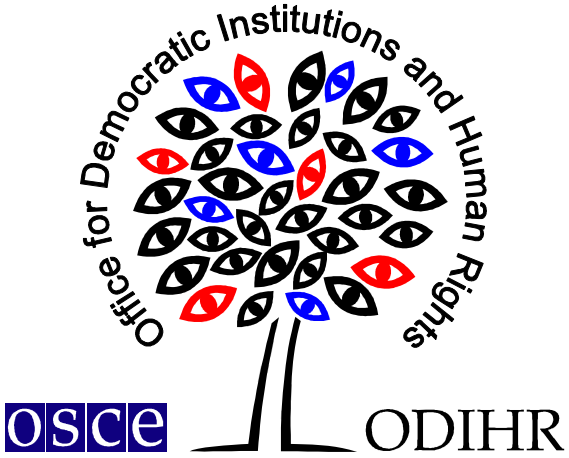

BACKGROUND PAPER

ON

Human Rights Considerations in Combating Incitement to Terrorism and Related Offences

OSCE/CoE Expert Workshop
Preventing Terrorism: Fighting Incitement and Related Terrorist Activities

Vienna, 19-20 October 2006

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INTRODUCTION

In line with its mandate, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) offers this paper as a background to the discussion on preventing incitement to and glorification of terrorism. The aim of this paper is to outline some of the major human rights implications of combating incitement to and glorification of terrorism and to provide some elementary tools for participating States to use in the development of policy and practice in this field. The paper will provide a brief overview of how human rights (and particularly freedom of expression) work in practice, and under what specific circumstances they may be lawfully restricted. It will then outline the major international instruments concerned with the issue of incitement, including the international framework governing the freedom of expression. Taking into account international human rights standards, decisions of the UN Human Rights Committee (HRC), of the European Court (ECtHR) and Commission (ECommHR) of Human Rights as well as decisions from outside the European Convention system such as those of the US Supreme Court, the paper will try to outline basic principles that apply to the restriction of freedom of speech in the context of combating incitement or glorification of terrorism.

1. BACKGROUND

Governments have an obligation to protect persons within their jurisdiction from the threat of terrorism, including taking measures which are likely to prevent terrorist acts. A key part of this obligation is to combat impunity by criminalising and prosecuting material support for such terrorist acts by individuals or organisations. The concept of material support in the criminal justice system may also be extended to the provision of advice, expertise or assistance, as well as incitement or public support for or glorification of (*apologie*) the commission of terrorist acts in order to allow States to act in a preventive rather than solely a reactive way to the terrorist threat.

The prevention of terrorism, however, is not limited to repressive methods such as the use of the criminal law or security services, but may be seen in the broader perspective of creating an environment which is not conducive to terrorist recruitment or the acceptance of justifications put forward by terrorists for their actions. In this regard, it is of the utmost importance that laws designed to prevent incitement to terrorism and related speech do not go further than is absolutely necessary for the prevention of terrorism. The suppression of expression that falls short of incitement to violence may not only be problematic legally but may also be counter-productive in that it can seem to lend the views expressed a legitimacy that they would not attract if they were expressed openly. It can also lead to a sense of alienation through depriving parts of the community of a legitimate means of expressing their views which may tend to push them further towards more radical forms of protest or create an environment which is more susceptible to terrorists' discourse.

The positive obligation to prevent terrorism and, by extension, incitement to or glorification of terrorism also entails the obligation to take all measures in compliance with international human rights law and standards. A number of human rights may be engaged by a policy to prevent these phenomena including the right to a fair trial, the right to freedom of assembly and association, the right to liberty and, most directly, the right to freedom of speech and the prohibition on the use of rights to destroy the rights and freedoms of others. In developing policy in this area, therefore, States must pay close attention to the impact on specific rights to ensure that the policy is human rights compliant. This paper will focus on the right to freedom of expression and the prohibition on hate speech and explore the issues that must be borne in mind while taking measures to combat incitement to terrorism and other related acts.

2. COMBATING INCITEMENT TO TERRORISM – THE INTERNATIONAL FRAMEWORK

The United Nations Security Council (UNSC) Resolution 1624 confirms that:

> "*Condemning also in the strongest terms the incitement of terrorist acts and repudiating attempts at the justification or glorification* (apologie) *of terrorist acts that may incite further terrorist acts* […the UNSC] *Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:*
> *(a) Prohibit by law incitement to commit a terrorist act or acts;*
> *(b) Prevent such conduct;*
> *(c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.*"[1]

The absence of an agreed definition of "terrorism" in international law leaves a broad margin of discretionary power to States in prohibiting and preventing incitement and *apologie*. In order for these policies to be human rights compliant, however, each law must in itself be tightly drawn so as not to be open to abuse. According to the terminology of the UNSC Resolution 1624, glorification and *apologie* are synonyms.

