DANGEROUS EXPRESSIONS: THE ECHR, VIOLENCE AND FREE SPEECH

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Abstract How should one balance the freedom of expression and the prevention of violence? This article delves into the grey zone between hate speech and incitement to violence by assessing the jurisprudence of the European Court of Human Rights in cases of allegedly dangerous speech. Rather than labelling this case law as simplistic, as some critics even within the Court have done, it is shown that the jurisprudence reveals cleavages within the Court on whether to adopt a more or less consequentialist approach on the links between speech and violence. Freedom of expression cases should preferably be assessed on the merits under Article 10 ECHR since this allows for a balancing of the various interests involved. The application of the abuse of rights clause of Article 17 ECHR is for that very reason undesirable, in addition to its inconsistent use by the Court.

Keywords: Article 10 ECHR, Article 17 ECHR, conflict escalation, dangerous speech, European Convention on Human Rights (ECHR), European Court of Human Rights, freedom of expression.

I. INTRODUCTION

In July 2013 the Grand Chamber of the European Court of Human Rights (the 'European Court') issued its unanimous judgment in the *Vona* case.[1] It ruled that Hungary had not violated the freedom of assembly by disbanding the Hungarian Guard Association and the movement connected to it. The latter had organized a number of paramilitary marches in villages with Roma populations, during which its uniformed members called for defending ethnic Hungarians against 'Gypsy crime'. The Court held that such physically threatening and racially divisive demonstrations had an intimidating effect on a racial minority and went further than the mere expression of offensive ideas. In such circumstances, in the Court's view, the State cannot be required to wait until actual violence occurs before taking action. Although *Vona* focused on freedom of assembly, the Court emphasized in the judgment that many of the considerations were applicable equally to the freedom of expression, as they are the collective and individual dimensions respectively of the same issue.[2] *Vona* was an example of expression accompanied by threatening collective conduct.

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[1] *Vona v Hungary* App No 35943/10 (ECtHR, 9 July 2013).
[2] ibid, paras 53, 63, and 66.

[*ICLQ* vol 63, April 2014 pp 491–503] doi:10.1017/S0020589314000104

https://doi.org/10.1017/S0020589314000104 Published online by Cambridge University Press

Few issues are as contested as the limits of the freedom of expression. The case law of the European Court shows that these contestations continue up to the highest level of fundamental rights adjudication in Europe. More than in judgments dealing with other rights in the European Convention on Human Rights (ECHR), the Court has often shown itself to be a house divided when it comes to freedom of expression. Notably, these disagreements even extend to speech which may lead to violence—prima facie one of the few limitations on free speech on which most people would agree. One former judge of the Court, Giovanni Bonello, even characterized the jurisprudence of the Strasbourg Court on this as 'simplistic'.[3] Such an assessment is all the more troubling considering that, ultimately, such situations deal with a complex balancing between the freedom of expression on the one hand and the right to life and, potentially, the protection against discrimination on the other. Judicial overview of State restrictions on the freedom of expression needs to avoid both the risk of illegitimate interferences and censorship and, at the other extreme, violence harming individuals or groups. This article will delve into the question of how the Court has dealt with this dilemma. It will specifically focus on instances of potentially dangerous speech, in the sense of expressions that can lead to violence.

II. THEORETICAL CONSIDERATIONS ABOUT DANGEROUS SPEECH

In a large survey of hate crimes, the Organisation for Security and Cooperation in Europe found that violence and hate crimes often occur in a context of intolerant or racist public discourse.[4] The *Vona* case is an illustration of the creation of such a threatening climate. Thus although we do not know precisely what the importance of a particular expression is in a specific situation of violence, 'we do know that it counts'.[5] This is the main problem with a consequentialist approach to freedom of expression, the idea that the consequences of a particular expression matter—here the potential of violence. Indeed, the causal links between speech and actual or future violence are usually difficult to establish in each particular instance, as the *Vona* case illustrates, with the possible exception of speech-acts such as 'shoot him!'. Frederick Schauer has therefore proposed that it is more useful to apply a non-determinist, but rather aggregate conception of causation. This conception relies on probabilities: in situations where research has shown that violence is likely in the context of a certain kind of expression, a frequent occurrence of such speech will be a strong indication of more future violence[6] and therefore an incentive to act to counter such speech. Convincing as this may be, it sits uneasily with criminal law conceptions of causation and guilt, since probabilities based on social science insights might not be the strongest of argument in Court. They are, however, a good reason for the authorities—and others in society—to

[3] G Bonello, 'Freedom of Expression and Incitement to Violence' in J Casadevall, E Myjer, M O'Boyle and A Austin (eds), *Freedom of Expression. Essays in honour of Nicolas Bratza* (Wolf Legal Publishers 2012) 350.

