

Religion, Terrorism and Speech in a ‘Post-Charlie Hebdo’ World

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Abstract

This article reviews the policy responses and the freedom of expression case law following the Charlie Hebdo attack. It unpacks the ‘Countering Violent Extremism’ framework from a freedom of expression standpoint and analyses court decisions related to glorification of terrorism and incitement to hatred with a particular focus on France and the United States as well as Russia, and Scandinavia. It shows the determination of governments to tackle the non-violent “ideological” bases of “terrorism”, and to treat religion as largely a public order issue. It concludes that in a post-Charlie Hebdo world, courts also have taken short cuts, instrumentalising not only speech to perceived higher needs, but judicial reasoning and practices as well.

Keywords

Charlie Hebdo attack – terrorism – countering violent extremism - incitement to violence – religious hatred – glorification of terrorism – International Convention for Civil and Political Rights

On 7 January 2015, some ten years after the first publication of the ‘Prophet Mohammed cartoons’, the offices of French magazine Charlie Hebdo were attacked in broad daylight in Paris, and 12 persons, including four cartoonists, executed in cold blood, in a seeming revenge for the magazine’s publication of cartoons depicting the Prophet Mohammed years earlier. Only days later, four customers of a Jewish Hyper Cacher kosher supermarket and a policewoman were killed as well. Both these attacks and their resulting deaths, followed shortly thereafter by another attack in Denmark (February 2015), took place

in a context of heightened instability globally, characterised by widespread incidents of sectarian or religious violence and “terrorism” around the world.¹

The 2015 Paris attacks were coordinated, it appears, to target at once both a symbol of freedom of expression characterised by its disrespect for religion, and representatives of the Jewish faith. The January 2015 attacks thus exemplify the interconnection between acts of violence (defined as “terrorism”),² religious hatred and religiously-grounded hatred against those deemed to be “guilty” of blasphemy. These interconnections had already taken centre stage in 2014, under force of ISIS sectarian violence and other acts of extreme and graphic violence, digitised and circulated through social media. Charlie Hebdo brought them inside the home of Western democracies.

The Charlie Hebdo attacks demonstrated ISIS’ global reach, and this in turn gave further momentum to a quasi-global political and legal response by governments, predicated on the connections between (extreme) violence and religion. This played out not only at (traditional) military and policing levels, but also in formal and informal communication, information and speech. A reunion of these three strands—religion, violence and expression—was initiated before Charlie Hebdo, but the dual attacks in January 2015, and the identities of their perpetrators and victims, gave this reunion huge impetus.

This is not to argue that the Charlie Hebdo attacks demonstrated the existence of what authors had labelled back in the 1990s as the ‘new terrorism’, defined by an increasing lethality of acts of violence and religious apocalyptic doctrines and fanaticism;³ a theory criticised by many.⁴ But it is to say that the

1 The latest Global Peace and Terrorism Indexes show a 61% increase in the number of people killed in terrorist attacks over the last year (available at <<http://www.visionofhumanity.org/#/page/indexes/terrorism-index>>).

2 It has become commonplace to explain that “terrorism” does not have an internationally agreed definition. This remains a crucial point. The world is coming *together* to fight a phenomenon, for which each member state has a different definition and under which each member state lists different groups, individuals or categories of individuals. The fact that they “may” agree on a few common “terrorist” enemies (and even that much is debatable) should not detract from the fact that there may be far more they disagree on.

3 See for instance Walter Laqueur, *The New terrorism, Fanaticism and the Arms of Mass Destruction* (Oxford University Press, 1999); Daniel Benjamin and Steven Simon, *The Age of Sacred Terror: Radical Islam’s War against America* (New York: Random House, 2003).

4 See for instance Martha Crenshaw, ‘The Debate over “New” vs. “Old” Terrorism’ (2007), presented at the Annual Meeting of the American Political Science Association, Chicago (available at <www.start.umd.edu/start/publications/New_vs_Old_Terrorism.pdf>; Thomas Copeland, ‘Is the “New Terrorism” Really New?: An Analysis of the New Paradigm for Terrorism’, *Journal of Conflict Studies* (2001), pp. 7–27, Isabelle Duyvesteyn, ‘How New is the New Terrorism?’, 27:5 *Studies in Conflict & Terrorism* (2004), pp. 439–454.

official response to Charlie Hebdo has been predicated on a paradigm close to that put forward as 'new terrorism', even if its conceptual or theoretical roots have not always been clearly enunciated. In effect, this has emerged as a renewed determination to tackle the "ideological" bases of "terrorism", including of its speakers, their speech and their medium of communication. In policy terms, it is translated into the countering 'violent extremism' framework. In legal terms, it has resulted in the launching of a wide legal net indeed, aimed at capturing religious—extremist—speech and largely dropping the test of connection to "violence".

This article will briefly review, first, governments' policy response to the Charlie Hebdo attack with a particular focus on unpacking the 'Countering Violent Extremism' framework from a freedom of expression standpoint. It will then turn to consider the legal and judicial responses post Charlie Hebdo with a particular focus on those of France and the United States although references will be made to jurisprudence in Russia, and Scandinavia too. In conclusion, it will seek to identify the main implications from the standpoint of freedom of expression standards and values.