The prohibition of terrorist incitement has not only been adopted at the UN level. At the regional level, art. 5 of the Council of Europe (CoE) Convention on the Prevention of Terrorism of 16 May 2005[2] reads:

> "1. *For the purposes of this Convention, 'public provocation to commit a terrorist offence' means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.*
> 2. *Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.*"

The 2005 CoE Convention uses a different terminology and refers to "public provocation to commit a terrorist offence," while highlighting the importance of the intent to incite the commission of a terrorist offence and of the objective danger that such offence would be committed. Due to this emphasis on intent and causality, this provision has been considered as a balanced and human rights compliant response by

[1] UNSC, Resolution 1624 of 14 September 2005, operative para. 1.
[2] CETS No. 196.

the UN Special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.[3]

At the European Union level, the incitement of terrorist acts is also prohibited by the Council Framework Decision on combating terrorism ("Each Member State shall take the necessary measures to ensure that inciting or aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable").[4]

This list of provisions at both the universal and regional level shows an increasing emphasis on prevention of incitement to terrorism. It is therefore crucial for States to consider how they can prevent incitement to terrorism without imposing excessive restrictions on freedom of expression. UNSC Resolution 1624 stresses that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and that States should adopt such measures in accordance with international law, in particular international human rights law, refugee law, and humanitarian law.[5] Addressing the problem of incitement to terrorism and related issues is an extremely complex task and States must ensure that, in doing so, their actions are carefully targeted.

3. THE RIGHT TO FREEDOM OF EXPRESSION

Freedom of expression constitutes one of the essential foundations of a democratic society. It provides protection for ideas, opinions and information that may offend, shock or disturb either the State or a relevant part of the population. It is, however, not an absolute right and as such, may be restricted in certain specific circumstances. In particular, the right to freedom of expression may not be used to destroy the rights of others. Any limitations on freedom of expression, however, must be proportionate and clearly prescribed by law.

The OSCE has extensive commitments in relation to freedom of expression and freedom of the media. These commitments confirm that

> "[…] *freedom of expression is a fundamental human right and a basic component of a democratic society. In this respect, independent and pluralistic media are essential to a free and open society and*

[3] Report by Martin Scheinin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, E/CN.4/2006/98, 28 December 2005, para. 56 (c) and more recently in A/61/267, 16 August 2006, para. 28.
[4] EU Council Framework Decision 2002/475/JHA, 13 June 2002, art. 4 (1).
[5] UNSC, Resolution 1624, *cit*., preparative para. 2. Para. 6 reads: "[…] any restrictions [on freedom of expression] shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR."

accountable systems of government. They take as their guiding principle that they will safeguard this right."[6]

Without freedom of expression it may not be possible to enjoy many of the other rights protected by human rights standards. The media in particular attract special protection because of their role as a public watchdog. Restrictions on freedom of expression are subjected to very close scrutiny and must be convincingly established, because restrictions on free speech restrict democracy. For all its faults, democracy is considered to be the most effective form of government precisely because it is subject to the scrutiny of a free media. A democratic state has to subject on a daily basis its policies, including its counter-terrorism policies and foreign policy to such scrutiny.

In international human rights law, the main guarantees for freedom of expression are found in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the European Convention on Human Rights (ECHR).[7]

Article 19 ICCPR reads:

> "1. *Everyone shall have the right to hold opinions without interference.*
> 2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
> 3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
> *(a) For respect of the rights or reputations of others;*
> *(b) For the protection of national security or of public order ("ordre public"), or of public health or morals.*"

Freedom of expression is not an absolute right like, for instance, the prohibition on torture but rather it is a qualified right. This means that it can be restricted, bearing in mind some fundamental principles. It may also be legally derogated from in cases of

[6] Budapest 1994, para. 36; see also (non exhaustively) Copenhagen 1990, para. 9.1, Moscow 1991, para. 26, Mandate of the OSCE Representative on Freedom of the Media (1997), para. 1, Istanbul 1999, para. 27.

[7] Article 10 ECHR reads: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

state of emergency in accordance with the conditions prescribed by Article 4 ICCPR[8] (and Article 15 ECHR[9]). This paper will not develop further the topic of derogation of rights but will focus on the scope for limitation of freedom of expression in compliance with international human rights standards.

4. EXPLORING THE BOUNDARIES OF RESTRICTIONS ON FREEDOM OF EXPRESSION

The balancing exercise required to determine the extent to which freedom of expression may be limited in the context of prevention of terrorism is highly complex. Identifying where the line of acceptability lies varies greatly from country to country depending on differing cultural and legal histories. The variety of different legal systems and cultures in the OSCE region adds to the difficulty in giving a definitive answer as to where that line should lie in an OSCE context. In order to highlight the differing approaches and to illuminate the reasoning behind those approaches, this paper relies heavily on judgments from the European Court of Human Rights whose jurisprudence applies across the 46 Member States of the Council of Europe, and on the jurisprudence of the US Supreme Court which reflects the weight given to freedom of expression in a common law and North American context.

Despite geographical variations, basic principles are clearly shared across the OSCE region and beyond. As stated by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the

[8] See Article 4 ICCPR and HRC, *General Comment No. 29 on States of Emergency (Article 4)*, 31 August 2001, Doc. CCPR/C/21/Rev.1/Add.11. See also *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995, Principle 3. The Johannesburg Principles were adopted on 1 October 1995 by a group of experts in international law, national security and human rights convened by Article 19, the International Centre against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, which met in South Africa. The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations. In his 1996 report to the Commission on Human Rights, the UN Special Rapporteur on freedom of expression found that "these Principles offer useful guidance in assessing the often competing claims of freedom of expression and national security", see Report of the UN Special Rapporteur on the right to freedom of opinion and expression (Mr. Abid Hussain), Doc. E/CN.4/1996/39, 22 March 1996. The UN Commission on Human Rights (now Human Rights Council) recalled the Principles in its resolution on freedom of expression since 1996.