[4] OSCE/ODIHR, *Hate Crimes in the OSCE Region – Incidents and Responses. Annual Report for 2007* (OSCE 2008) <www.osce.org/odihr> accessed 26 August 2013.

[5] S Baer, 'Violence: Dilemmas of Democracy and Law' in D Kretzmer and F Kershman Hazan (eds), *Freedom of Speech and Incitement against Democracy* (Kluwer 2000) 91.

[6] F Schauer, 'Speech, Behaviour and the Interdependence of Fact and Value' in ibid 50–2.

https://doi.org/10.1017/S0020589314000104 Published online by Cambridge University Press

act in other ways to counter dangerous speech, for example through education or public debate.

The overlap between the two forms of potentially dangerous speech, expressions that incite hatred and those that may lead to violence, relates to one of the core issues of the freedom of expression: when can and should such speech usefully and legitimately be curtailed? Three main justifications have been traditionally distinguished in legal thinking on the issue.[7] The first is the prevention of breaches of the peace and protecting public order. An example of this is the preventive action against potential violence taken in Hungary against the paramilitary movement organized by Mr Vona. A second is the protection of the targeted group, both regarding its members' feelings and physical safety. In *Vona* the Roma villagers were intimidated by calls for race-based action. This argument again shows how hate speech and violence-prone speech can be part of a continuum. Thirdly, the curtailment of speech through law can have a symbolic or declaratory function by reflecting what society deems inappropriate. The European Court in its *Vona* judgment identified one such value which the Hungarian authorities sought to defend by their actions: the cohabitation of people without racial segregation.[8]

Critics have pointed at the potential dangers of restrictions. Such laws can and have been used merely to quash the rights of opponents of those in power or have been applied arbitrarily.[9] They may also deter useful forms of speech because individuals and the media may apply self-censorship in order to avoid State sanctions. Another problematic element is that criminal trials can provide an additional public platform for those whose speech one wants to curtail by prosecuting them. Such trials may lead to more rather than less attention for the contested expression. Finally, there are other ways which may be both more effective and less problematic from a human rights perspective, such as reacting to the speech in question by public counter-speech that counters the opinions expressed.[10] Even those who advocate for a general abolition of hate speech laws, due to the dangers the pose for democracy and their internal inconsistencies, do acknowledge that in new or weak democracies restrictions on dangerous speech can be justified.[11] This, however, makes the 'who will guard the guardians' paradox all the more poignant: in weak or recently established democratic States, trust in the government may be low and state imposed restrictions on rights may be more likely to be partisan than independent. Supervision of the State's adherence to the freedom of speech by an international institution such as the European Court of Human Rights will be crucial in such fragile democratic States.

The case law of the European Court shows an overlap between cases relating to hate speech and those relating to instances of violence-prone speech. The two categories are connected as hate speech may contribute to violence in the long run, but conceptually the Court does not always clearly distinguish between the two. In general, the Court claims to grant a wider margin of appreciation to States if expressions 'incite to violence against an individual, a public official or a sector of the population'.[12] It does not,

[7] M Banton, 'The Declaratory Value of Laws against Racial Incitement' in S Coliver (ed), *Striking A Balance. Hate Speech, Freedom of Expression and Non-Discrimination* (Article 19 and Essex University Human Rights Centre 1992) 357.

[8] *Vona*, para 57.

[9] S Coliver, 'Hate Speech Laws: Do They Work?' in ibid 363.

[10] E Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 174–5.

[11] E Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69 MLR 543, 573–4.

[12] *Ceylan v Turkey* ECHR 1999-IV 25, para 34.

https://doi.org/10.1017/S0020589314000104 Published online by Cambridge University Press

however, conclusively explain *when* this is the case. Indeed, its consideration of freedom of expression cases seems to be very context-specific and reflects a certain reluctance to 'formulate generalizable methods for free speech adjudication', as one observer put it.[13] In addition, the Court seems to adhere to a rather wide definition of hate speech, taken from a 1997 Recommendation of the Council of Ministers which provides that hate speech includes all forms of expressions which not only incite but also promote, justify or spread 'racial hatred, xenophobia, anti-Semitism and other forms of hatred based on intolerance'.[14] Again, *Vona* shows that this can include racial hatred against groups such as the Roma.

