Tilburg University

Foretelling the future, facing the past

van Noorloos, Marloes

Published in:
Margins of conflict

Publication date:
2011

Document Version
Publisher's PDF, also known as Version of record

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):
van Noorloos, M. (2011). 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* (pp. 131-151). (Series on transitional justice; No. 5). Intersentia.

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FORETELLING THE FUTURE, FACING THE PAST

Hate Speech and Conflict Situations under the ECHR

Marloes VAN NOORLOOS*

1 INTRODUCTION

The past century's experiences of armed conflict demonstrate that horrific violence does not appear out of the blue: communication through the mass media plays an essential part in the process of initiating and sustaining armed conflict. The role of the Rwandan media in the 1994 genocide, with their dehumanizing depiction of Tutsis as 'cockroaches' and their inciting remarks ('let's exterminate them') is one of the most widely known examples. As the International Criminal Tribunal for Rwanda found in its *Media case* judgment, '...if the downing of the plane was the trigger, then RTLM, *Kangura* and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded'.¹ In other types of conflicts, such as those involving terrorist violence, inciteful speech is also regarded as a meaningful triggering force.

Notwithstanding the potential dangers of speech, the fundamental right to freedom of expression demands a careful approach to speech restrictions. In the framework of the European Convention on Human Rights (ECHR), Article 10 lays down the right to freedom of expression and the criteria for interfering with this freedom.

So far, the cases on extreme speech in conflict situations that have been put before the European Court of Human Rights (ECtHR) mostly deal with terrorist violence in south-east Turkey; these judgments focus on incitement against the State and/or dominant forces in society instead of 'traditional' hate speech

* Ph.D. candidate at Utrecht University, Willem Pompe Institute for Criminal Law and Criminology. I would like to thank Dr. Anja Mihr, Dr. Peter Malcontent, Prof. Chrisje Brants and Prof. Jenny Goldschmidt for their helpful comments.

¹ ICTR (Trial Chamber) *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003), para. 953.

against minorities. Yet it is also essential to have a look at a number of cases involving hate speech against minorities outside armed conflict, since racist and xenophobic expressions are regarded as factors that could lead to future conflict. The Court's approach to such speech still bears witness to the coming into being of the Convention as a reaction to the Second World War, as will be demonstrated below. The ECtHR's case law shows that both types of expressions – against the State/majority and against minorities – can fall under the heading 'hate speech'. Furthermore, this chapter will briefly delve into expressions about *past* conflicts such as denial or justification of grave violence.

The aim of this chapter is to critically analyze which normative ideas around restricting hate speech/extreme speech in conflict situations the ECtHR adheres to in judging such expressions, to investigate whether the right to freedom of expression is sufficiently guaranteed in the face of conflict. What views about the prevention of conflicts, the role of the media and the functioning of democracy can be discerned from the Court's approach? To this end, I will start in paragraph 2 by setting out some of the theoretical rationales behind restricting speech around armed conflict. In paragraph 3, the ECHR's relevant case law around Article 10 is analyzed against this framework – comprising extreme speech & terrorism (par. 3.1), traditional hate speech (par. 3.2) and dealing with past conflicts (par. 3.3). Finally some conclusions will be drawn in paragraph 4.

2 THE ROLE OF HATE SPEECH AND THE MEDIA IN CONFLICT SITUATIONS

2.1 SETTING LIMITS TO HATE SPEECH: RATIONALES

Before analyzing the role of speech in conflict situations, I will examine some general theoretical aspects around restrictions of hate speech. Interferences with extreme speech are often explained about by pointing out the risk that it will lead to violence and will thus inflict harm on individuals and public order. This harm would not only damage individuals but also society as a whole, including the government whose legitimacy depends on its capacity to maintain stability. Since we are dealing with *potentially* harmful expressions, the causal relationship between speech and potential consequences is important here: the weaker this link, the less reason there is to proscribe speech. For instance, restrictions of indirect advocacy of violence, such as glorifying or justifying terrorism, require a careful approach. Such advocacy is often meant to support the underlying political goals of the terrorist group concerned, and is thus a form of political expression. When a State is confronted with terrorist attacks, a 'democratic dilemma' is involved: when should human rights (such as free expression) be limited for the sake of protecting the majority against violence? A particular risk

here is the natural tendency of States to give precedence to the rights of the majority (to security) against the rights of individuals or minorities when confronted with terrorist threats.²

A more indirect type of harm to public order is the risk that speech will lead to setting different groups in society against each other, resulting in unrest and undermining social cohesion. If speech bans on this ground are interpreted too broadly, the danger is that any speech against orthodox views is suppressed in order to uphold collective peace.

A common argument for restricting hate speech against *minority groups* is the idea of 'negative imaging'. Expressions which reinforce negative stereotypes about groups in society have the potential to lead to discriminatory behaviour, since they can damage groups' reputation projected to the outside world. Furthermore, messages conveying inferiority and denial of equal respect can cause psychological harm to the victims themselves. Nevertheless, it is important to consider the causal link between speech and potential harm here as well. The rationale of 'negative imaging' is indirectly related to the idea of 'defensive democracy', too: hate speech which goes against democratic principles (including equality), involves a risk that such democratic values will eventually be harmed or even overthrown if the speakers gain enough power. Yet prohibiting the expression of extreme opinions in turn infringes liberal democratic values.

2.2 THE 'MARKETPLACE OF IDEAS' IN CONFLICT

Setting limits to freedom of speech in a situation of armed conflict involves other challenges than restricting expression in 'normal' situations. The 'marketplace of ideas' argument – that extreme messages are best countered in an open debate where the best ideas will eventually win – is dysfunctional in the context of war. Particularly when the State is the aggressor in an armed conflict, State control over the media takes away any independent forum for public discussion. For instance, the conflict in the former Yugoslavia was accompanied by intense propaganda through a highly manipulated media system, where alternative sources had been shut down.³ Indeed, many societies in which conflict has arisen did not have a history of an independent media. Accordingly, the media can also contribute to conflict involuntarily: in an underdeveloped media culture, journalists may lack the professional skills to prevent stereotyped reporting and inflammation of grievances.⁴

² MICHAEL IGNATIEFF, *The Lesser Evil: Political Ethics in an Age of Terror*, (Princeton: Princeton University Press, 2005).