[9] Article 15 ECHR reads: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

Organisation of American States Special Rapporteur on Freedom of Expression in their Joint Declaration (the Joint Declaration) in this context:

> "*The right to freedom of expression is universally recognised as a cherished human right and to respond to terrorism by restricting this right could facilitate certain terrorist objectives, in particular the dismantling of human rights.*
>
> *While it may be legitimate to ban incitement to terrorism or acts of terrorism, States should not employ vague terms such as 'glorifying' or 'promoting' terrorism when restricting expression. Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring*."[10]

As a qualified right, the right to freedom of expression does allow for a degree of limitation on the exercise of the right. In order to interfere with the right to freedom of expression, however, the tests of legality, necessity, proportionality and non-discrimination must be satisfied.

4.1 Legal Certainty

Any restriction on freedom of expression must be expressly established by law and

> "[…] *the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*."[11]

This means that any law in this field must be sufficiently clear for a person to be able to judge whether or not their speech would amount to an infringement of the law. The level of precision of the law depends on the type of law in question, the field it is

[10] Joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005.

[11] ECtHR, *Sunday Times v. United Kingdom,* 26 April 1979, para. 49. The Court continues: "Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

designed to cover and the number and status of those to whom it is addressed.[12] The ECtHR did not hesitate to find a violation of the right to freedom of expression when the definition of an offence was deemed to be too vague.[13]

The criminalisation of speech *directly* inciting or provoking the execution of terrorist acts is already provided for in a number of States and is not contentious. On the other hand, criminalisation of "indirect" incitement or *apologie*/glorification of terrorist acts or terrorism more generally is more complicated. Criminalisation of such speech entails a clear and predictable risk of abuse due to the general criminalisation of the expression of ideas or opinions that are not "liked" by the majority, without questioning whether or not they are in fact likely to lead to the commission of a terrorist act. This problem is particularly acute in relation to offences which fall short of actual 'incitement' such as *apologie*, glorification or justification of terrorism. The problem of definition of such offences is exacerbated by the fact that the notion of 'terrorism' itself is notoriously difficult to define.

The Joint Declaration expresses concern

> "*that the standard of restricting expression which amounts to incitement, hitherto well-established in the areas of public order and national security, is being eroded in favour of vague and potentially very overbroad terms*"[14]

The offence of incitement to commit a terrorist act will clearly be human rights compliant where there is **direct** incitement, supported by an **intention** to promote terrorism and a **causality link** between the incitement and the likely realisation of a terrorist act. Incitement to commit serious crimes is an offence that is commonly found in domestic criminal laws across the OSCE region and the criminalisation of speech that incites or provokes the execution of terrorist acts is already provided for in a number of States.[15] This is not the case, however, for the criminalisation of *apologie* or glorification of terrorism which is much more difficult to define in a human rights compliant way.[16]

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[12] The ECtHR found that a constitutional provision was detailed enough if read together with complementary laws and administrative regulations, see ECtHR, *Rekvényi v. Hungary*, 20 May 1999, para. 34.

[13] ECtHR, *Hashman and Harrup v. United Kingdom*, 25 November 1999, paras. 29-43.

[14] Joint declaration, *cit.*.

[15] See for a collection of national practices at the Council of Europe level the study CoE, *"Apologie du terrorisme" and "Incitement to terrorism"*, Strasbourg, 2004. See also EU Network of Independent Experts on Fundamental Rights, *The requirements of fundamental rights in the framework of the measures of prevention of violent radicalisation and recruitment of potential terrorists* – Opinion n° 3-2005, spec. pp. 25-27.

[16] "The Special Rapporteur considered that, by not clearly setting out the threshold for criminalization, the terms 'glorification' and 'indirect encouragement' of terrorism did not allow individuals to regulate their conduct appropriately. This was at variance with the provisions of article 15 of ICCPR and might amount to a disproportionate limitation to freedom of expression", Report by Martin Scheinin, A/61/267, *cit.*, para. 7 (concerning UK Terrorism Act 2006).

One working (though not legal) definition which has been used by the Council of Europe states that *apologie* "could be understood as the public expression of praise, support or justification of terrorists and/or terrorist acts."[17] The concepts in this definition are difficult to identify in a precise way which makes legislating on these areas particularly susceptible to the risk of excessively broad definitions. For example, at what point exactly does legitimate opinion or political speech about the root causes of terrorism or a particular terrorist act become a justification of terrorism that should be criminalised? The absence of a clear definition of 'terrorism' at the international level exacerbates the problem.

In this area in particular, States need to give very careful consideration to the basic principles of legal certainty and proportionality when drafting laws on incitement to or glorification of terrorist acts. One way of ensuring that legislation in this area is carefully targeted and proportionate, is to expressly require both a **specific intent** to incite the commission of a terrorist act and a **concrete danger** of this act being committed **as a result** of incitement.[18] States must be wary of introducing legislation in this area which does not meet the standards of legal certainty.