III. THE OUTER LIMIT: ARTICLE 17 ECHR

Ever since the 1970s, the Court has reiterated time and again that Article 10 ECHR not only protects those expressions that are 'favourably received or regarded as inoffensive or as a matter of indifference, but also … those that offend, shock or disturb'.[15] The Court's jurisprudence also shows that free expression is deemed to be of vital importance for the well-functioning of democratic societies.[16] However, there is an outer limit to the protections of Article 10. Article 17 ECHR prohibits the abuse of rights:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The provision's main aim was to prevent totalitarian and extremist groups from justifying their actions by invoking the ECHR.[17] Article 17 reflects the view that a democracy should be able to defend itself against destructive forces.[18] The Court has applied Article 17 to instances of Holocaust revisionism[19] and anti-Semitism.[20] Applications by persons advocating such views have been declared manifestly ill-founded. The Court has labelled certain general and vehement verbal attacks against a specific ethnic group as contrary to the underlying values of the ECHR, which included 'tolerance, social peace and non-discrimination' in the case of an author who wrote a series of articles depicting Jews as the source of evil in Russia.[21] In addition, the Court declared a complaint about a violation of Article 11, the freedom of association, inadmissible under Article 17 for being contrary to the Convention's

[13] I Hare, 'Method and Objectivity in Free Speech Adjudication: Lessons from America' (2005) 54 ICLQ 49, 82.

[14] Council of Europe, Committee of Ministers, Recommendation No R (97) 20 on 'Hate Speech' [1997].

[15] *Handyside v UK* (1976) Series A No 24, para 49.

[16] See eg *Özgür Gündem v Turkey* ECHR 2000-III 1, para 43.

[17] *Ždanoka v Latvia* App No 58278/00 (ECtHR, 17 June 2004) para 109. An example of application is: *Kasymakhunov and Saybatalov v Russia* App Nos 26261/05 and 26377/06 (ECtHR, 14 March 2013) paras 102–114.

[18] DJ Harris et al, *Law of the European Convention on Human Rights* (2nd rev edn, OUP 2010) 649.

[19] eg *Garaudy v France* (admissibility decision) ECHR 2003-IX (extracts) 369.

[20] *Ivanov v Russia* (admissibility decision) App No 355222/04 (ECtHR, 20 February 2007).

[21] ibid.

https://doi.org/10.1017/S0020589314000104 Published online by Cambridge University Press

values, which in the Court's wording included a 'commitment to the peaceful settlement of international conflicts and to the sanctity of human life'.[22] The complaint related to an Islamic association active in Germany which called for the violent destruction of Israel and the killing of its inhabitants and which sought to justify suicide attacks on civilians there. In this case, the reasoning relating to abuse of rights was thus directly linked to open calls for and justifications of violence. In the *Vona* proceedings in Strasbourg, Hungary also invoked Article 17, but to no avail. The Grand Chamber held that the facts of the case revealed no *prima facie* acts aimed at the destruction of the rights of others or which amounted to an apology or propaganda for totalitarian views.[23] Since one can conclude from the rest of the judgment that the actions of the paramilitary groups did come dangerously close to this, it may be concluded that this initial assessment by the Court was triggered by a desire to consider the merits of the case in-depth rather than dismissing it right away under Article 17.

The latter case reflects the fact that hateful utterances are not often considered under Article 17: the Court addresses the majority of such instances through substantive assessments. This includes expressions directed against religions, ethnic groups or those of minority sexual orientation.[24] One of the rare exceptions is the case of *Norwood*. In the months following the 9/11 terrorist attacks, Norwood, a citizen of the United Kingdom, had at various occasions put up a poster depicting the burning Twin Towers and a crescent and star in a prohibition sign. The poster included the text 'Islam out of Britain—Protect the British People'. Referring to Article 17, the Court concluded that the application of Norwood was inadmissible. It took into account that the poster was a 'general, vehement attack' against all Muslims in the United Kingdom. Connecting an entire religious group with grave acts of terror was deemed incompatible with the Convention's values.[25] In cases like *Norwood*, in which the Court applies Article 17, a balancing of interests under Article 10 ECHR no longer occurs. Interestingly, Norwood had tried to convince the Court to contextualize and thereby balance. In an attempt at wordplay with the older *Handyside* judgment, he contended that free speech should also be protected if it was 'irritating, contentious, eccentric, heretical, unwelcome and provocative'.[26] Norwood added that the outer limit of freedom of expression was not the act of criticizing but that of provoking violence—something he claimed not to have done. He pointed out that he lived in 'a rural area not greatly afflicted by racial or religious tension and there was no evidence that a single Muslim had seen the poster'.[27]

The application of Article 17 in the Court's jurisprudence has been criticized for the very reason that it does not allow for a balancing of rights and interests.[28] In addition, it is not clear in which instances the provision applies: is it only in cases of Holocaust revisionism or also when other crimes against humanity are denied? For