³ See MARK THOMPSON, *Forging War: The Media in Serbia, Croatia, Bosnia and Hercegovina*, (Luton: University of Luton Press, 1999).

⁴ MARK FROHARDT & JONATHAN TEMIN, *Special Report: Use and Abuse of Media in Vulnerable Societies*, October 2003, United States Institute of Peace, www.usip.org, p. 2.

In situations concerning State-sponsored violence, hate propaganda has appeared as a destructive force: in conflicts such as those in the former Yugoslavia, Rwanda as well as the Second World War, powerful groups in society successfully practised hate speech against vulnerable minorities. When counter forces are no longer available against hateful messages, their impact becomes even stronger.⁵ Freedom of speech assumes a different meaning in such situations: while traditionally a right against State power, it is instead abused by governments (or its supporters) to suppress a part of its people.⁶ As the ICTR held in its *Media Case* judgment:

'The dangers of censorship have often been associated in particular with the suppression of political or other minorities, or opposition to the government. The special protections developed by the jurisprudence for speech of this kind, in international law and more particularly in the American legal tradition of free speech, recognise the power dynamic inherent in the circumstances that make minority groups and political opposition vulnerable to the exercise of power by the majority or by the government. These circumstances do not arise in the present case, where at issue is the speech of the so-called 'majority population', in support of the government.'⁷

In conflicts involving insurgency or terrorist violence against the State, this situation is reversed: it is likely that the State will try to oppress inciteful speech – but also less extreme speech – by insurgents representing a minority group (in terms of relative power). Governments often tend towards keeping the marketplace closed for such groups, even for speech that relates to their political goals and does not really incite violence. This can have detrimental effects on the freedom of speech; moreover, risks can be enhanced if the channels for political dissent are closed. After all, the lack of peaceful means to achieve change is often exactly what leads people to resort to violence to achieve their goals.

2.3 HATE SPEECH BEFORE CONFLICT

Dealing with hate speech *during* conflict requires a different approach compared to when dealing with hate speech *before* a potential conflict arises. At a moment when violent acts have already taken place, suppressing speech can be more easily justified: the causal connection between speech and potential harm is more convincingly established. The occurrence of violent acts against groups or against

⁵ SUSAN BENESCH, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide', (2007–2008) 48 *Virginia Journal of International Law*, pp. 485–528 at 496.

⁶ BENESCH (2007–2008), p. 495.

⁷ ICTR (Trial Chamber) *Prosecutor v. Nahimana*, Case No. ICTR 99–52-T, Judgment and Sentence (Dec. 3, 2003), para. 1008.

State forces sets hateful expressions in a different light: from that moment on, the meaning of hate speech – both by the speaker and by the audience – changes for good.⁸ Glorifying or justifying past or present violence is more serious during conflicts as well, since its connection to future violence is closer than outside conflict.

Nevertheless, hate propaganda *during* a conflict could never be such a destructive force if the groundwork were not already laid *before* that conflict. The violent conflicts in the former Yugoslavia and Nazi Germany were preceded by a history of scapegoating, ethnic stereotyping and reinforcement of prejudices, in a long process of social conditioning over generations.⁹

In the light of freedom of expression, it is wise to distinguish clear hate propaganda by an already powerful person or group from the longer history of stereotyping and reinforcement of prejudices that precedes it. Whether hate speech is 'successful' in leading to violence depends on how it is perceived by those to which it is directed¹⁰: does it convince people that the group should be hated or even attacked? This requires that racist/xenophobic attitudes must already exist to some extent – otherwise hate speech will not have salience.¹¹ In turn, these attitudes can be caused by several factors – including, but not limited to, stereotypical expressions that create a climate of discrimination. Yet the argument that all speech that contributes to the social construction of inequality should be restricted is so broad that it can be used to suppress any book, film or joke that involves stereotypes, maliciously or not – and there are many of those. The harm caused by such expressions seems rather an effect of their accumulation: it is the pattern of systematic discriminatory messages which makes them harmful, especially when mixed into a hateful cocktail by manipulative powers. Therefore, judging who is to be held responsible for this is a difficult task: before and during ethnic conflicts many persons are involved in discrimination and stereotyping in some way – thus spreading 'a layer of blame that is a mile wide and an inch deep'.¹² Clear incitement to hatred should also be distinguished from legitimate criticism related to a group's emancipation in society, which is of importance to public debate.

Finally, it can be problematic to compare current situations to past conflicts because of the particular circumstances in which they took place. The examples of Nazi Germany, Rwanda and the former Yugoslavia often close our eyes to the

⁸ BENESCH (2007–2008), p. 522.

⁹ WIBKE KRISTIN TIMMERMANN, 'The relationship between hate propaganda and incitement to genocide: a new trend in international law towards criminalisation of hate propaganda?', (2005) 18 *Leiden Journal of International Law*, pp. 257–282.

¹⁰ WOJCIECH SADURSKI, *Freedom of Speech and its Limits*, (Dordrecht: Kluwer Academic Publishers, 1999), p. 129.

¹¹ W. BRADLEY WENDEL, 'The Banality of Evil and the First Amendment', (2004) 102 *Michigan Law Review*, pp. 1404–1422, at 1417.

¹² BRADLEY WENDEL (2004), p. 1408. See also CLAY CALVERT, 'Hate Speech and its Harms: a Communication Theory Perspective', (1997) 47 *Journal of Communication*, pp. 4–17.

fact that hate speech may well be far less destructive in long-standing, stable democracies with well-functioning media that provide counter forces to hate messages.¹³

This still leaves the argument that a special approach may be required when dealing with new democracies that have recently emerged from conflict situations and/or authoritarian regimes. In Central and Eastern Europe, liberal institutions are generally still very fragile¹⁴, including the mass media. Indeed, 'hate speech is becoming the *lingua franca* of the region... The region is characterised by a particularly exclusive and violent form of xenophobic nationalism'.¹⁵ In such situations, it may be wise to allow democracies more 'militancy' to enable the development of a true democratic culture.¹⁶ Nevertheless the potential of hate speech laws to foster democracy is not uncontested. Strong hate speech bans may do exactly what they aim to prevent – they can endanger social harmony between groups. In Rwanda, human rights organizations have accused the government of manipulating the legacy of the 1994 genocide to suppress political opposition by a very broadly drafted prohibition of 'genocide ideology'.¹⁷ The local BBC radio service, for instance, was not allowed to broadcast a debate on forgiveness among Rwandans after the genocide. Experience has shown the risk that hate speech laws are used by the powerful against minority groups is real¹⁸ – and perhaps even more so in fragile democracies.