4.2 Grounds for restriction

See also the Report of the Counter-Terrorism Committee to the Security Council on the implementation of resolution 1624 (2005), S/2006/737, 15 September 2006, at para. 11: "Five States that reported expressly prohibiting incitement to commit a terrorist act or acts informed the Committee that that prohibition encompassed statements that might be construed as justification or glorification (*apologie*) of acts of terrorism. In such cases, States generally indicated that evidence of a link between the alleged glorification and the commission of further terrorist acts was still required. One State, for example, reported criminalizing 'indirect encouragement' of others to commit acts of terrorism or specified offences. It stated that indirect encouragement included the glorification of terrorism or the specified offences, where it could reasonably be inferred that the conduct that was glorified should be emulated in existing circumstances. Another State said that apologie was criminalized only when, by its nature and circumstances, it constituted a direct incitation to commit an offence. It should be noted that six States mentioned provisions of their criminal laws that prohibit the public approval or glorification of any serious crime, adding that the prohibition could be applied to acts of terrorism where such acts were defined in their criminal codes."

[17] CoE, *Apologie, cit*., p. 12.

[18] This is provided in Article 5 of the CoE 2005 Convention: "99. However, its application requires that two conditions be met: first, there has to be a specific intent to incite the commission of a terrorist offence, which is supplemented with the requirements in paragraph 2 (see below) that provocation be committed unlawfully and intentionally. 100. Second, the result of such an act must be to cause a danger that such an offence might be committed. When considering whether such danger is caused, the nature of the author and of the addressee of the message, as well as the context in which the offence is committed shall be taken into account in the sense established by the case-law of the European Court of Human Rights. The significance and the credible nature of the danger should be considered when applying this provision in accordance with the requirements of domestic law", Council of Europe Convention on the Prevention of Terrorism, *Explanatory Report*, para. 99-100. The importance of such elements for human rights compliant laws on incitement is also stressed in House of Lords, House of Commons-Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, Third Report of Session 2005–06, HL Paper 75-I-HC 561, 28 November 2005, spec. pp. 15-22.

The interference with freedom of expression must be justified by reference to the recognised grounds for restricting rights within the Article itself. The State, therefore, has to be able to justify that the interference with the right is authorised by one or more of the stated grounds in the Article at issue.[19] In the context of restricting the right to freedom of expression to prevent terrorism, the primary grounds for restriction are likely to be protecting the rights of others and national security.

4.2.1 Protecting the rights of others

Like the ICCPR, the ECHR contains a formula explicitly banning the abuse of the Convention's rights in order "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."[20] In relation to this, the HRC and the ECtHR have developed a sizeable body of jurisprudence around the prohibition of Holocaust denial and National Socialism.[21]

Article 20 of the International Covenant on Civil and Political Rights (ICCPR) is unambiguous in asserting:

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[19] In the present case, Article 19 (2) ICCPR.

[20] Article 17 ECHR. "The general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention. To achieve that purpose, it is not necessary to take away every one of the rights and freedoms guaranteed from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms. Article 17 covers essentially those rights which, if invoked, will facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention", ECommHR, *Glimmerveen and Hagenbeek v. the Netherlands*, Decision on the admissibility of Appl. No. 8348/78 and 8406/78, 11 October 1979, p. 195; and ECtHR, *Lawless v. Ireland*, 1 July 1961, para. 6 (in the Law).

[21] See in particular HRC, *Faurisson v. France*, Decision of 8 November 1996, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996), spec. paras. 9.1-10. Mr. Faurisson was fined for having said during an interview that: "No one will have me admit that two plus two make five, that the earth is flat, or that the Nuremberg Tribunal was infallible. I have excellent reasons not to believe in this policy of extermination of Jews or in the magic gas chamber [...] I would wish to see that 100 per cent of all French citizens realize that the myth of the gas chambers is a dishonest fabrication ('est une gredinerie'), endorsed by the victorious powers of Nuremberg in 1945-46." The HRC found no violation of Article 19 for a fine.
In the same vein at the European level: "National Socialism is a totalitarian doctrine incompatible with democracy and human rights and [that] its adherents undoubtedly pursue aims of the kind referred to in Article 17", ECommHR, *H., W., P. and K. v. Austria*, Application No. 12774/87. In *Garaudy*, a case dealing with the publication of a revisionist book about the Holocaust, the Court found that "the main content and general tenor of the applicant's book and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention", ECtHR, *Garaudy v. France*, Application No. 65831/01, 24 June 2003, p. 23. Concerning the application of the same principles in a case of non-violation of article 10 and 17, see ECtHR (Grand Chamber), *Lehideux and Isorni v. France*, Judgment of 23 September 1998, spec. paras. 47 and 53.

"1. *Any propaganda for war shall be prohibited by law.*
2. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*"[22]

The prohibition of propaganda for war and advocacy of national, racial or religious hatred is a clear consequence of the atrocities leading up to and during WWII. The right to life (Article 6 ICCPR) and to equality (Article 26 ICCPR) form the backbone of the ICCPR and the drafters of the Covenant decided to combat the root causes of such violations (war, discrimination) "by way of preventive prohibitions in the area of formation of public opinion."[23]

This provision provides a clear basis in human rights law for restricting freedom of expression where that freedom is used to incite discrimination, hostility or violence or for war propaganda. It may be used as a basis equally to prevent abuse of freedom of expression for a terrorist cause and to prevent the imputation of terrorist tendencies to particular communities which may amount to incitement to discrimination, hostility or violence against members of those communities.