[22] *Hizb Ut-Tahrir and others v Germany* (admissibility decision) App No 31098/08 (ECtHR, 12 June 2012) para 74.
[23] *Vona*, para 38.
[24] An example of the latter is: *Vejdeland and others v Sweden* App No 1813/07 (ECtHR, 9 February 2012). Note that judges Spielmann and Nussberger in their concurring opinion argued that art 17 would have been relevant.
[25] *Norwood v UK* (admissibility decision) ECHR 2004-XI 343.
[26] ibid.
[27] ibid.
[28] For a recent overview of case law, see ME Villiger, 'Article 17 ECHR and Freedom of Speech in Strasbourg Practice' in Casadevall et al (n 3) 321–9.

https://doi.org/10.1017/S0020589314000104 Published online by Cambridge University Press

which forms of extreme expressions against religious groups is it relevant?[29] The Court's case law does not offer conclusive answers. Occasionally, for example, the Court has applied Article 10 ECHR with reference to Article 17, even when the case centred on totalitarian ideologies.[30] In recent years, the Court has reviewed applications concerning racist and xenophobic statements entirely under Article 10.[31] This entails an assessment on the merits, including a balancing exercise. From a human rights perspective, this is to be preferred since it explicitly evaluates arguments for and against the prohibition or punishment of specific expressions. Many of these judgments have referred not only to the dignity but also to the security and safety of persons targeted by the expression in question. However, in this category of cases concerning racism and xenophobia, the Court often does not go beyond this, for example by directly linking the contested expression on the one hand and violence against the targeted persons on the other, and one might question why it does not look at such potential linkages in such cases.

IV. DANGEROUS SPEECH UNDER ARTICLE 10 ECHR

What of cases in which either the State or the Court does link the expression to violence, without Article 17 being used as a bar for a consideration of the merits? For the most part, these concern situations concerning alleged terrorism. Many of the judgments relate to the protracted conflict in Eastern Turkey. In the following paragraphs, a number of key cases will be addressed to evaluate which criteria the Court takes into account when establishing whether an expression has led or could have led to violence.

One of the leading cases in this respect is the *Zana*[32] judgment. Mehdi Zana, the former mayor of the large Eastern Turkish city Diyarbakir, gave an interview in 1987 to one of Turkey's major newspapers. He was detained at the time of the interview, after having been convicted for a number of crimes. In the interview, he expressed his support for the Kurdish Workers' Party (PKK) which was at the time engaged in an armed struggle against Turkish security forces. Zana declared himself not to be in favour of massacres and asserted that the PKK had killed women and children by mistake. As a result of these utterances, he was convicted for having endangered public safety and having defended an act punishable by law and given a prison sentence of 12 months of which he had to serve a small part.

The European Court found no violation of the freedom of expression in this case. In its assessment, it weighed both the context and content of the interview. As to content,

[29] For more elaborate critiques of jurisprudential inconsistencies see D Keane, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights' (2007) 25(4) NQHR 641; M van Noorloos, 'Foretelling the Future, Facing the Past: Hate Speech and Conflict Situations under the ECHR' in A Buyse (ed), *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict* (Intersentia 2011); T McGonigle, 'A Survey and Critical Analysis of Council of Europe Strategies for Countering Hate Speech' in M Herz and P Molnar (eds), *The Content and Context of Hate Speech. Rethinking Regulations and Responses* (CUP 2012).

[30] *Schimanek v Austria* (admissibility decision) App No 32307/96 (ECtHR, 1 February 2000).

[31] See eg *Soulas and others v France* App No 15948/03 (ECtHR, 10 July 2008) and *Féret v Belgium* App No 15615/07 (ECtHR, 16 July 2009). Even occasionally when the applicant himself invoked art 17 ECHR *against* the State: *Seurot v France* (admissibility decision) App No 57383/00 (ECtHR, 18 May 2004).

[32] *Zana v Turkey* App No 18954/91 (ECtHR, 25 November 1997).

https://doi.org/10.1017/S0020589314000104 Published online by Cambridge University Press

the Court considered that the quotation at stake was 'both contradictory and ambiguous' since Zana had both supported the armed PKK and rejected massacres and had condemned killings of women and children, but simultaneously labelled them as 'mistakes'.[33] This in itself may not have justified the imposition of criminal sanctions but the wider context legitimized Turkey's interference with the freedom of expression under ECHR Article 10. First, the situation in Eastern Turkey at the time was extremely tense given the very recent attacks by the PKK on civilians. Secondly, the Court deemed the position of the applicant (as a former mayor) and the medium used—a national daily newspaper with a large circulation and readership—to be relevant. The severity of the penalty imposed was of lesser consequence in this particular case since Zana only had to serve a small part of his time in prison. One may note that the outcome, that there was no violation of the freedom of expression, was very much based on the particularities of the situation at hand. The weighing of similar criteria led to an opposite conclusion in the later *Bingöl* judgment in 2010.[34] The lack of consensus within the Court is also reflected in the voting margins: 12 judges in *Zana* voted against finding a violation of the freedom of expression and a sizeable minority of 8 judges voted in favour.[35] The dissenting judges argued that imprisonment can rarely be a proportional penalty in freedom of expression cases. In addition, Zana's position as a former and imprisoned mayor was no longer as influential as the majority assumed. Finally, the dissenters added that his intention had, erroneously, not been weighed in the assessment, either at the national level or before the European Court. The case shows that there was discussion within the Court both about the choice of relevant criteria and their application to the facts.