1 Policy Responses to the Charlie Hebdo Attacks

The Countering Violent Extremism policy agenda or CVE is not a product of the Charlie Hebdo attack. The first US strategy on the topic appears to date back to 2011. Some authors trace it back to 2005, when it emerged, immediately after the "7/7" attack in London,⁵ as a strategic move away from the *War on Terror* approach. As a government policy, CVE nonetheless is firmly grounded in the post 9/11 World. And, there is no doubt that the January 2015 attacks (and subsequent ones) have strengthened the political and legal resolve to address (violent) extremism and radicalization, which are seen as the key path towards acts of terrorism. This is particularly clear in the case of France: while the plan to tackle violent radicalization dates back to April 2014, some four ministerial-level memos to Prefects and two decrees were adopted in the months following Charlie Hebdo, in addition to a new law on intelligence and security.⁶ The UK announced an 'Extremism Bill' in July 2015 that will 'unite our country and

5 Minerva Nasser-Eddine, Bridget Garnham, Katerina Agostino and Gilbert Caluya, *Countering Violent Extremism (CVE) Literature Review* (Counter Terrorism and Security Technology Centre, Australia, March 2011).

6 Ministère de l'intérieur, Dispositions juridiques et instructions gouvernementales, 10 February 2015, available at <<http://www.interieur.gouv.fr/SGCIPD/Prevenir-la-radicalisation/Prevenir-la-radicalisation/Dispositions-juridiques-et-instructions-gouvernementales>>.

keep you and your family safe by tackling all forms of extremism' and will also 'combat groups and individuals who reject our values and promote messages of hate'.⁷ The proposed bill will include *Banning Orders*, a new power for the Home Secretary to ban extremist groups, *Extremism Disruption Orders*, a new power for law enforcement to stop individuals engaging in extremist behaviour and *Closure Orders*, a new power for law enforcement and local authorities to close down premises used to support extremism. The new powers will also allow the vetting of British television programmes before transmission to curtail extremist content.⁸ Even if in the aftermath of the attacks in France not all countries moved to adopt a range of new laws or strategies, there is globally now a sense of greater focus on, and greater global alignment about, CVE and counterterrorism as priorities.

On 11 January 2015, the US White House announced that it 'will host a Summit on Countering Violent Extremism to highlight domestic and international efforts to prevent violent extremists and their supporters from radicalizing, recruiting, or inspiring individuals or groups in the United States and abroad to commit acts of violence, efforts made even more imperative in light of recent, tragic attacks in Ottawa, Sydney, and Paris'.⁹ The Summit took place on 17–19 February and brought together heads of states, Ministers UN Officials and experts on Violent Extremism, Radicalization and de-radicalisation. Over the following 6 months, a number of regional forums on the same topic were held throughout the world, in the lead up to the September 2015 United Nations General Assembly, while another day-long discussion on the same topic was hosted by President Obama.

Yet, the concept of 'Violent Extremism' is both complex and elusive, and, as a result, it suffers from much the same conceptual problems as those involved with the term "terrorism". It is thus not so surprising that the multitude of inter-governmental CVE initiatives, in the aftermath of Charlie Hebdo, do not translate into a distinct, coherent and universally agreed definition of the key concept at hand. Several hours of research on the website of the Global

7 Prime Minister's Office, 'The Queen's Speech 2015: What It Means for You', 27 May 2015, available at <<https://www.gov.uk/government/publications/queens-speech-2015-what-it-means-for-you/queens-speech-2015-what-it-means-for-you#extremism-bill>>.

8 John Plunkett and Mark Sweney, 'Broadcasters attack Theresa May's plan to vet TV programmes for extremism', *The Guardian*, 29 May 2015, Available at <<http://www.theguardian.com/media/2015/may/29/broadcasters-attack-theresa-mays-plan-vet-tv-programmes-for-extremism>>.

9 Available at <<https://www.whitehouse.gov/the-press-office/2015/01/11/statement-press-secretary-white-house-summit-countering-violent-extremism>>.

Counterterrorism Forum yielded no definition of violent extremism but many seminars, workshops and declarations on how to counter it.¹⁰ Similar results characterise a search of the website of the UN Counter Terrorism Implementation Task Force.¹¹ The OSCE for its part has shied away from defining violent extremism, preferring instead to focus on terrorist radicalisation defining it as:

[t]he dynamic process whereby an individual comes to accept terrorist violence as a *possible*, perhaps even legitimate, course of action. This may eventually, but not necessarily, lead this person to advocate, act in support of, or to engage in terrorism.¹²

The European Union affirms repeatedly that the prevention of *radicalisation* and *violent extremism* is one of the key components of its counterterrorism strategy but yet it too fails to offer a definition of either concept.¹³ Hedayah, the international institution created by the 29 countries in the Global Counterterrorism Forum for training and research to counter violent extremism, notes for its part that more work needs to be done on differentiating between the concepts of violent extremism and terrorism, and that 'definitions of these terms are often determined by the government that is running the program, and are not always informed by the literature on the topic'.¹⁴ Interestingly enough, Hedayah itself does not appear to have adopted any definition for these key concepts.

Perhaps not surprisingly, efforts for a settled definition yield more results at national level. The US has defined violent extremists as 'individuals who

10 Available at < <https://www.thegctf.org/web/guest/countering-violent-extremism>>.

11 Remarkably and scarily, a full conference and document was devoted to the 'Use of the Internet to Counter the Appeal of Extremist Violence' and yet again, there was no definition of the central and key concepts. Riyadh Conference on 'Use of the Internet to Counter the Appeal of Extremist Violence', 24–26 January 2011, Conference Summary & Follow-up/Recommendations, CTITF Working Group on Use of the Internet for Terrorist Purposes, 2011, available at <http://www.un.org/en/terrorism/ctitf/pdfs/ctitf_riyadh_conference_summary_recommendations.pdf>.

12 OSCE, *Preventing Terrorism and Countering Violent Extremism and Radicalization that may lead to Violence: A Community-Policing Approach* (OSCE: 2014), p. 35 (emphasis added), available at <<http://www.osce.org/atu/111438?download=true>>.