4.2.2 National Security

In cases involving restrictions of human rights in the fight against terrorism States tend to invoke either or both public order and national security as grounds for the interference. In this regard, however, it is important to note that national security may not be used as a blanket ground for interference with rights but rather:

"*a restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an*

[22] "For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy", HRC, *General Comment 11, Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)*, 29 July 1983, para. 2. In *Ross* the Human Rights Committee decided that the removal of Mr. Ross from a teaching position was a legitimate restriction to his freedom of expression, since his public off-duty activities were deemed to be discriminatory against Jews and to have contributed to cases of harassment against some Jewish pupils in school, HRC, *Malcolm Ross v. Canada*, Decision of 18 October 2000, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000). In *J.R.T.*, recorded messages warning callers about "the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles" were considered by the Human Rights Committee as advocacy of racial or religious hatred which Canada had an obligation under article 20 (2) of the Covenant to prohibit, HRC, *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981, 6 April 1983, U.N. Doc. Supp. No. 40 (A/38/40), para. 8 (b).

[23] M. Nowak, *CCPR Commentary*, 1993, p. 359.

internal source, such as incitement to violent overthrow of the Government."[24]

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information state that

> "*expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country under the conditions stated in Principle 3.*"[25]

Prior censorship on the grounds of national security is therefore only permissible in truly exceptional circumstances.

To penalise an expression qualified as a threat to national security, a government must prove "*that*

> *a) the expression is intended to incite imminent violence;*
> *b) it is likely to incite such violence; and*
> *c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."*[26]

The Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR state that

> "*national security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.*"[27]

4.3 Necessity and Proportionality

This test requires a line to be drawn between the right of the individual (freedom of expression) and the interests of the State or the community. The application of this

[24] *Johannesburg Principles,* Principle 2(a).
[25] *Johannesburg Principles,* Principle 23. Principle 3 reads: "In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law."
[26] *Johannesburg Principles,* Principle 6.
[27] *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (1985), Principle 30. The principles were developed in 1984 by a panel of 31 international experts who met at Siracusa, Italy, to adopt a uniform set of interpretations of the limitation clauses contained in ICCPR. They do not have the force of law, but offer authoritative guidance as to the meaning of the terms contained in the ICCPR, particularly in areas not covered by general comments of the Human Rights Committee.

balancing test to terrorism cases and above all to terrorism cases involving freedom of expression by the European Court of Human Rights has never been simple. The principles need to be applied to the specific circumstances of each case and there are no clear rules as to where the line should be drawn in a general sense. Outside of the application of the European Convention on Human Rights, the US Supreme Court demonstrates yet another approach to this delicate balance.

In order to make an assessment as to the legitimacy of proposed measures, the government should justify its actions by establishing that the interference is necessary in a democratic society. 'Necessary' does not mean indispensable, but neither does it mean 'reasonable' or 'desirable'.[28] What it implies is a pressing social need and that pressing social need must accord with the requirements of a democratic society, i.e. tolerance and broad-mindedness.[29]

Of particular relevance in this context, is the fact that although individual interests must on occasion be subordinated to those of the perceived majority, that does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

Freedom of expression is

> "*one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.*"[30]

[28] *Sunday Times, cit.,* para. 59. The government must demonstrate that "(a) the expression or information at issue poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles", *Johannesburg Principles,* Principle 1.3.

[29] "The Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in issue was 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'", see ECtHR, *Lingens v. Austria*, 8 July 1986, para. 40, and ECtHR, *Barfod v. Denmark*, 22 February 1989, para. 28.

[30] ECtHR, *Handyside v. United Kingdom*, 7 December 1976, para. 49.

The principle of proportionality is not mentioned in the text of human rights treaties, but it is the dominant theme in the application of human rights. What proportionality requires is that there is a reasonable relationship between the means employed and the aims sought to be achieved. Essentially, a measure of interference which is aimed at promoting a legitimate public policy will be disproportionate if it is either:

- unacceptably broad in its application; or
- has imposed an excessive or unreasonable burden on certain individuals.[31]

A decision taking account of proportionality principles should:

- Impair as little as possible the right in question.
- Be carefully designed to meet the objectives in question.
- Not be arbitrary, unfair or based on irrational considerations.

Factors to consider when assessing whether or not an action is disproportionate are:

- Have relevant and sufficient reasons been advanced in support of it?
- Was there a less restrictive measure?
- Has there been some measure of procedural fairness in the decision making process?
- Do safeguards against abuse exist?
- Does the restriction in question destroy the "very essence" of the right in question?

A disproportionate restriction on freedom of expression may be counter-productive as it may deprive people of their ability to legitimately express their views and opinions and create a sense of frustration which may be a factor in fomenting an environment conducive to terrorist recruitment.

4.4 Non-discrimination

As part of the test for assessing the legality of an interference with human rights, the issue of discrimination must be addressed, even if there has been no violation of the substantive right at issue. As a general principle, a distinction in treatment will be considered discriminatory if it treats a certain part of the population differently and:

- There is no objective and reasonable justification for such differentiation;
- There is not a very good reason for differentiating;
- The differentiation is disproportionate.

[31] The Human Rights Committee affirmed that "[…] where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right", HRC, *General Comment 31 (Nature of the General Legal Obligation Imposed on States Parties to the Covenant)*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 6.

If these criteria cannot be fulfilled, a difference of treatment will amount to discrimination and will be unlawful. Principle 4 of the Johannesburg Principles reads

> "*In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status*."