3 ARTICLE 10 ECHR AND THE EUROPEAN COURT OF HUMAN RIGHTS' CASE LAW

3.1 GENERAL FRAMEWORK ARTICLE 10

Under the European Convention on Human Rights, freedom of expression as enshrined in Article 10 constitutes 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'.¹⁹ Article 10 is applicable 'not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of

¹³ See ERIC HEINZE, 'Viewpoint Absolutism and Hate Speech', (2006) 69 *Modern law review* 2006, pp. 543–582, at 548.

¹⁴ FREEDOM HOUSE, *Nations in Transit*, 2009.

¹⁵ BOJAN BUGARIC, 'Populism, Liberal Democracy, and the Rule of Law in Central and Eastern Europe', (2008) 41 *Communist and Post-Communist Studies*, pp. 191–203.

¹⁶ ANDRÁS SAJÓ, 'Hate Speech for Hostile Hungarians', (1994) 82 *East European Constitutional Review*, p. 82.

¹⁷ ARTICLE 19, *Comment on the Law Relating to the Punishment of the Crime of Genocide Ideology in Rwanda*, London, September 2009.

¹⁸ See MALEIHA MALIK, 'Extreme Speech and Liberalism', in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy*, (Oxford: Oxford University Press, 2009), pp. 96–122.

¹⁹ ECtHR *Lingens v. Austria*, 8 July 1986 (Appl. no. 815/82) par. 41.

indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.²⁰ At the same time, the Court holds that 'whoever exercises his freedom of expression undertakes 'duties and responsibilities' the scope of which depends on his situation and the technical means he uses'.²¹

Freedom of expression and the 'duties and responsibilities' involved in it take on a special form when the media are involved. As a conveyor of information and ideas in public debate, the media have on the one hand a very important role to play as a 'public watchdog'. Article 10 includes the right to freedom of information, which can only be effectively maintained if media freedom is not unduly restricted. The other side of the coin is that journalists have a special responsibility to act with integrity in conducting this public debate.²²

3.2 EXTREME SPEECH IN THE CONTEXT OF TERRORISM

The ECtHR has dealt with a large number of cases concerning speech in the context of terrorism, ranging from direct incitement to violence to separatist propaganda. The Court explicitly takes into account the external context of such cases, particularly problems linked to the prevention of terrorism. In the large majority of judgments this context concerns the situation in south-east Turkey, where an armed conflict between militants of the separatist PKK (Kurdistan Workers' Party) and the government has been raging since the 1980s.

In general, the Court has stressed that it must 'ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations'.²³ The Court holds that freedom of speech cannot be too easily restricted in such cases, since there is little scope under Article 10 par. 2 to restrict political speech or debate on matters of public interest.²⁴ On the other hand, Member States are awarded a large margin of appreciation to restrict expressions that can be characterized as *hate speech* or *incitement to violence*.

²⁰ ECtHR *Handyside v. United Kingdom*, 7 December 1976 (Appl. no. 5493/72) par. 49.

²¹ Ibid.

²² CHRISJE BRANTS, 'The Free Flow of Information. A Sovereign Concept in and of Itself', in INEKE BOEREFIJN & JENNY GOLDSCHMIDT (eds.), *Changing Perceptions of Sovereignty and Human Rights (Liber Amicorum Cees Flinterman)*, (Antwerpen: Intersentia, 2008), pp. 395–416.

²³ ECtHR *Zana v. Turkey* (Grand Chamber), 25 November 1997 (App.no. 18954/91) par. 55.

²⁴ See, for instance, ECtHR (Grand Chamber) *Karatas v. Turkey*, 8 July 1999 (Appl. no. 23168/94) par. 50; ECtHR *Özer v. Turkey*, 5 May 2009 (Appl. no. 42708/98).

3.2.1 *Legitimately restricted speech, context and consequences*

The landmark judgment in this area is *Zana v. Turkey*, where the Court started to develop a theory on terrorist speech.²⁵ In this case, a former mayor in south-east Turkey was convicted for his statements in an interview with journalists where he indicated that he supported 'the PKK national liberation movement'; though he was not 'in favour of massacres', he also held that 'anyone can make mistakes, and the PKK kill women and children by mistake'. In judging whether his criminal conviction violated Article 10, the Court especially looked at the context surrounding the expression: the interview coincided with murderous attacks by the PKK on civilians in Southeast Turkey where extreme tensions existed at that time. The Court concluded that '[i]n those circumstances the support given to the PKK – described as a 'national liberation movement' – by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region.'²⁶ Therefore no violation of Article 10 was found. This case shows that the distance between expressions and potential consequences can be quite large: there is no need for a 'clear and present danger' for prohibiting inciting speech – or at least this danger is more easily conceived when the expression is uttered by an influential person. This also comes back in the recent case, *Yalçınar v. Turkey*²⁷, where a member of the administrative council of a political party was convicted of giving a public speech. He heavily criticized the deadly actions by the Turkish government in south-east Turkey, concluding that:

'On ne peut pas arriver au but uniquement par la guérilla. (...) Si les Turcs restent sans réaction pendant que les Kurdes sont tués, je vais vous dire ce qui va se passer demain: les Kurdes seront dans une situation où ils ne pourront rien faire pendant que les Turcs seront tués.'

The Court noted an ambiguity in the applicant's expressions as regards the acceptability of employing violent measures against the government, and held that he had not clearly distanced himself from the use of violence. Though the degree of incitement is not obviously higher than in other expressions where the Court did find a violation (see for instance *Asli Güneş v. Turkey* and *Özer v. Turkey*, below), the Court's reasoning turns out differently here – probably because it concerns an influential person.²⁸

²⁵ *Zana* (Grand Chamber); STEFAN SOTTIAUX, 'The "Clear and Present Danger Test" in the Case Law of the ECHR', (2003) 63 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, pp. 653–679 at 669.

²⁶ *Zana* (Grand Chamber), par. 60.

²⁷ ECtHR *Yalçınar v. Turkey*, 21 February 2008 (Appl. no. 64116/00).