13 See for instance the revised 2014 strategy to combat violent radicalization, available at <<http://data.consilium.europa.eu/doc/document/ST-9956-2014-INIT/en/pdf>>.

14 Hedayah CVE Research brief, 1 December 2014, available at <<http://www.hedayah.ae/pdf/cve-research-brief-1.pdf>>.

support or commit *ideologically*-motivated violence to further *political* goals'.¹⁵ Countering violent extremism thus encompasses 'the preventative aspects of counterterrorism as well as interventions to undermine the attraction of extremist movements and ideologies that seek to promote violence. CVE efforts address the root causes of extremism through community engagement'.¹⁶ Similarly, Australia defines violent extremism as 'the use or support of violence to achieve ideological, religious or political goals'.¹⁷ France offers a tautological and circular definition of all three concepts in one of its public educational messages: 'radicalization is a behaviour change which may lead certain individuals to extremism and terrorism'.¹⁸ In another message, it defines radicalization as 'the move towards a *more intransigent* discourse or action: it may be expressed through the violent contestation of public order and society, as well as the *marginalization vis-à-vis* the latter'.¹⁹ The UK, for its part, has defined extremism as:

the vocal or active *opposition* to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs. We also include in our definition of extremism calls for the death of members of our armed forces, whether in this country or overseas.²⁰

These concepts of *violent extremism* or *violent radicalization*, let alone those of *extremism* or *radicalisation without the use of violence*, are problematic at many levels. Academics, in general, have been sceptical about and critical of the concept of "extremism" for its lack of clarity and the risks of political manipulation that this labelling carries.²¹ What is "extremism" for some may not be so for

15 Available at <https://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf>, p. 1 (emphasis added).

16 Available at <<https://www.whitehouse.gov/the-press-office/2015/02/18/fact-sheet-white-house-summit-countering-violent-extremism>>.

17 Australia's Attorney-General's Department, available at <<https://www.ag.gov.au/NationalSecurity/Counteringviolentextremism/Pages/default.aspx>>.

18 Ministère de l'intérieur ('La radicalisation est un changement de comportement qui peut conduire certaines personnes à l'extrémisme et au terrorisme').

19 Available at <http://cache.media.education.gouv.fr/file/02_-_fevrier/76/8/Prevenir-la-radicalisation-des-jeunes_390768.pdf> (emphasis added). The focus there is on (early) warning signs of radicalization many of which are problematic.

20 Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263181/ETF_FINAL.pdf> (emphasis added).

21 As noted by Maleika Malik, 'the term "extremist" remains surprisingly under-theorized... Whether or not an individual or a group is extreme will depend on the

others, and the political standpoint or benchmark through which the extremist idea is assessed matters greatly to any review's outcome. Simply, there is as yet no inherently objective legal definition of "extremism". In addition, and in the post-9/11 context, the use and definition of *violent extremism* have become greatly intermingled with those of *terrorism*. An extensive review of the academic literature conducted for the Australian government concluded that the terms *violent extremism*, *political violence*, *political terrorism* and *terrorism* were largely used interchangeably and that 'no real distinction between violent extremism and terrorism has fully evolved'.²²

The above definitions, notwithstanding their differences, raise a number of concerns from a freedom of expression standpoint. In the first instance, they are vague in meaning and overly broad, which leaves them open to interpretation and thus potential abuse. It is particularly unclear whether "extremism" refers to a set of beliefs, behaviour or actions, or all three. Where they include 'the support of violence', they do not elaborate on what this actually entails. The use of the term "support" in the US and Australian versions, and even more so that of 'opposition to British values' in the UK definition, suggests a very different threshold from that requested by Article 20 of the ICCPR for incitement, being either *propaganda of war*, under its first paragraph or *incitement to hatred*, under its second. It also differs from the prohibitions of "incitement" and "dissemination" of racist materials under Article 4 of the International Convention on the Elimination of Racial Discrimination. International standards limit restrictions to free expression on the grounds of national security to cases in which the expression is intended to incite violence and where there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. This principle has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression,²³ as well as by the European Court of Human Rights.²⁴

comparator against which they are being evaluated, that is, extremism is a relational concept'. Maleika Malik, 'Extreme Speech and Liberalism', in: Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford University Press, Oxford, 2007), p. 97.

22 M. Nasser-Edine et al., *Countering Violent Extremism (CVE) Literature Review* (Australian Government Dept. of Defence, Defence Science and Technology Organisation, Edinburgh, SA, 2011), p. 9.

23 Joint Declaration on defamation of religions, and anti-terrorism, and anti-extremism legislation, 2008, available at <<https://www.article19.org/resources.php/resource/3058/en/joint-declaration-on-defamation-of-religions,-and-anti-terrorism,-and-anti-extremism-legislation>>.

24 See *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras. 50–52.

The US civil liberty organization, the ACLU, for its part, saw the reference to “support” as a clear entrenchment on constitutionally protected rights and most importantly on a possible violation of freedom of opinion and belief: ‘By focusing not only on actions but *beliefs*, this definition casts a broad net, encompassing many who will never commit violence and may in fact abhor violence. Moreover, “extremist” is a subjective label highly vulnerable to politicization. An example from recent history—the inclusion and subsequent removal in 2008 of Nelson Mandela and other members of the African National Congress from the terrorist watchlist—illustrates the potential for labels based on associations and ideology, including ideology accepting of certain political violence, to be applied in ways that undermine respect for human rights and opportunities for conflict resolution.’²⁵ The ACLU goes on to critique the subtle targeting of specific religious communities and indeed beliefs: ‘To the extent that government agencies believe certain interpretations of Islam, for example, correlate with propensity to commit violence, they may indirectly or directly use CVE initiatives to discourage such interpretations and promote alternatives’.²⁶