Care must be taken in restricting freedom of expression in the context of counter-terrorism that the restriction does not specifically target a particular political or other opinion if there is not a very good reason for making such a differentiation such as, for example, the fact that that opinion promotes the use of violence.

5. MEANS OF RESTRICTING FREEDOM OF EXPRESSION - PRIOR RESTRAINT VERSUS SUBSEQUENT LIABILITY

There are two main kinds of restriction on freedom of expression that States may use in order to combat incitement and/or glorification-*apologie* of terrorism. These are prior censorship of public expressions and subsequent liability. Prior restraints are of particular relevance in cases where it is known that a particular statement is to be broadcast or distributed or where a person who is known to espouse particular ideas is to be interviewed in the press and a State wishes to take preventive action.

The use of prior restraint is, however, highly contentious and the situations where it may be used are extremely limited. This is reflected in the fact that the Inter-American Convention on Human Rights specifically introduces a virtually complete ban on prior censorship although this is not explicitly found in other international human rights instruments.[32] In the US context, the importance of freedom of expression contained in the First Amendment is shown by the fact that it will rarely be capable of restriction through prior restraint. The Government must prove that publication would "surely result in direct, immediate, and irreparable damage"[33] to the nation before publication could be blocked.

[32] IACHR, Article 13 (2) reads: "The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure: a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals."

[33] US Supreme Court, *New York Times Co. v. United States*, 403 US 713, 30 June 1971. The Supreme Court ruled that First Amendment did protect the New York Times' right to publish the so called "Pentagon Papers". The Papers, commissioned in 1967 by the Secretary of Defence, focussed on the history of the war in Viet-Nam, including the internal planning and policy decisions within the U.S. Government. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity", US Supreme Court, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The Government "thus carries a heavy burden of showing justification for the

The ECtHR has by and large taken a different stand, allowing States to restrict freedom of expression *ex ante* on a national security basis or on one of the other grounds recognised by art. 10 (2) ECHR. This has been the case in a number of decisions concerning the publication of interviews with terrorists. The ECtHR rejected as inadmissible the application regarding the refusal by a domestic court to allow a terrorist to be interviewed before the end of the trial[34] and the ECommHR did not find a violation of freedom of expression for a blanket ban on interviews with members of *Sinn Féin*, an organisation not proscribed though deemed to represent the political wing of the Irish Republican Army (IRA). The Commission emphasised

> "[…] *that the exercise of that freedom 'carries with it duties and responsibilities' and that the defeat of terrorism is a public interest of the first importance in a democratic society. In a situation where politically motivated violence poses a constant threat to the lives and security of the population and where the advocates of this violence seek access to the mass media for publicity purposes, it is particularly difficult to strike a fair balance between the requirements of protecting freedom of information and the imperatives of protecting the State and the public against armed conspiracies seeking to overthrow the democratic order which guarantees this freedom and other human rights*."[35]

In another case, the ECommHR found no violation of freedom of expression for an eight week restriction on the broadcasting of a programme based on the transcripts of the trial of six alleged IRA terrorists pending the verdicts. The ECommHR

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imposition of such a restraint", US Supreme Court, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

[34] The ECtHR noted "that terrorism by the Red Army Faction (RAF) had been a major threat to national security and public safety in Germany for more then twenty years and that fighting terrorism is a legitimate interest of every State. This includes the taking of measures intended to prevent the recruitment of members and supporters for terrorist organisations." The Court found that the State had enough margin of appreciation due to the applicant personal history (she is one of the main representatives of the terrorist group RAF) and because of some ambiguity in messages previously released by her, see ECtHR, *Hogefeld v. Germany*, Decision on the admissibility of Appl. No. 35402/97, 20 January 2000, pp. 5-8. In a case involving a prisoner and the possibility for him to call journalists from the prison, the Commission ruled the application inadmissible because of the impossibility for the prison authorities to exercise effective control over the telephone communications, see ECommHR, *Bamber v. UK*, decision on the admissibility of Appl. 33742/96, 11 September 1997.

[35] The applicants contested that the methods adopted by the Government to achieve its legitimate aims were neither reasonable nor proportionate because of a law already in force in Ireland forbidding the broadcasting of 'anything which may reasonably be regarded as being likely to promote, or incite to, crime or as tending to undermine the authority of the State.' In their opinion the Government ignored the role of the professional broadcaster in critically presenting and analysing the views of those who are interviewed, ECommHR, *Purcell and others v. Ireland*, Application No. 15404/89, 16 April 1991.

emphasised the fact that the dramatic reconstruction of court proceedings on television appreciably differs from reporting of those proceedings in the press.[36]

States may also choose to punish people after a criminal act is committed and, at least in an American context it can clearly be seen that

> "s*ubsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privilege*."[37]

The existence of offences such as incitement to commit terrorist acts should serve in itself as a deterrent. This second type of restriction of freedom of expression, the liability *ex post*, is particularly significant in cases of incitement to commit terrorist acts, of *apologie*-glorification of terrorism and in general in cases of speech involving advocacy of violence or of other criminal behaviours. Subsequent liability for expression, providing the law is drafted clearly and that prosecution of such offences is carried out in accordance with international standards of fair trial, is likely to have a lesser impact on the core of the right to freedom of expression and therefore should be viewed as preferable to prior restraint which should only be used in truly exceptional circumstances.