²⁸ The Court eventually considered the government's reasons for the applicant's conviction 'relevant and sufficient' but did find a violation because of the excessive sentence.

Another judgment considered a landmark is *Sürek v. Turkey* (1).²⁹ The applicant in this case owned a weekly review which had published two readers' letters, harshly condemning the military actions of the authorities in south-east Turkey and accusing them of brutally suppressing the Kurdish people. '[T]he struggle of our people for national freedom in Kurdistan has reached a point where it can no longer be thwarted by bloodshed, tanks and shells...The Kurdish people, who are being torn from their homes and their fatherland, have nothing to lose. But they have much to gain.' In its assessment the Court focused in the first place on the words used, noting that:

'...there is a clear intention to stigmatise the other side to the conflict by the use of labels such as 'the fascist Turkish army', 'the TC murder gang' and 'the hired killers of imperialism' alongside references to 'massacres', 'brutalities' and 'slaughter'. In the view of the Court the impugned letters amount to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence.'

Again, the Court considered the sensitive security context in south-east Turkey. Linking content and context together, the Court found that 'the letters must be seen as capable of inciting to further violence in the region by instilling a deep-seated and irrational hatred against those depicted as responsible for the alleged atrocities. Indeed, the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor'. The applicant's criminal conviction (he was sentenced to a fine) did not violate Article 10; the Court found – without further explanation – that '[w]hat is at issue in the instant case (...) is hate speech and the glorification of violence'.

Apparently, the Court recognizes the dangers of a strategy of 'fear-mongering', where grievances are exaggerated through hateful language with the eventual goal of revenge against the identified aggressor. Nevertheless this judgment also provoked much dissent within the Court: Judge Palm, in her partly dissenting opinion, held that 'the majority has attached too much weight to the admittedly harsh and vitriolic language used in the impugned letters and insufficient attention to the general context in which the words were used and their likely impact...Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so?' Judge Bonello, too, found that '[w]hen the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail'.

²⁹ ECtHR *Sürek v. Turkey* (1) (Grand Chamber), 8 July 1999 (Appl. no. 26682/95).

As opposed to this argument for a strict consequential test, Judges Wildhaber, Pastor Ridruejo, Costa and Baka argue in *Karatas v. Turkey* that 'unlike the advocacy of opinions on the free marketplace of ideas, incitement to violence is the denial of a dialogue, the rejection of the testing of different thoughts and theories in favour of a clash of might and power. It should not fall within the ambit of Article 10'.³⁰ In this view, incitement to violence – whatever the proximity and degree as to the consequences – is unacceptable in principle because the method of violence is at odds with democracy. This points to a 'militant democracy' argument, which is also apparent in the Court's reasoning in *Hocaogullari v. Turkey*³¹ where it emphasized that the expression at hand was 'susceptible de favoriser la violence en Turquie; il ne saurait passer pour compatible avec l'esprit de tolérance et va à l'encontre des valeurs fondamentales de justice et de paix qu'exprime le Préambule à la Convention'. In this case as well as in *Halis Doğan v. Turkey* (3)³², the Court did not find violations of Article 10, arguing that the expressions showed a 'clear intention to stigmatise the other side of the conflict'.

The acceptability of justifying terrorism may also depend on the speaker's own history with and present views on the method of terrorism, as appears from the Court's admissibility decision in *Hogefeld v. Germany*.³³ This decision deals with dismissed requests by several journalists for an interview with former Red Army Fraction (RAF) member Birgit Hogefeld, who was in detention (and continues to be detained in life imprisonment) for a deadly terrorist attack. The German courts had judged it necessary to prohibit Hogefeld from making public statements in order to prevent her from promoting the organization's ideology and from influencing its supporters.³⁴ The applicant's declarations in court about her attitude towards the RAF were ambiguous (see also *Yalçiner v. Turkey*), but 'although she admitted 'mistakes' in the strategy of the RAF, she continued to claim 'that our beginnings and our fight for a different world were at any time well-founded and justified, and that fight has to be conducted as a confrontation'. Moreover, she held that 'the reversal of the social developments is still a matter for which one must fight'. Seen in the light of her personal history, such statements 'could possibly be understood by supporters as an appeal to continue the activities of the RAF'.

It seems that the Court is well aware of the media's special role as regards terrorism – which itself thrives on media attention. In *Sürek and Özdemir v. Turkey* and *Erdoğan v. Turkey*, the Court equally emphasized the media's duties

³⁰ Joint partly dissenting opinion of Judges Wildhaber, Pastor Ridruejo, Costa and Baka, ECtHR (Grand Chamber) *Karatas v. Turkey*.

³¹ ECtHR *Hocaogullari v. Turkey*, 7 March 2006 (Appl. no. 77109/01).

³² ECtHR *Halis Doğan v. Turkey* (no. 3), 10 October 2006 (Appl. no. 4119/02).

³³ ECtHR *Hogefeld v. Germany* (inadmissible), 20 January 2000 (Appl. no. 35402/97).

³⁴ The request was made in 1995 – three years after the RAF had officially denounced the use of violence.

and responsibilities in publishing terrorist statements: '[t]he Court also acknowledges that in situations of conflict and tension particular caution is called for on the part of the national authorities when consideration is being given to the publication of opinions which advocate recourse to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence.'³⁵ Expressions through the mass media can have a greater impact on national security than, for instance, literature.³⁶ Yet '[w]here a publication cannot be categorised as inciting to violence, Contracting States cannot with reference to the prevention of disorder or crime restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media'.³⁷

3.2.2 Violations of Article 10

Nevertheless, there are numerous cases where the Turkish government was found in violation of Article 10 – all involving heavy criticism of the government and/or propagation of the Kurdish cause. In *Incal v. Turkey*³⁸, the Court held that a leaflet virulently criticizing measures taken by the local government and appealing to Kurdish citizens to oppose the situation, could – if read in context – not be taken as incitement to violence, hostility or hatred between citizens. Though the Court took into account the background of terrorism, it did not discern anything that would lead to the conclusion that Mr. Incal was in any way responsible for the problems of terrorism in the region. It is interesting that the Court here delved into the connection between the particular speaker and the violence in the region, which is usually not considered.