Even if one focuses merely on the content of expressions, no clear or very coherent line can be perceived in the Court's jurisprudence. The *Sürek* judgment centred on readers' letters in a weekly magazine in which the Turkish army was called fascist and referred to as 'mercenaries of imperialism'. The European Court held that the letters conveyed the message that violence was both required and defensible in self-defence against the State, in some instances by even specifically naming people, inciting 'deep-seated and irrational' hatred against them, calling for 'bloody revenge' and directly exposing them to the risk of violence.[36] The Court noted that this was all the more serious, since it had occurred in a context of such violence and disturbance in the region that many had already died and emergency rule had been declared. In addition, the Court found that such utterances as labelling the other side as 'the fascist Turkish army', 'the TC murder gang' and 'the hired killers of imperialism' and connecting them to massacre and slaughter were clearly intended to stigmatize and to increase prejudice.[37]

Contrary to the *Zana* judgment, intention did play a role in the Court's assessment in this case. Equally, in *Halis Doğan*, a case about a publisher of a weekly magazine who had been sentenced for spreading separatist propaganda, the Court looked at the alleged intention to stigmatize the other party in the conflict in combination with the use of texts that referred to a last chance of revolt.[38] In *Sürek*, however, dissenting judges Palm and

[33] ibid, para 58.
[34] *Bingöl v Turkey* App No 36141/04 (ECtHR, 22 June 2010).
[35] The former European Commission of Human Rights could not even reach a decision in the same case, until its President cast the deciding vote.
[36] *Sürek v Turkey (No 1)* ECHR 1999-IV 353, para 62.
[37] ibid.
[38] *Halis Doğan v Turkey (No 3)* App No 4119/02 (ECtHR, 10 October 2006) para 34.

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Bonello argued that an assessment of the real risk of violence should have weighed more heavily in the Court's balancing.

A more consequentialist appraisal of a clear and present danger, as Palm and Bonello had advocated, was applied in *Gül and others*. The applicants in this case had participated in peaceful demonstrations to show their support for the illegal, armed and communist organization TKP/ML. During the demonstrations, they had shouted slogans such as 'political power grows out of the barrel of the gun' and 'it is the barrel of the gun that will call to account'.[39] They were convicted to prison sentences of up to ten months. The European Court held that the slogans had a very limited impact on national security or public order. The slogans could not be interpreted as a call for violence. Significantly, the Court did not restrict itself to the literal text of the slogans, which it qualified as reflecting a violent tone, but also to the reception of these slogans as well as the peaceful and legal character of the demonstrations themselves:

> Nevertheless, having regard to the fact that these are well-known, stereotyped leftist slogans and that they were shouted during lawful demonstrations—which limited their potential impact on 'national security' and 'public order'—they cannot be interpreted as a call for violence or an uprising.[40]

Again, the Court was divided over the issue. It found a violation of the freedom of expression by five votes against two. The dissenting judges Sajó and Tsotsoria asserted that other aspects of the societal context should have weighed more heavily: in the late 1990s, tensions in the region were such that the risk of violent reactions was significant. They also indicated that national judges are in principle better equipped to assess the effect and context of expressions. Often far removed from the events, both in time and space, such an assessment is much more challenging for international human rights bodies. This may explain why the European Court in more recent cases such as *Vona* is very explicit in repeating the findings of domestic courts as a part of its own reasoning and assessment.[41] This will be safer than an international Court making its own assessment of potential consequences of speech.

The problems of taking a strictly consequentialist approach surfaced in the case of *Erbakan*, the politician who would later become the first Turkish Prime Minister with a strong Islamic ideology.[42] In a speech at an election rally in Eastern Turkey in 1994, Erbakan, then leader of the later dissolved Welfare Party (*Refah Partisi*), contrasted the just (his party) and the unjust, Muslim believers and all others. He accused the other parties of being cronies of the West and oppressors. As a result, Turkish courts convicted Erbakan for inciting hatred. By contrast, the European Court held that Turkey had violated Article 10 ECHR. First, the Court underlined that since the fight against all forms of intolerance was an integral part of human rights protection, it was crucial that politicians in their public appearances avoided spreading discourse which could nurture intolerance. This is a rather rare dictum and the Court was quick to add that free political debate is crucial in a democracy and therefore interferences can only be justified in exceptional circumstances. Secondly, in looking at whether such a justification existed, the Court held that no actual risk or imminent danger existed in this case, contrary to what the government had asserted. The fact that he was prosecuted more than four years

[39] *Gül and others v Turkey* App No 4870/02 (ECtHR, 8 June 2010), para 13.
[40] ibid, para 41.
[41] *Vona*, paras 60–62.
[42] *Erbakan v Turkey* App No 59405/00 (ECtHR, 6 July 2006).