6. SOME PRACTICAL EXAMPLES

A general formula for legally restricting freedom of expression in the context of counter-terrorism is impossible to establish. Each case will require a consideration of the specific context in hand bearing in mind a number of different elements that may include the form of expression, the characteristics of the person making the expression, the legal and cultural framework in a particular country and the actual impact of the expression amongst others.

6.1 The European Court of Human Rights Approach

The complexity of finding the right balance in restricting freedom of expression in the context of the prevention of terrorism and incitement to terrorism can be seen by comparing a set of differing judgments on the subject concerning the specific circumstances in South East Turkey.

i) Zana v. Turkey

[36] The Commission considered that "such a television programme would not normally affect the judgment of the Court, but that the appellants had the right to be assured that the Court was unaffected by external matters and that they would have understandable doubts of this if the programme was in fact shown before the judgment was given", ECommHR, *C.Ltd v. UK*, Application No. 14132/88, 13 April 1989.

[37] US Supreme Court, *Near v. Minnesota,* 283 U.S. 697 (1931).

In the *Zana* case, the Court did not foind a violation of Article 10 for the imprisonment of the former mayor of a city of the South East of Turkey who said during an interview:

> "*I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake*."[38]

The ECtHR based its decision on the ambiguity of the message and its dangerousness in the context of the extreme tension in South East of Turkey at that time. In particular,

> "*in 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*."[39]

ii) *Sürek v. Turkey (No. 1)*

In *Sürek*, the owner of a Turkish newspaper was prosecuted and fined for the publication of two readers' letters harshly criticising the Turkish military operations in the South East. The letters accused Turkey, among other things, of having conspired in the imprisonment, torture and killing of Kurdish freedom fighters.[40] The Court did not find a violation of Article 10, as:

> "*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.* [In the context of the Turkish South East security situation] *the content of 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*."[41]

This decision was contentious however and six out of the eighteen judges of the Grand Chamber dissented, arguing that the real and imminent risk of those letters inciting violence or hatred had not been proved, some explicitly calling the Court to

[38] ECtHR, *Zana v. Turkey*, 25 November 1997, para. 12.
[39] ECtHR, *Zana, cit*., para. 60. The Court voted in favour of the non-violation 12 votes to 8.
[40] ECtHR (Grand Chamber), *Sürek v. Turkey*, (No. 1) 8 July 1999. The letters are reproduced in English translation at para. 11.
[41] *Sürek*, *cit*., para. 62.

adopt the *Brandenburg* test[42] as defined by the US Supreme Court as a better tool for protecting freedom of expression.[43]

iii) Ceylan v. Turkey

In the apparently similar case of *Ceylan*, an article written by a trade-union leader described the Turkish military operations in the South East as "State terrorism", "genocide" and "bloody massacres" and called for reaction from the democratic forces of the nation. The Court, pointing out the importance of political speech, found that "the article in question, despite its virulence, does not encourage the use of violence or armed resistance or insurrection" and accordingly registered a violation of Article 10.[44]

iv) Arslan v. Turkey

In *Arslan*, the Court reversed the conviction of the applicant for the publication of a book "disseminating propaganda undermining the indivisibility of the nation." The Court considered that the book, notwithstanding some acerbic passages painting in extremely negative fashion the population of Turkish origin, did not constitute an incitement to violence, armed resistance or an uprising. The publication of these statements in a book instead of through mass media and the severity of the penalty imposed on the applicant were taken into consideration by the Court.[45]

v) Karataş v. Turkey

In *Karataş*, the Court considered that poetic expression (by definition addressed to a small audience, unlike other mass media) had a limited impact on national security, public order or territorial integrity, notwithstanding some lines calling for violence with quite aggressive tones. Considering the poems, the Court affirmed:

> "*the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation*."[46]

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[42] See below.

[43] In particular, Judge Bonello argued that "the common test employed by the [European] Court seems to have been this: if the writings published by the applicant supported or instigated the use of violence, then his conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient. I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create 'a clear and present danger.' When 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", *Sürek*, *cit*., Judge Bonello's dissenting opinion.

[44] ECtHR (Grand Chamber), *Ceylan v. Turkey*, 8 July 1999, paras. 33-36.

[45] The book had been written in form of literary historical narrative, mainly describing the Turks as cruel invaders and the Kurdish people as the only ones not being able to free itself from the yoke, see for details ECtHR (Grand Chamber), *Arslan v. Turkey*, 8 July 1999, paras. 44-50.

[46] ECtHR (Grand Chamber), *Karataş v. Turkey*, 8 July 1999, para. 52.

vi) Incal v. Turkey

Several elements are usually taken into account by the ECtHR in considering restrictions to freedom of expression. In *Incal*, criminal conviction for the dissemination of a pamphlet was in violation of Article 10 ECHR, considering the severity of the sanction, the fact that the applicant sought an authorization from the prefecture before circulating the leaflet, the fact that the applicant is a member of one of the opposition's political parties (and the consequent importance of openness to criticism by governments in democratic societies), and most importantly because the document was not considered by the ECtHR as clearly inciting violence or hatred among citizens.[47]

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These cases clearly show a number of factors that will be taken into account in deciding on whether or not a restriction of freedom of speech amounts to a violation and are useful to compare as they all reflect the same political backdrop. Amongst the factors that must be taken into consideration are the severity of the sanction, the format of the expression and the audience, the status of the person (e.g. a member of a political party) and the likelihood of the expression leading to violence.

