Professor Cannataci properly noted that "the difference between forming the intention to do something and then actually carrying out the act is still fundamental to

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11. *Id.* c.3, § 3(4).

12. *Counter-Terrorism and Border Security Act 2019*, GOV.UK, https://www.gov.uk/government/collections/counter-terrorism-and-border-security-bill-2018 [hereinafter Counter-Terrorism Government Collection] (last updated May 7, 2019).

13. Counter-Terrorism and Border Security Act 2019, c. 3, § 3(2). The Act has far-reaching consequences such that, recently, British Home Secretary Priti Patel has proposed a new terrorism offence for possession of terrorist material. At current, criminal legislation extends to propaganda and not just mere possession. Haroon Siddique & Jamie Grierson, *Home Office Proposes Offence of Possessing Terrorist Propaganda*, GUARDIAN (Jan. 14, 2020, 4:53 PM), https://www.theguardian.com/uk-news/2020/jan/14/home-office-proposes-offence-of-possessing-terrorist-propaganda.

14. Counter-Terrorism and Border Security Act 2019, c. 3, § 3(4).

15. Rebecca Hill, *New UK Counter-Terror Laws Come into Force Today – Watch Those Clicks, People. You See, Terrorist Propag . . . NOOO! Alexa Ignore Us!*, REGISTER (Apr. 12, 2019, 3:06 PM), https://www.theregister.co.uk/2019/04/12/uk_counterterror_act_online_content.

16. Dearden, *supra* note 3.

criminal law."[17] As such, individuals should not be punished for intentionally viewing terrorist material online, the *mens rea* element, without also having taken action, the *actus reus* element, to actually commit the crime. Privacy rights protect our online search history from being monitored.[18] Freedom of expression protects individuals from being punished for merely thinking about engaging in criminal activity.[19] The new legislation, which carries a hefty sentence of up to 15 years in prison,[20] in essence, effectively punishes one's thought and expression, opening the floodgates of litigation to endless possibilities. For example, one could argue that looking up a flight schedule online may fall under the type of material that could be of use to a terrorist. This is especially true because there are no established criteria informing UK residents of what might constitute information likely to be of use to a terrorist, thus resulting in far-reaching consequences.[21]

In addition to provisions that violate the right to freedom of expression and privacy, the Act also introduces a new offense, which prohibits UK residents from entering, or, if they are already located in these specific areas, from remaining in areas outside the UK that are designated as necessary to protect the public from terrorism,[22] thereby violating the right to freedom of movement as well. This provision stems from the fear that individuals, so-called foreign fighters, are traveling to high-risk areas, such as Iraq or Syria, to fight alongside terrorists in these regions and, when they return, the UK government will be unable to prosecute them.[23] Thus, this clause would allow the

17. *Id.*

18. G.A. Res. A/RES/68/167 (Jan. 21, 2014); The right to privacy in the digital age *Rep. of the Office of the United Nations High Commissioner for Human Rights* ¶ 5, U.N. Doc. A/HRC/27/37 (June 30, 2014); Frank La Rue (Special Rapporteur on the on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Report of the Special Rapporteur* ¶ 1, U.N. Doc. A/HRC/23/40 (Apr. 17, 2013).

19. *See* G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966), art. 18(1); Dearden, *supra* note 3.

20. Counter-Terrorism and Border Security Act 2019, c. 7, § 7(3).

21. *See generally* Counter-Terrorism and Border Security Act 2019.

22. *Id.* c. 3, § 4. For a list of the main provisions, see Counter-Terrorism Government Collection, *supra* note 12.

23. *Counter-Terrorism and Border Security Act 2019: Designated Area Offence Fact Sheet*, GOV.UK (Feb. 11, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778109/2019-02-11_Designated_Area_Offence_RA.pdf (information site for Central Government).

government to stop individuals upon their return from designated areas for potential questioning and investigation.[24] That alone is enough to discourage individuals from visiting these areas.[25] Additionally, individuals who enter a designated area before it is designated as such and are consequently unable to leave could later face criminal responsibility for *remaining* in the area after its designation.[26] While journalists, those visiting family members, and people with other legitimate reasons are exempted, the Act carries a 10-year sentence for anyone who is deemed to violate this offense.[27] Thus, this provision assumes that a person has guilty motivations, thereby suggesting that national security legislation is headed toward a system of guilty until proven innocent.