The British and French policy definitions of “extremism” raise even more problems. They cover speech that bears no relation to the use or advocacy of violence. They also include highly subjective concepts such as *intransigent* or *British values*. As such, were these definitions to become statutory, there is a high probability that they would be deemed to be in violation of the European Convention on Human Rights, and any cases then brought to the European Court of Human Rights likely to be upheld. The Court has repeatedly endorsed and referenced the standard principles that freedom of expression includes information and ideas that can offend, shock or disturb and that the right to express and openly debate controversial and sensitive views constitutes one of the fundamental aspects of freedom of expression, distinguishing a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime.²⁷

Whether ‘intransigent discourse’ or the ‘opposition to British values’ would benefit from the protection under their domestic legal and judicial systems is on the other hand increasingly open to question. Similar questions may be raised with regard to the ‘support for violence’ under the US system in light of recent developments, spearheaded by the US Patriot Act and the US Supreme

25 Available at <<https://www.brennancenter.org/sites/default/files/analysis/Boston%20Organizational%20Letter%20re%20CVE%20Concerns.pdf>>.

26 *Ibid.*

27 *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

Court *Holder v. Humanitarian Project* decision, which upheld restrictions on political speech.

2 Legal and Judicial Responses

From the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination and the 1966 International Convention on Civil and Political rights (ICCPR), it has been understood that freedom of speech is not absolute and that it should or may be limited. When speech conveys hatred (and thus potentially negates or violates the central principle of equality of all human beings and non-discrimination), States have an obligation to restrict it. Unfortunately, the aforementioned Conventions have not offered the same response or threshold as to the kind of speech that may be restricted and the nature and extent of legitimate restrictions, and in some cases have contradicted each other—rendering the issue particularly opaque and difficult to adjudicate.

Under international human rights law, hate speech may be prohibited by Article 19 of the International Covenant on Civil and Political Rights (ICCPR), Article 20 of the ICCPR and Article 4 of ICERD. Most “extreme” forms of hate speech (incitement to genocide) are also prohibited under the 1948 Genocide Convention, and the ICC Statute (Article 25(3)). In addition, United Nations Security Council resolution 1624 (2005) requires States to prohibit incitement to commit a terrorist act (Article 1).

Particularly problematic is the incompatibility between Article 20 of the ICCPR, which prohibits incitement of hatred, and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination,²⁸ which prohibits not only incitement but also the dissemination of ideas based on racial superiority. While ICERD is not directly relevant to religious speech and religious hatred, the Committee responsible for the interpretation of the ICERD has insisted that, in appraising discrimination, ‘the specific characteristics of ethnic, cultural and religious groups be taken into consideration’²⁹ and

28 The International Convention on the Elimination of All Forms of Racial Discrimination was adopted and opened for signature by the United Nations General Assembly on 21 December 1965, and entered into force on 4 January 1969. For the full text on the treaty, see: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>>.

29 Concluding observations on Lao People’s Democratic Republic, A/60/18, paragraph 169, cited by Thornberry. Patrick Thornberry, ‘Forms of Hate Speech and the Convention on

that it ‘searches for an “ethnic” or other connection or element of intersectionality between racial and religious discrimination before it regards its mandate as engaged’.³⁰

As explained elsewhere,³¹ at national level, hate speech regulations, including on religious ground, suffer the world over from very similar problems: being overly broad, offering little legal clarity and certainty, and underpinned by often contradictory jurisprudence.

Enter into this difficult legal mix a range of new laws seeking to regulate speech in relation to terrorism. According to the Human Rights Watch 2012 report, more than 140 countries have passed counterterrorism laws since the attacks of 11 September 2001, often with little regard for due process and other basic rights. Human Rights Watch reviewed 130 of those laws and found that all contained one or more provisions that opened the door to abuse.³² Amongst the eight elements most likely to be abused, two were directly related to freedom of expression: restrictions on funding and other material support to terrorism and terrorist organizations; and, limitations on expression or assembly that ostensibly encourage, incite, justify, or lend support to terrorism. For instance, nearly 100 counterterrorism provisions reviewed by Human Rights Watch define material support for terrorism as a crime. Of those, 32 required neither knowledge nor intent that the support could result in a terrorism-related offense—recklessness was sufficient.³³ Russia adopted, in 2002, a law

the Elimination of All Forms of Racial Discrimination (ICERD); Conference room paper 11, Expert seminar on the links between Articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR): Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, (2–3 October 2008, Geneva).

30 *Ibid.*

31 See for instance: Louis-Leon Christians, ‘Background Study for the Workshop on Europe’, Expert workshop on the prohibition of incitement to national, racial or religious hatred, OHCHR, 9 and 10 February 2011, Vienna; Agnes Callamard, “Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred”, Expert workshop on the prohibition of incitement to national, racial or religious hatred, OHCHR, 9 and 10 February 2011, Vienna; see also Agnes Callamard, “Freedom of Expression and Advocacy of Religious Hatred that may constitute incitement to discrimination, hostility and violence: links between article 19 and article 20 of the ICCP”, paper presented at the Expert meeting on Articles 19 and 20 of the ICCPR, organized by the OHCHR, Geneva, 2–3 October 2008.

32 Human Rights Watch, ‘In the Name of Security: Counterterrorism Laws Worldwide since September 11’ (2012), available at <<https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11>>.

33 *Ibid.*, p. 38.