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after the events was an indication of this. In addition, the penalty had a chilling effect on political debate.[43] One can contrast this slow State reaction with the swift dissolution by the State of the association and movement in *Vona* where the first action by the public prosecutor followed within less than a fortnight after the biggest march.

As the only dissenter in the Court's judgment in *Erbakan*, Judge Steiner emphasized the difference between short-term effects—there was indeed no immediate violence that followed as she acknowledged—and longer-term consequences. She asserted that the impact of Erbakan's words could only be measured over time. In her view, his speech was a harmful contribution to a climate of intolerance nourishing primitive prejudice and cleavages in society.[44] Steiner here clearly pointed at something which is extremely difficult to take into account from a legal perspective, especially a criminal law one. Certain discourse can indeed have such effects, but this requires a discourse and conflict analysis for which the judiciary is ill-equipped. It also entails problems of proof and culpability.[45]

The same context of election discourse came up in a Belgian case, *Féret*.[46] The applicant was the president of the Belgian *Front National*, an extreme right wing party. During its political campaigns between 1999 and 2001, the party published materials which depicted and labelled immigrants as 'brown pestilence', called a refugee centre 'poison for the neighbourhood', advocated that asylum should be limited to Europeans only and immigrants should be sent back to their countries of origin. Féret was convicted before the national courts which held that the campaign messages incited, if not violence then at least discrimination and hatred. It is precisely this thin line between risks of violence and broader risks of hatred that is at the heart of the case. The European Court held that Belgium had not violated Article 10 ECHR, since it had convincingly argued that Féret's conviction was necessary in a democratic society. As to this distinction, the Court indicated that incitement to hatred—hate speech in the narrow sense—does not necessarily require or include appeals to violence.[47] But even in this narrower sense, States are bound to combat discrimination and racial hatred cannot be 'camouflaged' by electoral processes or campaigns.[48]

Again, the Court was heavily divided over the limits of the freedom of expression. Three out of seven judges dissented and emphasized that the contested expressions did not call for violence. In addition, the expressions were also not explicitly racist and the dissenters stated that national authorities should be careful not to read racist intentions too quickly into words or writings. More specifically, they argued that only a real—and not a potential—impact on the rights of others needed to be demonstrated. Combating mere intolerance was not, in their view, sufficient to justify infringing the freedom of expression. In taking this view they distanced themselves openly from the majority's stance and the Committee of Minister's recommendation. They pointed out the difference between incitement—with direct effect—and the long-term consolidation of prejudice and intolerance. Such potential future dangers should not be presented as an

[43] ibid, paras 64, 68–69.
[44] Partially dissenting opinion of judge Steiner in *Erbakan v Turkey* App No 59405/00 (ECtHR, 6 July 2006).
[45] As the Court remarked in *Vona*, an indication could be that an association can be reasonably regarded as a 'hotbed for violence' of which actual actions, such as the organized nature of the paramilitary marches in a threatening atmosphere, can be proof (para 63 of *Vona*).
[46] *Féret v Belgium* App No 15615/07 (ECtHR, 16 July 2009).
[47] ibid, para 73.
[48] ibid, para 78.

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apocalyptic scenario which warrants limits on freedom of expression in the present. To do so would limit free political debate and deny the power of counter-arguments and the independent formation of opinions.[49]

The possible escalation of violence was also at stake in a small number of other non-Turkish cases in Strasbourg. The French case of *Leroy* centred on a cartoon which had been published in a local nationalist review in the French Basque country a few days after 11 September 2001. It depicted collapsing skyscrapers, hit by two planes, with the accompanying caption: 'We all dreamt of it … Hamas did it'.[50] Both the cartoonist and the magazine were fined (1500 euros) for glorifying terrorism. The European Court held that this did not violate the freedom of expression. First, the Court rejected the cartoonist's explanation that he merely wanted to expose American imperialism and that the cartoon was not about the glorification of violence. For the Court, the applicant's intention was not the main issue. Nor was the penalty, which the Court did not find disproportionate. Rather, it held that the timing—so soon after the attacks in New York—and location, a politically volatile region, were relevant. Within that context, the cartoon could incite violence.[51] It is notable that the Court did not think it relevant that not a single act of violence had actually occurred; nor was the very different terrorist context—Basque as opposed to Islamic. It was the potential, rather than the actuality of violence, that counted.[52] In the *Vona* case also, this potential for violence played a role. The Court held that the absence of actual violence was not decisive in and of itself, since this could also have been due to the presence of police during the marches in Roma neighbourhoods. Rather, the context of organized marches by movement members wearing paramilitary uniforms and displaying military-like behaviour, combined with expressions of defending Hungarians against Roma crime, was one in which recourse to violence no longer seemed a remote possibility. Rather, it could be perceived as a real threat to Roma which—by being in their homes along the route of the marches—formed a captive audience. Thus, when threatening and intimidating conduct accompanies expressions, which already were racist, the level of protection for expression under the Convention is greatly reduced.[53]