The Act lends itself to considerable abuse by the government of the United Kingdom. No balancing analysis would hold national security concerns to override human rights in the abovementioned instances, no matter the outcome. The protection of freedom of thought and expression, the freedom of movement, and the right to privacy are deemed so fundamental that these rights are explicitly enshrined in many national constitutions, as well as in international treaties.[28] Accordingly, the legality of the Act will now be considered, resulting in the conclusion that the Act violates both UK law and international law.

A. THE LEGALITY OF THE ACT UNDER NATIONAL AND SUPRANATIONAL LAW

Article 10(1) of the Human Rights Act of 1998 provides that "everyone has the right to freedom of expression" in the United Kingdom.[29] Article 8 states, "everyone has the right to respect for his private and family life, his home and his correspondence."[30] The Human Rights Act (HRA) incorporates into UK law the rights contained in the European Convention on

24. Counter-Terrorism and Border Security Act 2019, c. 3, sch. 3.
25. *See id.*
26. *Id.* c. 4.
27. *Id.* c. 3, § 4.
28. *See, e.g.*, U.S. CONST. art. I; KUWAIT CONST. arts. 31, 36, 39; S. AFR. CONST., 1996; G.A. Res. 2200A (XXI), *supra* note 19, art. 19(1).
29. Human Rights Act 1998, c. 42, § 10(1) (Eng.).
30. *Id.* c. 42, § 8(1).

Human Rights (ECHR), to which the UK is a Party.[31] Similar to the ECHR, the HRA provides that freedom of expression rights and privacy rights may not be limited, except where "prescribed by law *and* are necessary in a democratic society, [*inter alia*], in the interests of national security . . . ."[32] On its face, then, the Counter-Terrorism and Border Security Act appears to be legal under national law because it appears to comply with the requirements of both the ECHR and the HRA. However, the Act, in fact, fails both prongs, namely, that the Act is not prescribed by law and that it is not necessary in a democratic society for national security purposes.[33]

In order for the government to interfere with individuals' qualified rights under the HRA, two elements must be met: First, the act setting out the limitation must be prescribed by law. Second, the law must involve a legitimate aim, which includes national security concerns, where the interference is absolutely necessary to protect that legitimate aim.[34] Thus, governments cannot exceed that which is necessary in order to achieve a legitimate government aim. Turning to the first prong, for an act to be prescribed by law, there must be clear legislation to enable individuals to understand exactly what forms a violation under the law.[35] Thus, three elements must be met. The law is required (1) to be adequately accessible, (2) to be "formulated with sufficient precision to enable the citizen to regulate his conduct," and (3) to "afford a measure of legal protection against arbitrary interferences by public authorities . . . ."[36] This is to ensure that laws do not grant authority figures with excessive discretion to limit rights afforded to individuals, such as the freedom of expression.[37] The provision preventing expression that is in support of a proscribed

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31. *See id.* c. 42, prologue.

32. *Id.* c. 42, § 10(2) (emphasis added); *see id.* c. 42, § 8(2), for similar phrasing.

33. *See id.* c. 42, §§ 8(2), 10(2); Counter-Terrorism and Border Security Act 2019, art. 4.

34. Human Rights Act 1998, c. 42, § 10(2) (Eng.).

35. *See* Sunday Times v. United Kingdom, App. No. 6538/74, 2 Eur. H.R. Rep. 245, ¶ 49 (1979) (stating elements required for a law to be prescribed by law).

36. *Id.*; *see generally* NINA-LOUISA A. LORENZ, THE LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS 204 (2007).

37. *See The Impact of UK Anti-Terror Laws on Freedom of Expression, Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights*, ARTICLE 19 (Apr. 2006) at 2, https://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf.

organization is considerably arbitrary.[38] For one, the government is in the position to choose which organizations are proscribed and which are not. Additionally, the government can change the list of proscribed organizations at any given moment, leading to more uncertainty.[39] As for the right to privacy, the Act would provide police officers with the opportunity to engage in racial profiling of individuals upon their return to the UK and, as such, forcing these individuals to disclose their whereabouts and reasons for their whereabouts would also violate the prong that prohibits arbitrary interference.