'On Counteracting Extremist Activity' which was further amended in 2007 to provide for

an expansion of the definition of extremism, to include "hatred or hostility towards any social group"—with no definition of "social group" and punishable with imprisonment for up to five years; and new regulations on the distribution of the "extremist materials" included in a "federal list", to be compiled by the authorities—punishable with administrative arrest and confiscation of said materials.³⁴

A review I conducted of the jurisprudence on freedom of expression in 2014 found that it 'stood out for its clear, and quasi-global, consolidation of (national) security—in law, mind and spirit—as an all-encompassing framework and subjected to little opposition'.³⁵ The review concluded that across jurisdictions there was little, or perhaps even a reduced, focus on the *intention* or *motivation* of the accused—of the "speaker", resulting in the very large *nature of the speeches* perceived as threatening national security. So, for instance, in the trials against Al Jazeera journalists in Egypt, the judge determined that "broadcasting materials" about public protests on the Al Jazeera channels amounted to assisting a "terrorist group" (Muslim Brotherhood). The review of jurisprudence also showed a heavy reliance on *official assessment of what constitutes national security threats* and little questioning of what security officials deem to be a threat.³⁶

Two examples may serve to illustrate these 2014 developments:³⁷

- On 9 January 2014, the French *Conseil d'État* re-instated the prohibition of a public show by controversial comedian Dieudonné M'Bala, which had been annulled by a previous Court. The *Conseil d'État* determined that the show posed "serious risks" to public order, violated principles and values embodied in the Universal Declaration of Human Rights and that it was of such

34 Article 19, 'Amendments to Extremist Legislation further restricts freedom of expression' (19 July 2007), available at <<https://www.article19.org/data/files/pdfs/press/russia-foe-violations-pr.pdf>>.

35 Agnes Callamard, 'Global trends in Freedom of Expression Jurisprudence in 2014, Columbia University Global Freedom of Expression' (June 2015), available at <<https://globalfreedomofexpression.columbia.edu/wp/wp-content/uploads/2015/06/A-Callamard-Global-Trends-FoE-Jurisprudence-June-2015.pdf?6fdc68>>.

36 *Ibid.*

37 *Ibid.*

nature as to challenge “national cohesion”.³⁸ Many French observers criticised this decision for breaking with the precedent established in 1933 regarding the balance between public order and freedom of expression and assembly.³⁹

- In *Arab Festival v. Bible Believers*,⁴⁰ a Sixth Circuit Court concluded that the police did not violate the First Amendment when they threatened to ticket Christian evangelists at an Arab-American street festival in suburban Detroit. The Court found that there was actual violence and that law enforcement was simply discharging its duty to maintain the peace by removing the speakers for their own protection. The decision drew a pointed dissent from a judge who called it a “blueprint” to silence speech.⁴¹

In the aftermath of the Charlie Hebdo attacks, these trends have been strengthened and further legitimised.

3 Implementation and Application

Within two weeks of the attacks on Charlie Hebdo, some 110 persons in France had been charged with ‘*apologie du terrorisme*’ or ‘incitement to racial hatred’ on the basis of a law adopted in November 2014 that had shifted the crime of ‘incitement and glorification’ of terrorism from the Press Law to the Penal code, allowing for faster procedures, including immediate appearance in front of a Court.⁴² Commentators largely agree that before the November 2014 changes and the Charlie Hebdo attacks, the charges of glorification of terrorism were limited to symbolic and/or very serious cases.⁴³ This is no longer the case. In fact, the seriousness of the situation compelled one of the main Unions of

38 See <<http://www.chronculture.com/index.php/fr/accueil/7-actualite-et-information/2163-ordonnance-du-conseil-detat>>.

39 See <<https://ledroitetmoi.wordpress.com/2014/01/12/a-propos-dune-ordonnance-du-conseil-detat/>>.

40 *Bible Believers v. Wayne County*, 14a0208p.06 (6th Cir. Aug 2014) available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0208p-06.pdf>.

41 See <<http://lawprofessors.typepad.com/conlaw/2014/08/sixth-circuit-rejects-first-amendment-challenge-by-bible-believers-excluded-from-arab-international-.html>>.

42 For a review of the many French laws related to hate and “extreme” speech, see Pascal Mbongo, ‘Hate Speech, Extreme Speech and Collective Defamation in French Law’, in: Hare and Weinstein (eds.), *supra* note 21, pp. 221–236.

43 See <<http://www.lejdd.fr/Societe/Justice/Qu-est-ce-que-le-delit-d-apologie-du-terrorisme-715312>>.

Judges in January 2015 to raise the alarm about expedited procedures based on a

review of the context, rarely of the circumstances and never of the person indicted with glorification of terrorism: Not for having organised demonstrations of support for the authors of the attack, nor for having drafted and largely distributed their pitch, but for clamors made while drunk or in anger . . . Convictions are raining down heavily accompanied by incarcerations at the hearing.⁴⁴

Judges, lawyers and others complained of the broad definition and interpretation of the charges brought about by State prosecutors, contradicting the original objectives of the legislators, according to which glorification of terrorism was meant to 'punish the organised promotion of existing terrorist acts that could bring those listening to them to radicalise or could drive them to commit terrorist attacks'.⁴⁵ To illustrate this broadening, in January 2015 a drunken man received a 14 month jail sentence for screaming to police officers '*I have only one thing in life, it is to do the Jihad . . . it is to kill cops*'.⁴⁶

Two other cases may also illustrate these developments. In March 2015, the Court de Cassation ruled that M. Bogour was guilty of glorification of terrorism for a T-shirt he gave to his 3 year old nephew which read, on one side: '*I am a bomb*' and on the other 'Jihad' and '*born n September*'.⁴⁷ His nephew had worn the T-shirt at his kindergarten, underneath a sweater. When he needed assistance from his teacher to go to the bathroom, she had removed his sweater and seen and read these words. The Court ruled that the use of a young child as the medium to *carry a favourable judgment on a criminal act*, constituted an act of glorification, which fell within the legitimate restrictions to freedom of expression as per Article 10 of the European Convention on Human Rights. The ruling focused on three main issues pertaining to glorification.