A clear counter-example of a case in which the Court found no link between expression and possible violence is the *Vajnai* judgment concerning Hungary. The applicant had been prosecuted for wearing a red star on his jacket during a leftist demonstration in 2003. Hungarian law prohibited the use of totalitarian symbols. In this case, the demonstration was peaceful and the Court found it particularly relevant that Hungary, more than two decades after the fall of communism, had proven to be a stable

[49] Dissenting opinion of judges Sajó, Zagrebelsky and Tsotsoria in *Féret v Belgium* App No 15615/07 (ECtHR, 16 July 2009. The majority had pointed to the risks of eliciting feelings of hatred among the least informed public ('*le public le moins averti*', para 69), suggesting that certain groups in society were easily susceptible to be influenced.

[50] *Leroy v France* App No 36109/03 (ECtHR, 2 October 2008) para 6. Author's own translation of the text: '*Nous en avions tous rêvé … le Hamas l'a fait*'. One may note that so shortly after the attacks, it was not yet conclusively clear that Al-Qaeda was responsible, but that others groups were still also thought capable of having orchestrated the acts of terror.

[51] ibid, para 45.

[52] For a more extensive analysis, see: U Belavusau, 'A *Dernier Cri* from Strasbourg: An Ever Formidable Challenge of Hate Speech' (2010) 16(3) EPL 373.

[53] *Vona*, para 66.

https://doi.org/10.1017/S0020589314000104 Published online by Cambridge University Press

democracy. There was no 'real and present danger' of a new communist dictatorship.[54] Article 10 had been violated. Although the issue of stability thus played a role in the Court's assessment, it was unclear whether the State was required to present a convincing cause-and-effect argument in the context of potential violence. At times, a more consequentialist approach takes the upper hand. But in other cases, a more general approach takes precedence: a democracy should be able to defend itself against expressions that encroach upon its foundations and stability. If one takes the Grand Chamber judgment in *Vona* as the most authoritative recent reflection of the Court's stance, a combination of coordinated and planned expressions and accompanying action, rather than incidental ones, is sufficient to trigger State action. For this to be in line with Convention requirements it is not necessary that there be a sufficiently imminent threat to democracy itself, but there should be 'sufficiently imminent prejudice to the rights of others [which] undermines the fundamental values upon which a democratic society rests and functions'.[55] Interestingly, in *Vona* dissolution of the association and the connected movement was seen by the Court as the least intrusive and even 'the only reasonable' measure to take.[56]

An important consideration is the specific role of the media, often used as a conduit for expression that might fuel violence. Mass and social media can reach large audiences and be key factors in violent escalation, as the hate radio during the Rwandan genocide and propaganda through television, newspapers and the internet in many conflicts illustrate. In no other context is the fact that the media carries duties and responsibilities more poignant. On the other hand, the media have a special, protected and privileged position from a human rights perspective as 'public watchdog', [57] furthering public debate in a democratic society.[58] Journalistic freedom even entails a certain degree of provocation and exaggeration, as the European Court of Human Rights has acknowledged.[59] This dual-edged sword of the media features in numerous Strasbourg cases. In situations of tension and violence, the Court's jurisprudence has confirmed that the responsibilities of the media carry additional weight. Particular caution is required in such a context when reporting on the views of persons and organizations which 'resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence'.[60] When calls for violence are concerned, the Court leaves States a larger margin of appreciation to interfere with such forms of expression in the media. The Court is, however, very much aware of the dangers of censorship and of overly stringent restrictions on the freedom of the press. Whenever expression does not fall into the category of calls for violence, States cannot 'with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of

[54] *Vajnai v Hungary* App No 33629/06 (ECtHR, 8 July 2008) para 49. See also van Noorloos (n 29) 142. The same conclusions were reached in a similar case three years later: *Fratanoló v Hungary* App No 29459/10 (ECtHR, 3 November 2011).