The Act also fails to meet the second prong, namely that the law must be necessary in the interests of national security.[40] UK legislators have deemed that the Act is necessary for the interests of national security in order to combat the growing threat of terrorism in the country. Thus, at first glance, the principle of necessity appears to be fulfilled here. However, the Act is not, in fact, necessary for the protection of national security, because it exceeds that which may be necessary to protect national security interests. The Act excessively restricts freedom of expression and freedom of movement beyond that which may be deemed necessary. Take, for example, the provision that criminalizes the mere clicking on terrorist material online,[41] and the provision that criminalizes UK residents entering or remaining in designated areas.[42] Both provisions assume guilty intentions, in the absence of actually perpetrating a wrongful act.[43] While governments are encouraged and required to protect citizens from atrocities such as terrorist attacks, governments must not impose blanket restrictions, which would set a dangerous precedent and result in a chilling effect on citizens' human rights, in situations where no crime has been committed. Especially worrisome is the lowering of the test of expression of support for a proscribed organization to recklessness, so that actual intention is no longer

38. *See* Counter-Terrorism and Border Security Act 2019, c. 1.

39. *Proscribed Terrorist Organisations*, GOV.UK (Feb. 28, 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869496/20200228_Proscription.pdf.

40. *See* Human Rights Act 1998, c. 42, §§ 8(2), 10(2) (Eng.).

41. *See supra* Part I, for a discussion of the various provisions of the Act that are at issue.

42. *See supra* Part I, for a discussion of the various provisions of the Act that are at issue.

43. *See supra* Part I, for a discussion of the various provisions of the Act that are at issue.

vital for a finding that an individual has violated the law.

Additionally, the right to privacy is hindered if UK residents are to be expected to justify their reasons for traveling abroad upon their return and if their browser history is monitored. These overreaching provisions may result in a chilling effect on free expression and the related right to private life, which is what the HRA and the ECHR aim to avoid.[44] By placing disproportionate burdens on travel and expression, many individuals may be deterred from traveling to designated areas or researching material online, on the fear that their excuses, however reasonable, may not be accepted, thereby exposing those individuals to potential criminal liability.

In addition to placing undue burdens on free expression and right to privacy, prohibiting someone from traveling to places designated as terrorist hotspots on the unfounded basis that he or she may be engaged in terrorist activity abroad, well before there is solid proof suggesting a potential link to criminal activity, places egregious impositions on one's right to freedom of movement as well. The right to freedom of movement involves not only the right to travel freely within the territory in which the citizen resides but also the right to travel abroad and safely return upon arrival.[45] Such a right may only be restricted, again, when necessary to protect public order or safety.[46] Permitting governments to determine areas designated as terrorist hotspots could result in a detrimental slippery-slope if other nations were to follow suit, one fueled by political agendas and self-serving government interests. Sri Lanka's Draft Counter Terrorism Act of 2018, for one, seems to heavily mimic the Act. Section 62 of Sri Lanka's proposed bill "allows senior police officers to make restrictions on movement and prohibitions on leaving or entering a specific area when an offence under the Bill has been committed or is likely to be committed."[47] The Act could

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44. Human Rights Act 1998, c. 42, §§ 8, 10; Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 8, 10, Nov. 4 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; Trine Baumbach, *Chilling Effect as a European Court of Human Rights' Concept in Media Law Cases*, 6(1) BERGEN J. CRIM. L. & CRIM. JUST. 92, 92 (2018); *see also* Frank La Rue (Special Rapporteur on the on the Promotion and Protection of the Right to Freedom of Opinion and Expression) *Rep. of the Special Rapporteur* ¶ 1, U.N. Doc. A/HRC/23/40 (Apr. 17, 2013).

45. JÉRÉMIE GILBERT, NOMADIC PEOPLES AND HUMAN RIGHTS 73 (2014).

46. ALAN DOWTY, CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT 4 (2014).

47. AMNESTY INT'L, COUNTER TERRORISM AT THE EXPENSE OF HUMAN RIGHTS: CONCERNS WITH SRI LANKA'S COUNTER TERRORISM BILL (2019).

therefore set the stage for dangerous precedent because other States are likely to follow suit, resulting in more laws being enacted that are in violation of human rights.

While the right to freedom of movement is not explicitly enshrined in the HRA, or any other applicable legislation, this right is preserved in the UK through common law,[48] which results in binding precedent in the English legal system.[49] In 2007, the House of Lords deemed that a provision in the Act's predecessor, the Anti-Terrorism Crime and Security Act of 2001, imposing control orders against those suspected of terrorism, "can be incompatible with the convention when they place extreme, arguably punitive restrictions on an individual's freedom of movement, privacy, and personal associations without adequate due process of law."[50] Twelve years later, that is exactly what the Act has effectuated.