It first determined that there had been glorification of a *crime*—a conclusion the Court reached on the basis of its analysis of the content of the 8 words speech, such as for instance the use of the word "bomb". The fact that the

44 See <<http://www.syndicat-magistrature.org/Apologie-du-terrorisme-Resister-a.html>>.

45 Cited in *Le Monde*, 22 January 2015, available at <http://www.lemonde.fr/societe/article/2015/01/22/apologie-du-terrorisme-la-justice-face-a-l-urgence_4560603_3224.html#tov7y1QsWYbvDMAo.99>.

46 *Ibid.*

47 Cour de Cassation, Arrêt No. 787 du 15 mars 2015 (13–87.358), available at <https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/787_17_31352.html>.

T-shirt did not include the child's year of birth but simply the month and day (9/11) was deemed to constitute a fundamental part of the characterization of the offense. The repeated explanation by the accused that this had just been a stupid insensitive joke was rejected on the ground that someone's death cannot be laughing matter, especially as 'it is an obvious reference to mass murder that killed nearly three thousand people'.⁴⁸

Secondly, the Court found *intention* of glorification in the fact that the uncle had bought the T-shirt, chosen the three phrases, debated with his sister whether or not the child should wear it at school, etc.

Thirdly, the Court found that because the child had worn the T-shirt at school, a *public* space, the T-shirt (the medium for the speech) had been publicised or made public.⁴⁹ The fact that the T-shirt in question was worn underneath a sweater and had been seen by two persons only (the school teachers) was not even considered.

The ruling compelled French legal commentator and lawyer Frederic Gras to hope for an appeal at the level of the European Court of Human Rights: 'It will then hopefully remind us all what characterises a pressing social need, noting that words are not ideas and institutions must govern the passions and not give in to them'.⁵⁰

In the same vein, the controversial French comic Dieudonné was found guilty of glorification of terrorism for a tweet which he posted shortly after the attacks on Charlie Hebdo and which stated: '*I feel like Charlie Coulibaly*'.⁵¹ Dieudonné deleted the tweet shortly afterwards. Dieudonné had insisted that he condemned 'without restraint and without any ambiguity' the attacks but that he also felt like Coulibaly, 'a leper in his own country' and treated as a "terrorist". The judges rejected his explanation. The ruling focused heavily on the context (the immediate post-Charlie Hebdo attack) and the analysis of the content of the speech, including its "irony". The judges noted 'Dieudonné's provocative amalgam between the symbol of freedom of expression that had cost the lives of journalists and the author of terrorist act with whom he identified'. They particularly noted that of the three authors of the attack, Dieudonné had chosen to identify with the one that had targeted a Jewish supermarket.

48 *Ibid.*

49 For a thorough and sarcastic analysis of the ruling, see Frederic Gras, 'Apologie et provocation non suivies d'effets: des incriminations dangereuses', *Legipresse* No. 328, 26 May 2015.

50 *Ibid.*

51 '*Je me sens Charlie Coulibaly*'. Amédée Coulibaly had attacked the Jewish supermarket, killing 4 persons there and a policewoman.

In the United States, the Departments of Justice and Homeland Security are recognised as taking a more aggressive stance against suspected would-be terrorists, for plots against the nation that are inspired—but not necessarily orchestrated—by the Islamic State in Syria and Iraq (ISIS) in the aftermath of attacks in France, Tunisia and Kuwait.⁵² In June and July, some 10 persons were arrested, suspected of having ties to the Islamic State. The media quoted FBI Director Comey stating that all of the people arrested were “products” of online recruiting and radicalization efforts by the Islamic State and that ‘some of them were planning attacks focused on the Fourth of July’.⁵³ He is also reported to have said, that ‘some might not be charged with terrorism-related crimes, an apparent acknowledgment that not all of those arrested had firmly established links to the terror group or were engaged in active plots’.⁵⁴

This has brought law professor Bobby Chesney to argue that the Department of Justice and the FBI have adopted what he calls ‘preventive prosecution’, that is, ‘a policy posture involving aggressive employment of the material support and conspiracy laws to enable arrests without having to await the emergence of specific plots (let alone attempts or completed acts)’.⁵⁵

One of the cases for which there is additional information concerns that of Munther Omar Saleh charged with conspiring to provide material support and resources to ISIS, and of preparing an explosion device in New York.⁵⁶ The FBI Affidavit describes Saleh as espousing violent Jihadist beliefs and to be a fervent supporter of ISIS. As evidence, the affidavit quotes from Saleh’s tweets, including: ‘*I fear AQ could be getting too moderate*’ or ‘*Subhan Allah, Is known for their high end videos, great weaponry and quality fighters*’ and ‘*Khilafah orders us to live under the law Allah prescribed for us, if we fear him we would rush to the land to be governed by it*’.⁵⁷ The Affidavit also mentions other tweets (without quoting from them) of support to the Charlie Hebdo attack, the killing of the Jordanian pilot and the attack in Garland, Texas. The affidavit further refers to tweets “suggesting” that Saleh translates Arabic videos to English and that he translates ISIS materials into English.

52 See <<http://thehill.com/policy/national-security/247567-feds-get-aggressive-on-terror-threats>>.

53 Available at <https://www.washingtonpost.com/world/national-security/fbi-chief-describes-surge-in-arrests-related-to-islamic-state/2015/07/09/60d77998-2662-11e5-aae2-6c4f59b050aa_story.html>.