In many other judgments the Court simply ruled that expressions could not be characterized as 'incitement to violence, armed resistance or uprising, or as hate speech' and were thus protected by Article 10, even in cases where a hostile attitude towards the Turkish State was apparent.³⁹ For instance in *Asli Güneş v. Turkey*, an editor in chief's conviction for publishing an article about the 'battle for the liberation of the Kurds' resulted in a violation of Article 10: notwithstanding the reference to a 'battle', the ECtHR held that it did not amount

³⁵ ECtHR *Sürek and Özdemir v. Turkey* (Grand Chamber), 8 July 1999 (Appl. nos. 23927/94, 24277/94); *Erdogdu v. Turkey*, 15 June 2000 (Appl. no. 25723/94) para. 62.

³⁶ STEFAN SOTTIAUX, *Terrorism and the Limitation of Rights – the ECHR and the US Constitution*, (Oxford: Hart Publishing, 2008), p. 121.

³⁷ *Sürek and Özdemir* (Grand Chamber); *Erdogdu*, para. 71; ECtHR *Demirel and Ateş v. Turkey* (no. 3), 9 December 2008 (Appl. no. 11976/03).

³⁸ ECtHR (Grand Chamber) *Incal v. Turkey*, 9 June 1998 (Appl. no. 22678/93).

³⁹ ECtHR *Kalin v. Turkey*, 10 November 2004 (Appl. no. 31236/96), ECtHR *Özkaya v. Turkey*, 30 November 2004 (Appl. no. 42119/98), ECtHR *Erdal Taş v. Turkey*, 19 December 2006 (Appl. no. 7650/01), ECtHR *Saygılı & Seyman v. Turkey*, 14 June 2007 (Appl. no. 62677/00), ECtHR *Bahçeci and Turan v. Turkey*, 16 June 2009 (Appl. no. 33340/03).

to incitement to violence or armed resistance.⁴⁰ A violation was also found in *Özer v. Turkey*⁴¹, concerning the publication of articles about the Kurdish situation ('L'Etat turc, dans sa répression contre la lutte pour l'indépendance') with the conclusion '[l]a seule voie possible pour la fraternité des peuples est la révolution'. Besides the fact that it concerned political speech, the Court noted that the author had not justified the PKK's deadly attacks but had just propagated solidarity among the Kurdish people.⁴² Seen in their context, the expressions could not be regarded as incitement to violence – according to the Court, 'la lutte' refers to a battle for the recognition of Kurds' rights rather than to 'war', while 'revolution' has a Marxist connotation.

In a case involving a totally different context, *Vajnai v. Hungary*⁴³, the Court surprisingly required a strict consequential relationship between speech and potential consequences. The leader of an opposition party was convicted for wearing a red star on his jacket at a lawful demonstration, but the Court observed that '[a]s regards the aim of preventing disorder (...) the Government has not referred to any instance where an actual or even remote danger of disorder triggered by the public display of the red star had arisen in Hungary. In the Court's view, the presence of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a 'pressing social need'. In the absence of a 'real and present danger' that a dictatorship will be restored in the future, there was no sufficient ground for prohibition (see also par. 3.3.3).

3.2.3 *Leroy v. France: glorifying the WTC attacks*

In *Leroy v. France*⁴⁴ the idea of protecting public order and national security was combined with the rationale of protecting victims of grave crimes from offence to their feelings. The judgment deals with a cartoonist's conviction for depicting the WTC attacks of 9/11 together with the words 'We all dreamt of it, Hamas did it', published in a magazine two days after the terrorist attacks of 9/11 as an expression of the cartoonist's anti-U.S. attitude. The Court considered that the depiction of the attacks as a dream that had finally come true was particularly offensive and shocking for the victims and their families. Moreover, the context surrounding the cartoon played a role: it was published only two days after the attacks at a time when the world was still in shock and public opinion was very much upset. Especially since the magazine was published in the Basque region, where the risk of terrorism is far from absent, such glorification could have important consequences in the Court's view – the hostile reactions that might ensue from it could impact negatively upon public order. Even though the Court

⁴⁰ ECtHR *Asli Güneş v. Turkey*, 27 September 2005 (Appl. no 53916/00).

⁴¹ ECtHR *Özer v. Turkey*, 5 May 2009 (Appl. nos. 35721/04, 3832/05).

⁴² *Özer*, par. 42.

⁴³ ECtHR *Vajnai v. Hungary*, 8 July 2008 (Appl. no. 33629/06).

⁴⁴ ECtHR *Leroy v. France*, 2 October 2008 (Appl. no. 36109/03).

itself argued that provocation is inherent in artistic expressions and that the cartoon belongs to a public debate on issues of general interest, it found no violation of Article 10. The Court concluded that the cartoon glorifies violence and found that 'le requérant juge favorablement la violence perpétrée à l'encontre des milliers de civils et porte atteinte à la dignité des victimes... Elle relève à cet égard que la provocation n'a pas à être nécessairement suivie d'effet pour constituer une infraction'.

It is remarkable here, especially in relation to *Vajnai v. Hungary*, how the Court accepts a criminal conviction on the basis of a very weak link between speech and its consequences for public order and national security. The two conflicts at stake in *Leroy* – Al-Qaeda's terrorist attacks in the United States and ETA's terrorism in the Basque region – have nothing to do with one another and it is therefore peculiar to assume that the mere glorification of violence in one situation can lead to enhancing the other – especially not when a satirical cartoon is involved that does not in any real way incite future violence. The Court seems to accept States' wish to regulate the decency of public debate in the wake of the WTC attacks, where it refers to the 'troubled public debate' that existed right after 9/11. The Court's judgment also seems to be influenced by initiatives within the Council of Europe to prevent terrorism: the Convention on the Prevention of Terrorism⁴⁵ requires that Member States criminalize in their jurisdictions 'public provocation to commit a terrorist offence', which may include indirect forms such as glorifying terrorism. In *Herri Batasuna & Batasuna v. Spain* – on freedom of association of a political party allegedly supportive of ETA – the Court also placed the party's dissolution in the light of the 'international wish to condemn the public glorification of terrorism'.⁴⁶

3.2.4 Conclusion: restricting extreme speech

The Court's sensitivity to the external context surrounding expressions explains why even indirect incitement is sometimes taken to be a legitimate restriction of freedom of speech. Even if expressions, taken literally, do not provoke violence, they may still be restricted under some circumstances: the use of indirect, symbolic language that reinforces grievances and conceals a call for revenge can be dangerous in the wake of a conflict, as history has shown. However, the Court could still consider the real causal link between speech and violence more consistently. In particular, one would expect the Court to apply a stricter test to restrictions of speech in stable democracies, where the link between expressions and violence is likely more remote; in *Leroy v. France*, for instance, the possibility

⁴⁵ Article 5. The CoE's Convention was largely followed by the EU in its Council Framework Decision amending Framework Decision 2002/475/JHA on Combating Terrorism, adopted in 2008.