Accordingly, because the Act violates both legislative acts and common law in the UK, in addition to supranational law of the European Union to which the UK is, as of now, still bound,[51] the Act is not valid under UK's domestic law.

B. THE LEGALITY OF THE ACT UNDER INTERNATIONAL LAW

In addition to national law obligations, the UK is also bound by its international law obligations to respect human rights.[52] Specific to terrorism, various Security Council and General Assembly resolutions "require that any measures taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with States' obligations under international law, in particular international human

48. David Jenkins, *Common Law Declarations of Unconstitutionality*, 7 INT'L J. OF CONST. L. 183, 185 (2009).

49. JAMES CRAWFORD & VAUGHAN LOWE, BRITISH YEARBOOK OF INTERNATIONAL LAW 57 (2008).

50. Sec'y of State for the Home Dep't v. JJ & Others [2007] UKHL 45; Sec'y of State for the Home Dep't v. MB [2007] UKHL 46; Jenkins, *supra* note 48.

51. *Transition Period*, EUR. COMMISSION, https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/brexit-brief/transition-period_en (last visited Apr. 22, 2020). "All EU law, across all policies, is still applicable to, and in, the United Kingdom, with the exception of provisions of the Treaties and acts that were not binding upon, and in, the United Kingdom before the Withdrawal Agreement entered into force." *Id.* In addition, Brexit does not affect the HRA, which incorporates the ECHR into UK law and, as of now, the UK is still governed by the HRA.

52. *Member States*, UNITED NATIONS, https://www.un.org/en/member-states/ (last visited Apr. 4, 2020).

rights law, refugee law, and international humanitarian law."[53] For this reason, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism deemed certain provisions in the Act to "fall short of the United Kingdom's obligations under international human rights law, including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR)."[54] In particular, three rights are at issue: freedom of expression, privacy, and freedom of movement.

1. Freedom of Expression

Similar to the freedom of expression provision recognized in the HRA and the ECHR, Article 19 of the International Covenant on Civil and Political Rights ("ICCPR") protects one's "right to hold opinions without interference."[55] It also includes a similar provision restricting this right *only* where restrictions "are provided by law and are necessary . . . for the protection of national security . . . ."[56] As a State Party to the ICCPR, the UK is obliged to respect the rights contained in the ICCPR, subject to any applicable reservations, to which none are present here.[57] Since the UK has made no reservations to Article 19 of the ICCPR, it is bound to respect Article 19 in its entirety.[58] The two-part test—that the restriction be provided by law and the test of necessity—is the same test that is applied by the ECHR. Accordingly, the test need not be reanalyzed, as it has been addressed in Section A above.[59] However, the applicability and importance of Article 19 of the ICCPR and its relevance to the Act at issue will now be addressed.

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53. Fionnuala Ní Aoláin (Special Rapporteur on the on the Promotion and Protection of the Human Rights and Fundamental Freedoms while Countering Terrorism) *Mandate of the Special Rapporteur* ¶ 4, U.N. Doc. OL GBR 7/2018 (July 17, 2018).

54. *Id.* ¶ 5. Note that the Special Rapporteur's report criticized the draft Bill, not the Act itself. However, the provisions at issue have not changed, so the relevance of the report is not affected.

55. G.A. Res. 2200A (XXI), *supra* note 19, art. 19(1).

56. *Id.* art. 19(3)(a).

57. *See* Status of Treaties: International Covenant on Civil and Political Rights, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

58. *See id.*

59. *See* discussion *supra* Section I.A.

Article 19 of the ICCPR aims to protect individuals from overbroad laws concerning civil and political rights that are far-reaching in application.[60] In an opinion by the Working Group on Arbitrary Detention, the Working Group noted that "vaguely and broadly worded laws have a chilling effect on the exercise of the right to freedom of expression with its potentials for abuse as they violate the principle of legality," which is enshrined in Article 11 of the Universal Declaration of Human Rights ("UDHR") as well as Article 15 of the ICCPR.[61] Specific to anti-terrorism, the Working Group has noted that anti-terrorism laws must be protected from overbroad laws, as this has the capacity to reach not only suspects but also innocent individuals, increasing the potential for arbitrary detention.[62] Accordingly, the Working Group has provided a list of principles that should be respected, including, Article 19 of the ICCPR and there to be concrete charges against individuals suspected of terrorist activity.[63] Vaguely worded laws, such as those contained in the Act, run counter to this requirement.