54 *Ibid.*

55 Available at <<https://www.lawfareblog.com/resurgence-terrorism-prevention-paradigm-law-enforcement>>.

56 Affidavit available at <<https://assets.documentcloud.org/documents/2104854/munther-signedcomplaint.pdf>>.

57 *Ibid.*, pp. 4–5.

Whether the charges and the evidence stand robust judicial scrutiny is open to question. Clearly, none of the tweets quoted from the Affidavit amounts to a direct incitement to an imminent violent crime. The tweets alleged to be supporting terrorist attacks are not quoted but these may not be a crime anyway under the US first amendment or even the US Patriot Act and *Humanitarian Project* threshold. The allegation of material support to ISIS (by translating ISIS materials into English) may potentially stand as they did in the older case of *Mehanna* (see below).

In August 2015, a Virginia teenager behind a powerful pro-extremist Twitter account @Amreekiwitness who provided instruction on how to use Bitcoin, a virtual currency, to mask the provision of funds to ISIS, and helped a friend by the name of Reza Niknejad travel to Syria to join ISIS, was sentenced to 11 years in prison. Niknejad was charged on 10 June 2015, in the Eastern District of Virginia, with conspiring to provide material support to terrorists, conspiring to provide material support to ISIS and conspiring to kill and injure people abroad.⁵⁸

In response to the sentencing, the Department of Justice issued a statement, which well highlights the overlapping between CVE and counter terrorism and the increasing focus on speech-related “offences”.⁵⁹ The statement first highlights ISIS’ continuing use of social media ‘to send their violent and hateful message around the world in an attempt to radicalise, recruit and incite youth and others to support their cause’ and ‘how persistent and pervasive online radicalization has become’.⁶⁰ Second, it insists on the US government resolve to identify and prosecute those who use social media as a tool to provide support and resources to ISIS ‘with no less vigilance than those who travel to take up arms with ISIL’.⁶¹ And thirdly, it links this policing and legal strategy to a community-based outreach:

The Department of Justice will continue to use all tools to disrupt the threats that ISIL poses, and our efforts will be furthered by parents and other members of our community willing to take action to confront and deter this threat wherever it may surface.⁶²

58 Department of Justice, see <<http://www.justice.gov/opa/pr/virginia-man-sentenced-more-11-years-providing-material-support-isil>>.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

Notwithstanding the conspiracy element, this aggressive approach and associated sentencing has been made possible largely by the Supreme Court decision in *Holder v. Humanitarian Law Project*, which upheld the constitutionality of the prohibition against material support for terrorism, including provision of expert advice and assistance, training, service and personnel.⁶³ In 2014, the Supreme Court had the opportunity to hear the case of Tarek Mehanna,⁶⁴ following his conviction by the First Circuit Court of Appeal,⁶⁵ but declined to do so. While Mehanna's lawyers argued that the incitement standard was applicable to Mehanna's case, the prosecution insisted that in light of *Humanitarian Law Project*, the standard for judging material support for terrorism was not whether the speech was intentional incitement to imminent lawless action that was likely to succeed, but whether it was coordinated or independent advocacy, a position endorsed by the district Court judge when he instructed the jury.⁶⁶

In Denmark, the Eastern High Court in Copenhagen found a Danish bookseller, Mansour, guilty of publicly condoning Islamic extremism, inciting terrorism, and expressing anti-Semitic views. The Court sentenced him to 4 years of imprisonment and ordered the revocation of his Danish citizenship upon serving his sentence, the first ever Dane to be revoked of citizenship. The Court found that the defendant had "advanced" terrorism through online posting, editing, and publishing three books on theological justifications for extreme Islamic jihad authored by infamous, radical Muslim cleric, Abu Qatada: "The judges had no reservations about treating explicit calls for jihad and the more ambiguous and abstract statements identically and found that all of these comments "advanced" and "publicly condoned" terrorism."⁶⁷ It ruled that Mansour's numerous radical expressions were not protected by Article 10 of

63 *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (U.S. 2010), available at <<http://supreme.justia.com/cases/federal/us/561/08-1498/>>.

64 See *Mehanna v. United States*, 13–1125 1 Ct. (October 2014) available at: <<http://www.scotusblog.com/case-files/cases/mehanna-v-united-states/>>.

65 See <<http://media.ca1.uscourts.gov/pdf/opinions/12-1461P-01A.pdf>>.

66 See <<http://www.truth-out.org/opinion/item/27088-does-crying-terrorism-trump-free-speech>>.

67 Jacob Mchangama, 'Drawing the line between free speech and online radicalisation', *Open Democracy* (3 July 2015), available at <<https://www.opendemocracy.net/digital-liberties/jacob-mchangama/where-do-you-draw-line-between-free-speech-and-promotion-of-terroris>>.

the European Convention on Human Rights, but failed to provide any detailed assessment of the competing interests at stake, or of the proportionality test.⁶⁸

The risks associated with the “extremist” language are well illustrated in Russia, which has seen a number of cases prosecuted for alleged violations of the anti-extremist law or laws on incitement to hatred. This has been evident in several cases linked to the Ukraine war. For instance, the Russia Court found that travel advice for Russians planning to visit Crimea constituted a violation of Russia’s territorial integrity and a call for extremist activities because Crimea was referenced as an ‘occupied territory’.⁶⁹ In another case, a poem calling for Ukrainian patriots to fight Putin’s secret police and Russia was found to contain hate speech and classified as extremist. Its author, Aleksandr Byvshev, a teacher, was sentenced to 300 hours of correctional work and a two-year ban on all teaching activities.⁷⁰