6.2 The US Supreme Court Approach

As an example from outside the European Convention system, the US approach to freedom of expression can be seen to be slightly different and perhaps demonstrating a stricter approach to the protection of freedom of expression. This is well illustrated through a set of Supreme Court judgments relating to the restriction of freedom of expression.

The US Supreme Court decision of *Brandenburg v. Ohio* (referred to in one of the dissenting opinions in the ECtHR case of *Sürek v. Turkey*), about a Ku Klux Klan gathering establishes a high bar for justifying restrictions on freedom of expression. Mere advocacy of violence will not be enough to restrict freedom of expression:

> "*the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action* […] *A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and*

[47] ECtHR (Grand Chamber), *Incal v. Turkey*, 9 June 1998, paras. 46-60.

> *Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.*"[48]

The result will turn on the particular circumstances of each case:

> "*The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.*"[49]

The Court applied the same principle a few years later, reversing the conviction of a demonstrator heard by a law-enforcement officer saying "We'll take the […] streets later." The Court found that this conduct was not enough to satisfy the *Brandenburg* test and added to the *Brandenburg* standard some important guarantees: the speech must have been "directed to a person or a specific group of persons"; secondly, the incited action must be immediate, not postponed.[50]

Clarifying these notions, in the National Association for the Advancement of Colored People (*NAACP)* case, the Court decided that the statement "if we catch any of you going in any of them racist stores, we're going to break your […] neck" did not represent a direct threat of violence. The NAACP, a civil rights organisation, promoted the boycott of some "white" shops and used to take note and read out names of people in the African American community violating the measure in NAACP meetings. The US Supreme Court found that the First Amendment protected the NACCP's non-violent activities (including freedom of expression, association and petition) directed to bring about political, social and economic change.[51]

There must be intent to provoke a lawless action. The burden to prove the element of intent must rest with the government in such cases thus protecting the presumption of innocence in criminal proceedings relating to free speech. In the case of *Virginia*, the Court found Virginia's law against cross burning unconstitutional because the burden of proof was on the defendant to demonstrate that he or she did not intend the cross burning as intimidation. The Court recalled that the protections afforded by the First Amendment are not absolute and States can accordingly ban "true threats", that is statements meant "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Intimidation being a type of "true threat", a law banning cross burnings *with the intent to intimidate* would have been compliant with the First Amendment.[52]

[48] US Supreme Court, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[49] US Supreme Court, *Schenck v. United States*, 249 US 47, March 3, 1919.
[50] US Supreme Court, *Hess v. Indiana*, 414 US 105 (1973).
[51] US Supreme Court, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).
[52] US Supreme Court, *Virginia v. Black*, 538 U.S. 343 (2003).

6.3. Conclusions

This set of judgments clearly shows that from the perspective of the ECtHR the evaluation of how far such statements are actually likely to provoke violence is of key importance. In the US context, the Brandenburg test which requires an intent to provoke immediate lawless action and a likelihood of such action being provoked in the circumstances creates a clear and high standard for the protection of freedom of expression in such cases.

In deciding whether or not a restriction on freedom of expression will be legitimate, the general political situation in the country, the means of expression and its aim as well as the element of intent will all be of crucial importance.

The restriction of freedom of expression through the criminal law must be very carefully circumscribed in order to meet the requirement of legal certainty and must take into account other human rights principles such as the right to a fair trial and its various elements such as the presumption of innocence.

OUTLOOK

Free speech is one of the central pillars of democracy: it has the power to promote an open society by way of bringing to light abuses and advancing political, artistic, scientific and commercial development. On the other hand, freedom of expression is sometimes abused to incite violence (including terrorism), racial hatred and discrimination. In the context of preventing terrorism and violent radicalisation, States must be vigilant in combating advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether that comes from persons or groups advocating terrorist acts, or from persons or groups seeking to associate other parts of the community with terrorist acts.

In the context of countering terrorism, there are concrete risks that by curbing political speech and/or expressions falling short of incitement to commit terrorist acts States may provoke a switch into less healthy expressions of discontent, including the recourse to violence and to terrorist acts. Removing the opportunity to express discontent with the system legitimately may add to a sense of frustration and alienation which contributes to creating an environment where terrorists may more easily find recruits. In addition, imprisoning those who seek to glorify or justify acts of terrorism may well be counter-productive by providing them with an audience which may be much more vulnerable and receptive than the audience they could reach in the general public. Alternative sanctions for this type of offence such as fines or other non-custodial penalties may be more effective in the prevention of terrorism.

States must carefully consider the broader issues and consequences involved in preventing and combating terrorism and incitement to terrorism when developing policy and legislation in this area. The importance of protecting freedom of

expression, even if that means tolerating the expression of opinions that may be found offensive and alarming was eloquently put by US Justice Holmes in 1919:

> *"*[…] *But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*"[53]

The ODIHR stands ready to support and advise OSCE participating States in developing policy and legislation in this highly complex area.

[53] US Supreme Court, *Abrahams v. United States*, 250 US 616 (1919), Justice Oliver Wendell Holmes' dissenting opinion, at 630.