In relation to freedom of expression, the expression of an opinion in support of a proscribed organization, without any incitement, falls under overbroad laws, to which the ICCPR intends to prohibit. Specifically, individuals do not know what actions would constitute an expression of support.[64] Similarly, the mere viewing of terrorist material online is not enough to hold accountable an individual on charges that are far less than concrete. Nor can the UK deem it necessary for purposes of national security. For comparative purposes, France overturned similar legislation that also criminalized the mere viewing of terrorist websites.[65] There, the French Constitutional Court held the legislation to be "an extreme and disproportionate

60. *See* Status of Treaties: International Covenant on Civil and Political Rights, *supra* note 57.

61. Working Group on Arbitrary Detention, Adopted Opinions of Its Seventy-Eighth Session ¶ 98, U.N. Doc. A/HRC/WGAD/2017/41 (July 26, 2017).

62. *Id.* ¶ 99.

63. *Id.* ¶ 100.

64. *See Mandate of the Special Rapporteur*, *supra* note 53, ¶ 6.

65. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2017-682QPC, Dec. 15, 2017 [hereinafter Decision No. 2017-682QPC]; Adam, *French Constitutional Court Stands Up for Free Speech Striking Down "Anti-Terrorist" Law*, DURAN (Dec. 16, 2017), https://theduran.com/french-constitutional-court-stands-up-for-free-speech/; Nicolas Boring, *France: Constitutional Court Strikes Down Prohibition on Accessing Terrorist Websites*, LIBR. CONGRESS (Jan. 17, 2018), https://www.loc.gov/law/foreign-news/article/france-constitutional-court-strikes-down-prohibition-on-accessing-terrorist-websites/.

infringement on the freedom of expression and that the provisions of the legislation were neither necessary nor adequate, given provisions of existing laws used to fight genuine terrorism."[66]

2. Privacy

Related to freedom of expression is the right to privacy, which is protected by Article 17 of the ICCPR, to which the UK, again, expressed no reservation.[67] The right to privacy includes individuals' right "to determine who holds information about them and how is that information used."[68] In relation to the Act, should individuals' online data be revealed or should individuals be forced to disclose their whereabouts and justifications for their whereabouts, their right to privacy will be violated.

While the right to privacy does not include limiting language, it is generally held to involve the same limitations test set forth in Article 19.[69] Accordingly, to limit the right to privacy, the limitation must be provided by law and must be necessary in the interest of national security. As with freedom of expression, a restriction cannot be provided by law if it is too vague or arbitrary in order to ensure that legislation is not "unjust, unpredictable or unreasonable."[70] To prosecute individuals who click on terrorist material online, the government must look into the browser history of individuals and monitor the websites that are visited. This, alone, is a serious invasion of the right to privacy, as has been recognized by the U.N. Human Rights Committee.[71] Additionally, the provision, which makes it an offense to enter or remain in designated areas abroad, is both vague and arbitrary. As previously described, this provision gives the government great powers to designate countries as terrorist hotspots, which is most certainly not necessary to fight terrorism because the provision applies to action that does not imply the threat or use of violence. Thus, these laws are overbroad and are sure to reach many individuals who are not

66. Adam, *supra* note 65.

67. G.A. Res. 2200A (XXI), *supra* note 19, art. 17.

68. *Report of the Special Rapporteur*, *supra* note 18, ¶ 22.

69. *Id.* ¶ 28.

70. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, HUMAN RIGHTS, TERRORISM AND COUNTER-TERRORISM, FACT SHEET NO. 32, at 45 (2007), https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf.

71. *Report of the Special Rapporteur*, *supra* note 18, ¶ 32.

engaged in terrorist activity and have no intentions to do so. Thus, for example, an individual visiting family located within a designated terrorist hotspot could face potential prosecution under the Act. The law therefore borders on an attempt to prosecute individuals before actual criminal intention, if any, is formed. This is in no way, necessary for a democratic society since individuals cannot be prosecuted for simply entering or remaining in a country designated as a terrorist hotspot.