⁴⁶ ECtHR *Herri Batasuna & Batasuna v. Spain*, 30 June 2009, (Appl. no. 25803/04, 25817/04) par. 90.

of violence was far from realistic. Because most subversive speech cases involve the sensitive political situation in Turkey (and the Court regularly uses the 'margin of appreciation' doctrine), mature democracies should also be critical in using this case law to guide domestic decision-making so as not to unduly inhibit freedom of speech.

Furthermore, the Court often combines the concepts of incitement to violence against the State, glorification or justification of violence and hate speech – it appears difficult to draw a sharp line between those types. Whereas the concept 'hate speech' traditionally refers to racist/xenophobic speech against minorities – as in the Council of Europe's recommendation on hate speech⁴⁷ – in the cases at hand the Court uses the term in situations where hatred is stirred up by an insurgent group against the *government* (and indirectly against the rest of the population). What needs to be kept in mind, though, is that the *rationale* behind the prohibition of extreme speech in the context of terrorism is quite different from that in traditional hate speech. While the latter type of speech is found unacceptable mainly because of the central principle of 'equal respect for human dignity', in cases concerning 'terrorist speech' the protection of national security and public order are central. Since the latter are closely linked to majority interests – often translated into State interests – it is particularly important to construe those restrictions in such a manner that the right to freedom of expression of individuals and/or minorities *against* the State is respected.

3.3 'TRADITIONAL' HATE SPEECH

3.3.1 *Equality, 'militant democracy' and Article 17 ECHR*

Hate speech in the traditional sense refers to incitement to hatred against persons on account of their membership of a certain group characterized by race/ethnicity, religion, nationality, sexual orientation and so forth. This mostly concerns minority groups, though hate speech laws often include both expressions against minority as well as majority groups.⁴⁸ The ECtHR traditionally leaves States much leeway to restrict such speech: it frequently emphasizes that:

[...] tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle

⁴⁷ Council of Europe, Recommendation (97) 20 of the Committee of Ministers to Member States on 'hate speech'.

⁴⁸ ECtHR *Erbakan v. Turkey*, 6 July 2006 (Appl. no. 59405/00): the Court has held that religious hate speech against majorities can be restricted under Article 10 as well. See also ECtHR *Otto-Preminger-Institut v. Austria*, 20 September 1994 (Appl. no. 13470/87), about blasphemy and the protection of the majority.

it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued.⁴⁹

This passage indicates that the main rationale for prohibiting hate speech under the Convention is to preserve respect for the equal dignity of all human beings. This is such a fundamental value under the Convention that expressions which are clearly at odds with it are sometimes prohibited under the 'abuse of right' provision of Article 17, without coming to a substantive assessment under Article 10. Article 17 works to remove some speech from the protection of Article 10 'purely on the basis of content. It eliminates the need for a 'balancing process' that characterises the Court's approach under Article 10'.⁵⁰ Both the Commission and the Court have ruled in several hate speech cases that expressions lacked the protection of Article 10 because they were aimed at the destruction of the rights set forth in the Convention – for instance the propagation of National-Socialism⁵¹, Holocaust denial⁵² (see par. 3.3.3 below) and advocating the removal of ethnic minorities from the Netherlands.⁵³ In some other cases, the Commission and Court have interpreted Article 10(2) in the light of the principles set out in Article 17.⁵⁴

The concept of abuse of right in Article 17 of the Convention expresses the idea of a 'militant democracy' that is defensive against adversaries who abuse the Convention's freedoms to destroy its basic values – that is, democracy itself and fundamental rights such as equality. As Judge Jambrek once stated in a concurring opinion, 'the requirements of Article 17 also reflect concern for the defence of democratic society and its institutions. The European Convention was drafted as a response to the experience of world-wide, and especially European, totalitarian regimes... It could be assumed that this original aim also corresponds to the more recent dangers to the European principles of democracy and the rule of law'.⁵⁵

⁴⁹ ECtHR *Gündüz v. Turkey*, 4 December 2003 (Appl. no. 35071/97) par. 40; *Erbakan*, par. 56; ECtHR *Féret v. Belgium*, 16 July 2009 (Appl. no. 15615/07) par. 64.

⁵⁰ DAVID KEANE, 'Attacking Hate Speech Under Article 17 of the European Convention on Human Rights', (2007) 4 *Netherlands Quarterly of Human Rights*, pp. 641–663, at 643.

⁵¹ ECommHR *X v. Austria* (inadmissible), 13 December 1963 (Appl. no. 1747/62).

⁵² ECtHR *Garaudy v. France* (inadmissible), 24 June 2003 (Appl. no. 65831/01); ECtHR *Witzsch v. Germany* (inadmissible), 13 December 2005 (Appl. no. 7485/03).

⁵³ ECommHR *Glimmerveen and Hagenbeek v. the Netherlands* (inadmissible), 11 October 1979 (Appl. no. 8348/78, 8406/78).

⁵⁴ ECommHR *Kuhnen v. Germany* (inadmissible), 12 May 1988 (Appl. no. 12194/86); ECtHR *Schimanek v. Austria* (inadmissible), 1 February 2000 (Appl. no. 32307/96).

⁵⁵ ECtHR *Lehideux and Isorni v. France* (Grand Chamber), 23 September 1998 (Appl. no. 24662/94), concurring opinion of Judge Jambrek, par. 3.

The Commission noted in the case of *Glimmerveen and Hagenbeek v. the Netherlands* that the overall purpose of Article 17 is to prevent totalitarian groups from exploiting for their own interests the principles enunciated by the Convention.⁵⁶ This was repeated by the Court in *Norwood v. UK*, where the complaint by a British National Party member – who had displayed in the window of his flat a large poster with a photograph of the Twin Towers in flames, the words ‘Islam out of Britain – Protect the British People’ and a symbol of a crescent and star in a prohibition sign – was found inadmissible with regard to Article 17.⁵⁷ The Court held that the words and images on the poster amounted to a public expression of attack on all Muslims in the UK, and that ‘such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination’. It is interesting to note that the Court has recently explicitly rejected the use of Article 17 in two cases concerning racial/religious hate speech (*Soulas v. France* and *Féret v. Belgium*), as set out in the next paragraph. It is to be awaited whether this points to a lasting development.