[55] *Vona*, paras 57 and 69.

[56] ibid, para 71. In his concurring opinion Judge Pinto de Albuquerque even argued that there was a positive obligation upon the State to take such action.

[57] *Jersild v Denmark* (1994) Series A No 298, para 35.

[58] See eg *Castells v Spain* (1992) Series A No 236, para 43.

[59] *Prager and Oberschlick v Austria* (1995) Series A No 313, para 38.

[60] *Sürek and Özdemir v Turkey* [Grand Chamber] App Nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) para 63.

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them by bringing the weight of the criminal law to bear on the media'.[61] The key question then still remains how to determine whether a certain expression is indeed a call for violence? An additional challenge emerges in situations in which the State itself, or groups linked to State authorities, actively use the media to propagate violence. Such instances fall under the Strasbourg radar unless an alleged victim complains about threats to her or his life caused by such calls for violence.[62]

As this overview shows, no entirely coherent picture arises from the Court's case law. It does show that the Court is willing to factor in both the content and context[63] of an expression in its balancing exercise. This may include criteria of place, timing, the particular media used, the position of the author or speaker, the accompanying actions, and the wider safety and security context. The Court requires national judges to incorporate such criteria in their judicial reasoning.[64]

V. CONCLUSION

The European Court has been struggling to find answers in the difficult balancing exercise of preventing violence and protecting the freedom of expression.[65] Nevertheless, it has identified relevant criteria to take into account, albeit not in an altogether systematic or refined fashion. Applications concerning direct calls to violence as well as the strongest forms of negative labelling can be dismissed by applying the abuse of rights clause (Article 17 ECHR). This precludes any assessment on the merits and thus any balancing act. The more recent trend in the Court's case law to assess cases under Article 10 is therefore a welcome development. As to the distinction between immediate risks of violence and long-term erosion of public peace through the use of very negative and dehumanizing stereotypes, it seems that the Court is rather divided. This reflects theoretical debates on the issue, as referred to in section II. It is important to take into account the perspective which defines most freedom of expression cases before the European Court: an individual whose expression has been penalized by the State. This automatically puts an emphasis on the freedom of expression perspective and means that the State has already used one of its heaviest tools to prevent the escalation of violent conflict: the criminal law. Whilst this tool may be acceptable in the sense of not leading to a violation of the ECHR—when combating the most open and direct calls for violence, it is often too much of an encroachment when dealing with stereotyping. This is not to say that it would not be wise for the State to act in other ways—opening up channels for alternative voices in public debate[66]—but this automatically falls outside the scope of assessment of the European Court. Nevertheless, the Court can give

[61] *Şener v Turkey* App No 26680/95 (ECtHR, 18 July 2000) para 42.

[62] In such situations, the call for violence would emanate from the State and might amount to threats to the right to life. See, *mutatis mutandis, Osman v United Kingdom* App No 23452/94 (ECtHR, 28 October 1998), which applied to death threats by a private person.

[63] This includes the consideration that quotes should never be lifted out of their context and assessed by themselves, but should always be read in light of the wider text of which they are part: *Faruk Temel v Turkey* App No 16853/05 (ECtHR, 1 February 2011) para 62.

[64] *Gözel and Özer v Turkey* App Nos 43453/04 and 31098/05 (ECtHR, 6 July 2010).

[65] FJ Hampson, 'Freedom of Expression in Situations of Emergency and Armed Conflict' in Casadevall et al (n 3) 457.

[66] To this effect, see eg A Marshall Williams and J Cooper, 'Hate Speech, Holocaust Denial and International Human Rights Law' (1999) 6 EHRLR 593, 613.

https://doi.org/10.1017/S0020589314000104 Published online by Cambridge University Press

important indications for national courts and policy makers. As the Grand Chamber judgment in *Vona* shows, the dissolution of social organizations rather than the criminal prosecution of individuals, can be an acceptable course of action from an ECHR perspective in order to prevent violence. To build such considerations on more solid grounds, the Court may be well advised to incorporate factors identified by the social sciences on how and when violence escalates.[67] This may help make Strasbourg's jurisprudence on potentially dangerous speech more convincing and unequivocal.

[67] For two attempts to incorporate such insights from social sciences in legal considerations about dangerous speech, see S Benesch, 'Vile Crime or Inalienable Right: A Model to Distinguish Hate Speech from Incitement to Genocide' (2008) 48 VaJIntlL 485 and: C Pauli, 'Killing the Microphone: When Broadcast Freedom Should Yield to Genocide Prevention' (2010) 61(4) AlaLRev 665. See also AC Buyse, 'Words of Violence: Relating Violent Conflict Escalation to the Boundaries of the Freedom of Expression' (2014 forthcoming) 36(4) HumRtsQ.

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