3. Freedom of Movement

Moreover, individuals located in a country before it is designated as a hotspot are forced to choose between returning to the UK with valid justifications or stay in the designated area, for fear that their justifications may not be accepted. Accordingly, their right to freedom of movement, which is protected by Article 12 of the ICCPR, may be inadvertently hindered as well.[72] This right may only be restricted where provided by law and is necessary to protect national security.[73] While the UK has made a reservation in regard to Article 12, it is not applicable in this case.[74] The reservation is in regard to "persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom."[75] The issue, here, is not the inability to enter or remain in the UK. Rather, it is that the law allows police officers to stop and question those suspected of being foreign fighters after they return to the UK. Accordingly, the reservation would not prevent the applicability of Article 12 and, therefore, Article 12 applies in its entirety.

First, the Act cannot be said to be provided by law, as, again, it fails to ensure that the law does not apply arbitrarily.[76] In permitting police officers to stop suspected terrorists, the Act would provide police officers with the opportunity to engage in racial profiling of individuals upon their return to the UK. In speaking against the widening of the scope of the proscription offenses, Lord Anderson of Ipswich, as Independent Reviewer of Terrorism Legislation, stated that, currently, "at least 14 of the

72. G.A. Res. 2200A (XXI), *supra* note 19, art. 12(1).

73. *Id.* art. 12(3).

74. *See* Status of Treaties: International Covenant on Civil and Political Rights, *supra* note 57.

75. *Id.*

76. LORENZ, *supra* note 36.

74 organisations proscribed under the Terrorism Act 2000, not including the 14 Northern Irish groups, are not concerned in terrorism and therefore do not meet the minimum statutory condition for proscription."[77] As such, these 14 organizations should not be placed on the proscribed organizations list. This thereby lends itself to more credibility that the related provision in the Act is not provided by law and therefore not valid under the ICCPR.

Second, even if one were to find that the Act is provided by law, it most is not necessary to protect matters of national security. As discussed above, banning individuals from traveling to areas designated as terrorist hotspots is not necessary in a democratic society.[78] The law presupposes that individuals traveling to these designated areas will engage in terrorist activity upon their return to the UK. However, without the formation of criminal intent, this provision is not necessary to protect UK nationals from potential terrorist activity, as it extends far beyond reaching only those who may be suspect of terrorist activity. Individuals with no criminal intent whatsoever may also be stopped upon their return to these designated areas and forced to provide justifications for their travel, thereby preventing individuals from either traveling to these hotspots or returning to the UK, should they face repercussions upon returning. As with the right to privacy and freedom of expression, none of these laws are provided by law nor are they necessary to protect matters of national security.

For these reasons, human rights concerns would far outweigh laws that would criminalize inherently non-criminal behavior in the name of national security. Where there are valid national security concerns, however, under the current test the legislation must remain within the limits of proportionality and necessity, as has been described to much detail. Let us now turn to these two principles to analyze their effectiveness in accordance with international human rights law.

77. 794 Parl Deb HL (5th ser.) (2018) col. 1641 (UK).

78. *Supra* Part A, the discussion on the legality of designated hotspots.

II. PROPORTIONALITY, NECESSITY, AND HUMAN RIGHTS IN THE CONTEXT OF THE COUNTER-TERRORISM AND BORDER SECURITY ACT OF 2019

Human rights are not absolute.[79] While certain human rights are well-regarded as absolute, such as the right to be free from torture,[80] the majority of human rights are qualified. As such, they can be subject to government restrictions. In the majority of cases, the human right that is at issue must be balanced against a legitimate state interest, which includes national security concerns.[81]

Courts, such as the European Court of Human Rights (the "European Court"), often balance human rights with public policy interests, in determining whether the right can be limited. In one landmark case, the European Court established that a clear violation of the right to freedom of expression existed when the Turkish government convicted two journal editors for publishing articles containing what the domestic courts classified as "statements by a terrorist organization."[82] In this case, the European Court found the Turkish law, which called for the conviction of "anyone who print[ed] or publishe[d] statements or leaflets by terrorist organizations," to be vague and overbroad.[83] Additionally, the European Court found that interference with human rights cannot exceed that which is necessary to achieve the legitimate state interest in question.[84] Similarly, the French Constitutional Court rightly held that an act criminalizing the mere viewing of terrorist material online is neither necessary nor proportionate.[85] Interestingly, in France, those convicted under the law would have faced two years of prison time,[86] less than one-seventh of that faced by those in the UK for a similar offense.[87] As such, it cannot be said that the UK prison sentence is at all proportionate, especially when, for many

79. *See* Amitai Etzioni, *Life: The Most Basic Right*, 9 J. HUM. RTS. 100, 104 (2010).