3.3.2 Racial and religious discrimination under Article 10

The Court has dealt with some instances of hate speech substantively under Article 10; the most well-known of these is *Jersild v. Denmark*.⁵⁸ This Grand Chamber judgment deals with a television programme which broadcast a documentary on ‘the Greenjackets’, a group of young people with racist ideas. The journalist responsible for the programme was convicted (besides the Greenjackets themselves) for aiding and abetting those racist expressions. Only the journalist’s case reached the ECtHR, where his conviction was judged to be in violation of Article 10. The Court argued that the applicant did not have as his purpose the propagation of racist ideas, since the case concerned a serious news programme intended for a well-informed audience, where the presenter counterbalanced the youths’ views and dissociated himself from them. The Court did remark that the conviction of the Greenjackets themselves was evidently in accordance with Article 10⁵⁹ thus clearly differentiating between the speakers and the media. Accordingly, the potential consequences of speech are not decisive for the Court in this case: what is decisive is the aim pursued by the speaker or conveyor. Is that to inform the public about matters of public interest, or merely to incite hatred?⁶⁰

⁵⁶ *Glimmerveen and Hagenbeek*.

⁵⁷ ECtHR *Norwood v. UK* (inadmissible), 16 November 2004 (Appl. no. 23131/03).

⁵⁸ ECtHR *Jersild v. Denmark* (Grand Chamber), 23 September 1994 (Appl. no. 15890/89) par. 10.

⁵⁹ *Ibid.*, par. 35.

⁶⁰ ANNE WEBER, ‘The Case Law of the European Court of Human Rights on Article 10 ECHR Relevant for Combating Racism and Intolerance’, paper presented at conference *Combating*

In the recent *Soulas and others v. France*⁶¹, a complaint was made by the author and publisher of a book entitled *The colonisation of Europe. Truthful remarks about immigration and Islam*. In this book the author sought 'to emphasise, in particular, what he regarded as the incompatibility between European civilisation and Islamic civilisation in a specific geographical area' with passages such as 'il ne s'agit pas de ghettos mais de territoires conquis et colonisés' and 'Les Français de souche sont expulsés des zones afro-maghrébines majoritaires'. The Court did not see a violation of Article 10 in the convictions of the author and his publisher for incitement to hatred. After giving an elaborate sketch of the problems of integration of immigrants – definitely a matter of debate of public interest, according to the Court – it held that State authorities' margin of appreciation is relatively large in this field and that combating racial discrimination in all its forms is of the highest importance, referring to Article 20 ICCPR and Article 4 CERD (the Court specifically mentions *racial* discrimination, not *religious*!). Finally, the Court accepted the following reasoning by the French Court of Appeal as relevant and sufficient:

'...the terms used in the book were intended to give rise in readers to a feeling of rejection and antagonism, exacerbated by the use of military language, with regard to the communities in question, which were designated as the main enemy, and to lead the book's readers to share the solution recommended by the author, namely a war of ethnic re-conquest.'

The French court thus accused the author and publishers of using the well-known propaganda strategy of creating fear and representing conflict as inevitable, as known from so many past conflicts. The author's aim was to identify an enemy to convince persons of the necessity for a war, according to the French court. That interpretation, however, remains open to criticism: one might just as well conclude that the author wished to discuss the problems in multicultural society in a provocative manner.

In *Féret v. Belgium*⁶², racial/religious discrimination by a political party was at stake: the chairman of the extreme right-wing 'Front National' was prosecuted and convicted for incitement to hatred, discrimination and violence by the distribution of party leaflets and posters in connection with the election campaigns. The leaflets advocated the repatriation of immigrants to their countries of origin and separation of Belgians and Europeans from immigrants in terms of work permits, social security and so on. The Court found no violation of Article 10. In one passage it becomes clear that restrictions of hate speech, for

racism while respecting freedom of expression, European Commission against Racism and Intolerance, Strasbourg, 16–17 November 2006, p. 101.

⁶¹ ECtHR *Soulas and others v. France*, 10 July 2008 (Appl. no. 15948/03).

⁶² *Féret*.

the Court, are not really about the connection between speech and eventual violence – but rather about protecting the dignity of groups against injury and to protect public peace and stability:

‘La Cour estime que l’incitation à la haine ne requiert pas nécessairement l’appel à tel ou tel acte de violence ni à un autre acte délictueux. Les atteintes aux personnes commises en injuriant, en ridiculisant ou en diffamant certaines parties de la population et des groupes spécifiques de celle-ci ou l’incitation à la discrimination, comme cela a été le cas en l’espèce, suffisent pour que les autorités privilégient la lutte contre le discours raciste face à une liberté d’expression irresponsable et portant atteinte à la dignité, voire à la sécurité de ces parties ou de ces groupes de la population. Les discours politiques qui incitent à la haine fondée sur les préjugés religieux, ethniques ou culturels représentent un danger pour la paix sociale et la stabilité politique dans les Etats démocratiques.’⁶³

According to the Court, especially for politicians it is of utmost importance to avoid feeding intolerance, in light of the defence of democracy. The fact that racist/xenophobic expressions were uttered in the context of an electoral campaign with the aim of convincing as many people as possible was regarded as an aggravating factor, since this way the impact of incitement to hatred would be even larger.⁶⁴ Different than in *Soulas v. France*, the Court did not mention the margin of appreciation here; rather it put its own substantive judgment – based on a strong militant democracy viewpoint – in the fore. However, in contrast to earlier racism/xenophobia cases, the Court explicitly rejected the application of Article 17 on the grounds that a substantive assessment was necessary.⁶⁵

This very articulate judgment has provoked much discussion within the Court itself: it was supported by a narrow majority of four judges and strongly criticized by the three dissenting judges.⁶⁶ They warned against the ‘banalisation of racism’ that would result from judging expressions such as Féret’s to be racist and concluded that a stable democracy does not need the kind of militancy that the Court adheres to. Apparently, national authorities as well as the European Court are struggling with the boundaries of public debate on immigration and multiculturalism. The special protection that is traditionally afforded to expressions that form part of public debate is not afforded to racist utterances; for the Court, these are simply not a legitimate part of a public sphere in a democratic, tolerant and pluralist society.⁶⁷ The concrete risks of speech in terms of future conflict and/or violence are not vital for the Court in traditional hate speech cases. This is related to the Convention’s coming into being in the

⁶³ Ibid., par. 73.