80. *See* ECHR, *supra* note 44, art. 3.

81. *See id.* arts. 8, 10–11.

82. *Gözel & Özer v. Turk.*, App. Nos. 43453/04, 31098/05 (ECtHR 2010), http://hudoc.echr.coe.int/eng?i=002-888.

83. *Id.*

84. *Id.*; *see also* Luka Anđelković, *The Elements of Proportionality as a Principle of Human Rights Limitations*, 15 L. & POL. 235, 240 (2017).

85. Decision No. 2017-682QPC, *supra* note 65, ¶¶13–14.

86. *Id.*

87. Counter-Terrorism and Border Security Act 2019, c. 7.

of the crimes, there is no criminal intent. Viewing terrorist propaganda online is not a crime. Traveling to areas highly suspect of terrorist activity is not a crime. Merely expressing an opinion supportive of a proscribed organization is not a crime—not without actual intention to engage in terrorist activity. As such, the criminalization of these acts, which carry with them prison sentences of over a decade is neither proportionate nor commendable, in the name of anti-terrorism efforts, by any stretch of imagination.

Nonetheless, governments often justify highly invasive legislative policies in the name of national security. As such, governments often justify invasive actions on the basis that these actions are proportional and necessary, justifications which are often unsubstantiated. It is easy to find that legislation meets proportionality and necessity requirements.[88] As such, many court cases, especially national court cases, do not find many violations of human rights, finding instead that the balance often tips in favor of the State.[89] The principles of proportionality and necessity, which are interrelated, cannot exist without each other. These benchmarks provide a framework in which human rights values and national security concerns are viewed as independent from one another. Specific to the Act, if one were to balance national security interests with human rights using the current test, the Act would be invalid, as the provisions in the Act are neither proportionate nor necessary. Yet, the Act was still passed, as the UK government deemed national security interests to trump human rights in these instances. This is the risk that is often faced when balancing State aims with human rights, even though the national security concerns are not legitimate. Where there are valid national security concerns, however, and the legislation remains within the limits of proportionality and necessity, an effective framework will now be proposed to deal with such conflicts to ensure that human rights are not superseded by national security interests.

III. ALTERNATIVE TEST: CONTRADICTORY OR COMPLEMENTARY?

There is a tendency to view human rights and national

88. *See, e.g.*, Anđelković, *supra* note 84, at 243.
89. *Id.* at 243.

security concerns as being mutually exclusive.[90] Instead of thinking of human rights and national security as being on opposite sides of the spectrum, one could look at them as being complementary to one another. This alternative framework does away with the balancing test, thereby reducing the risk that national security concerns may trump human rights during moments of fleeting security guided by terrorist attacks. Rather than advancing national security mechanisms at the expense of human rights, state governments could focus on implementation strategies that would incorporate human rights *into* national security strategies. Still, the law should be necessary and proportional. But, in addition to those principles, there should be additional safeguards to protect human rights from being superseded by invasive national security policies. To ensure that this does not happen, legislation combatting terrorism should take an integrated approach, one constituting both national security concerns and human rights. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has advocated for this integrated approach in discussing the legality of the UK Act.[91] As such, let us take the example of the Act to establish how one would complement national security policies with human rights concerns.

First, as it currently stands, the provision that criminalizes the mere viewing of terrorist material online is in violation of human rights, namely the freedom of expression and the related right to privacy.[92] It has been rightly argued that the mere viewing of terrorist material online, without actual criminal intent to commit a crime, is not enough to hold this provision as being necessary in the interests of national security.[93] To make this provision more compliant with international law standards, it must be amended to reflect the essential element of criminal acts, namely that the *mens rea* be supported with the requisite *actus reus*. Here, as with all other provisions that are at issue, the UK is attempting to stop potential terrorist activity before it commences. However, in doing so, the UK is punishing inherently non-criminal behavior on the presupposition that

90. William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249, 249 (2004).

91. *Cf. Mandate of the Special Rapporteur*, *supra* note 53, ¶ 4.

92. Counter-Terrorism and Border Security Act 2019, c. 7.

93. Liberty, *Liberty's Second Reading Briefing on the Counter-Terrorism and Border Security Bill 2018* (June 2018), ¶ 16.

individuals who have guilty thoughts will lead to guilty actions. Punishing guilty thoughts, before a guilty action has taken place, is a dangerous precedent to set in a democratic society. As such, incorporating these concerns into national security policies would ensure that human rights violations are not committed and that chilling effects on human rights are not felt. While there are some exemptions, the exemptions fail on their own because they do not relieve the fear of the potential for prosecution. As has been rightly stated, "[i]t is a brave reporter or researcher who will be undeterred by the prospect of a 15-year prison sentence."[94]

Another provision in the Act at issue is the prohibition against expressions of support for proscribed organizations.[95] Here, the provision could be more specific so that it, too, reflects the missing element of intent required for an act to be considered criminal. As of now, the current test is that of recklessness. However, without criminal intent, this provision would violate UK's obligations under national and international law, as it is a blatant violation of freedom of expression and thought. In addition to intent, the Special Rapporteur has also argued that there must be a direct causal link between the speech being made and actual incitement.[96] In changing the provision to reflect both actual intent and actual incitement, no human rights violations would be at issue in this instance, thereby aligning human rights interests with national security concerns. Here, national security interests are still protected, but not at the expense of human rights, as human rights interests are equally protected as well.

Finally, the provision criminalizing the entering or remaining in designated areas blatantly disregards individuals' rights to freedom of movement and privacy.[97] To bring this provision in line with its international law obligations, the UK should ensure that safeguards are put in place so that individuals are not stopped arbitrarily. Additionally, individuals should not be forced to disclose their reasons for their travel plans upon returning to the UK, absent clear and convincing evidence that the individuals taken for questioning are, in fact, engaging in terrorist activity abroad. This is very difficult to prove when the law criminalizes activity before it becomes

94. *Id.*, ¶ 17 (quoting *id.*, ¶ 16).
95. Counter-Terrorism and Border Security Act 2019, c. 3, § 1.
96. *Mandate of the Special Rapporteur*, *supra* note 53, ¶ 8.
97. Counter-Terrorism and Border Security Act 2019, c. 3, § 4(2).

criminal. However, should there be clear proof that one has engaged in terrorist activity abroad, the provision may apply in the strictest sense. Otherwise, this provision falls short of UK's requirements under national and international law.

These small amendments could make the difference between a law violating human rights obligations and a law that complies with such obligations. As such, incorporating human rights into national security policies, and thereby ensuring respect for human rights, will provide the solution to the dilemma caused by human rights and contravening national security policies. In the digital age, where future advancements in technology will surely play a role on the limitation of human rights, it is time for human rights and national security to be viewed, not as false dichotomies, but as complementary to one another.

CONCLUSION

Countering acts of terrorism is, undoubtedly, a necessary objective. States are obligated to protect society against acts of terrorism. However, measures to combat terrorism should not be taken at the risk of expansively limiting human rights. Nor should such measures be taken to punish what has traditionally been unpunishable domain: guilty thoughts. The Act extends far beyond any reasonable limitation of human rights and, should the law be allowed to remain as it is, it will undoubtedly lead to the demise of the basic human rights framework. These laws provide the government with power to, in essence, prosecute potential individuals before a terrorist plot is in fact undertaken. The government is, accordingly, punishing thoughts, long before any criminal intent is formed. This law has been able to pass, as the UK deemed the law to meet necessity and proportionality requirements, thereby suggesting that such a balancing framework is not to the benefit of human rights.

As such, a better framework has been proposed to deal with human rights and national security concerns. Rather than viewing human rights and national security as two competing values, it is better to look at them as being mutually exclusive. In this sense, one can be assured that States do not justify highly intrusive national security policies at the expense of human rights, since human rights would now be incorporated into these same national security policies.

National security concerns are important. Human rights are

equally as important. To respect human rights, a complementary framework incorporating human rights with national security concerns, or any other legitimate government purpose for that matter, is better suited in dealing with potential risks of human rights violations. There is no doubt that one must be limited in favor of the other at times, but this must be very narrowly construed and only in situations that do not result in chilling effects on human rights. Accordingly, a better strategy would be to always incorporate human rights into legitimate national security policies to ensure respect for human rights at all times. The Act must therefore be struck down or redrafted to ensure compliance with human rights.