⁶⁴ Ibid., par. 76.

⁶⁵ Ibid., par. 52.

⁶⁶ Ibid., dissenting opinion Judge Sajó, joined by Judge Zagrebelsky and Judge Tsotsoria.

⁶⁷ Ibid., para. 64; see also A. NIEUWENHUIS, *Over de Grens van de Vrijheid van Meningsuiting*, (Nijmegen: Ars Aequi Libri, 2006), p. 312.

aftermath of the Second World War, which evoked in the Convention a strong spirit of protecting democracy from the 'enemies' that will 'aim to overthrow it'. However understandable – and however important the protection of equal dignity – the prohibition of certain viewpoints outright draws the Court's attention away from the necessity to look carefully at the grounds for prohibition and its proportionality. With the appearance of new and more subtle forms of racism/xenophobia, identifying democracy's 'enemies' is not as easy as it once seemed; distinguishing outright attacks on human dignity from legitimate public debate about policies on multiculturalism and immigration is increasingly challenging. The use of hate speech laws to interfere with such highly divisive public debates may even become a source of social disharmony in itself.

3.3.3 Denial or justification of historical facts

The denial or justification of historical facts – an issue we have already seen in *Leroy v. France* – has links to both incitement to violence and hate speech. Justification of grave crimes can involve an implicit incitement to future violence (see the Turkish cases), but this need not be so: in cases involving the denial or justification of clearly established historical facts such as the Holocaust, the rationale for prohibition lies in offence to the feelings of victims or survivors of such mass violence. The real purpose of Holocaust denial, according to the Court, is not to engage in historical debate but 'to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history'. Denying the Holocaust is therefore 'one of the most serious forms of racial defamation of Jews and of incitement to hatred of them'.

However, the Court does not accept restrictions of revisionist speech that do not concern 'clearly established historical facts', but rather matters of ongoing historical debate. This appears from the Grand Chamber judgment in *Lehideux and Isorni v. France*, which dealt with an advertisement in *Le Monde* which justified the actions of Philippe Pétain. According to the Court, 'even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately'.⁶⁸ This was repeated in *Orban v. France*⁶⁹, involving the conviction of book publishers for 'apology of war crimes' in a book in which a former secret agent in counter-terrorism operations in Algeria gives testimony of his experiences, arguing that torture and summary executions can be legitimate and inevitable in such a conflict. The Court held that such a testimony is of importance for public

⁶⁸ *Lehideux and Isorni*, par. 55.

⁶⁹ ECtHR *Orban and others v. France*, 15 January 2009 (Appl. no. 20985/05).

discussion about a people's collective memory, as it aims to make others understand the complexities of a past situation which continues to occupy present debate.⁷⁰ The government's argument that the publication offended the feelings of those submitted to torture was rejected since the events had taken place more than 40 years ago.

In *Vajnai v. Hungary*⁷¹, the memory of past suffering also played a role: the government justified its intervention by arguing that the red star symbolizes totalitarian ideas and practices that are against the Convention's values. The Court did not accept this argument under Article 17, as the red star here was 'merely the symbol of lawful left-wing political movements' instead of totalitarian groups. On the merits, the Court noted the following:

'...almost two decades have elapsed from Hungary's transition to pluralism and the country has proved to be a stable democracy... there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship...The Court is of course aware that the systematic terror applied to consolidate Communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives...It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression...'

In 'revisionist' cases such as those concerning Holocaust denial, the Court does not pay attention to the real and present danger that a past conflict or dictatorship will be restored in the future. Instead, the aim of the author is generally decisive – is that to engage in a real historical debate or merely to offend persons? In *Vajnai*, on the other hand, the Court considered that offence alone cannot set the limits to freedom of expression. What is most problematic about the Court's case law, however, is the fact that the Court engages in the task of distinguishing 'clearly established historical facts' (currently applying only to the Holocaust), the denial of which engages the criminal law. Even though singling out Holocaust denial for prohibition is understandable in the light of the Convention's coming into being, going down this road begs comparisons with other past atrocities – glorifying Stalin, denying the Armenian genocide, and so on. It is already very difficult to uphold consistency – at this moment a symbol related to the Communist past cannot be prohibited because of the 'lapse of time' and 'lack of real and present danger', whereas the latter considerations are not applied to Holocaust denial. Facing such inconsistencies, it seems wise that the Court reconsider the necessity for speech restrictions in this area.

⁷⁰ Ibid., par. 49.

⁷¹ *Vajnai*.

4 CONCLUSION

This chapter has sketched a picture of the Court struggling with a very complex and diffuse *problematique*. While asked to predict the future, the Court is still facing the Convention's past. The difficulties the Court encounters are related to the *principles* from which it departs to establish the limits to freedom of expression.

When it comes to terrorist speech, the Court has sometimes refrained from exercising strict scrutiny as regards the real causal link between speech and terrorism. Moreover, since the rationales behind the concepts of 'extreme speech against the state' and 'hate speech against minorities' are so different, intermingling these concepts – as the Court does – may challenge its ability to effectively guarantee the rights of minorities against the government. Nevertheless, it must be said that in many cases the Court has effectively managed to uphold the freedom to express 'subversive speech' in a conflict context.

The ECtHR generally departs from a strong militant democracy viewpoint, inspired by the Convention's history. However, it gets increasingly stuck in this democratic paradox when it comes to denial or justification of historical facts: when it starts to take account of the real dangers of speech, the Court runs into inconsistency.

In cases concerning racial/religious discrimination, the Court has tended towards prohibiting such viewpoints outright without a proportionality assessment – often under Article 17. This tradition of defensive democracy is more difficult to uphold now that the 'enemies of democracy' are not so easily identified anymore, while the Court is encountering the expanding limits of public debate on immigration/integration.

Rendering judgment on the limits to hate speech before, during and after conflict remains an extremely difficult task; it can be safely predicted that this will continue to divide the Court as well as Member States in the future.