In an August 2015 case, the prosecutor of Southern-Sakhalin requested the court to ban the book *Prayers (Dua) to God: Its Purpose and Place in Islam* on the basis of it containing extremist speech. The prosecutor submitted the book to an expert linguistic assessment, which focused on translated Quranic verses rather than the commentary, suggesting thus that parts of the Quran were on trial for extremism, rather than their interpretation. The assessment concluded that the book contained statements on the superiority of one group or person over others on the basis of race, nationality, religion or relationship to religion. Specifically, the expert linguistic analysis of Quranic verses in the book determined that they promulgated the notions that Allah is the only true god while followers of other religions follow false gods and that Muslims are superior to other believers as others follow false gods. The court tested the prosecution expert’s conclusions of the book by requesting its own linguistic-psychological review conducted by a linguist and professor of Russian language. The court’s expert concluded that the book contains statements that promulgate the superiority of one group over another, and that although the book does not contain explicit calls or justification to extremism, it contains specific features of extremism. The court ultimately concluded that on the basis of the qualified expert testimony, the book contained indirect statements of incitement to unlawful and extremist activities dangerous to the public. The danger would

68 Summary and review of the case available at <<https://globalfreedomofexpression.columbia.edu/cases/mansour-v-director-of-public-prosecution/>>.

69 Available at <<https://globalfreedomofexpression.columbia.edu/cases/case-of-russian-consumer-rights-protection-societys-extremist-statement/>>.

70 Available at <<https://globalfreedomofexpression.columbia.edu/cases/the-case-of-aleksandr-byvshev/>>.

stem from the statements' potential to create a positive outlook on extremism among some, which could lead to the creation of extremist values and beliefs, undermining Russia's constitutional regime.⁷¹

A recent Norwegian case does show that there are other ways of conducting judicial business in a post-Charlie Hebdo era. The Appeal Court dismissed charges of public incitement to murder with terrorist intent and of glorification of terrorism. The latter were dismissed as inapplicable since 'glorification of already committed acts is not punishable'.⁷² The Appeal Court found that the legal uncertainty created by the vagueness of the law had to benefit the defendant and interpreted "incitement" as requiring a 'degree of concretization' and "strength" to be met, very much in keeping with the UN recommendation related to Article 20 of the ICCPR.⁷³ Remarkably, and unlike all the other cases identified above, as observed by commentators,

the Court also confirmed previous Supreme Court case law determining that no one should risk criminal liability for expressions based on inferred interpretation rather than explicit statements. Accordingly, the Court found that the statements in question constituted "mere" glorification of already committed terrorist acts, rather than "incitement" to commit new ones and thus acquitted the defendant (who was also acquitted for racist hate speech but convicted for threats in relation to a number of other statements).⁷⁴

71 Decision of 12 August 2015.

72 As analysed by Jack Mchangama, 'Drawing the line between free speech and online radicalisation', *Open Democracy* (3 July 2015), available at: <<https://www.opendemocracy.net/digitaliberties/jacob-mchangama/where-do-you-draw-line-between-free-speech-and-promotion-of-terroris>>.

73 See Rabat Plan of Action, available at <http://www.un.org/en/preventgenocide/adviser/pdf/Rabat_draft_outcome.pdf>. On this plan and for a comprehensive analysis of Article 20(2) ICCPR, see Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge: Cambridge University Press, 2016), developing the requirement of a 'triangle of incitement'.

74 Jack Mchangama, 'Drawing the line between free speech and online radicalisation', *Open Democracy* (3 July 2015), available at <<https://www.opendemocracy.net/digitaliberties/jacob-mchangama/where-do-you-draw-line-between-free-speech-and-promotion-of-terroris>>.

4 Conclusion

The long history of suppression of extreme criticism of political or social conditions suggests that democracies tend to overreact to what at the time seemed to be imminent threats to core societal values or to projects such as the successful prosecution of war upon which the fate of the nation is thought to depend.⁷⁵

In the years between the 2007 Mohammed Cartoons and the 2015 Charlie Hebdo attacks, the legal, policy and academic debates focused largely on the necessity (or its absence) of protecting incitement to religious hatred, and how, with particular reference to the issues of blasphemy and defamation of religion.⁷⁶ In a post-Charlie Hebdo world, the terms of the debate have shifted to focusing on the protection of (global) society against “extremist” religious speech. Given the rather amorphous and elastic character of what constitutes “extremism”, the boundaries of this exercise too have become expandable.

75 Weinstein and Hare (eds.), *supra* note 21, p. 5. They go on to cite United States Supreme Court Justice William O. Douglas who observed that though ‘the threats were often loud they were always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous’. *Brandenburg v. Ohio* 395 US 444, 454 (1969).

76 See for instance the UN initiatives on this topic including the OHCHR workshops on Incitement to Hatred, focusing heavily on religion. There are countless academic articles on the topic of incitement to religious hatred, particularly in the UK where the proposal to extend the incitement legislation to include religious hatred generated many reactions. See for instance: Jeroen Temperman, ‘Blasphemy, Defamation of Religion, Religious Hate Speech’, in Silvio Ferrari (ed.), *Routledge Handbook of Law and Religion* (Oxon/New York: Routledge, 2015), pp. 381–394; Jeroen Temperman, ‘Blasphemy Versus Incitement’, in: Christopher Beneke, Christopher Grenda and David Nash (eds.), *Profane: Sacrilegious Expression in a Multicultural Age* (University of California Press, Oakland, CA, 2014), pp. 401–425; Susannah C. Vance, ‘The Permissibility of Incitement to Religious Hatred Offenses Under European Convention Principles’, 14 *Transnat’l L. & Contemp. Probs.* (2004), p. 201; Nazila Ghanea, ‘Intersectionality and the Spectrum of Racist Hate Speech: Proposals to the UN Committee on the Elimination of Racial Discrimination’, 35 *Human Rights Quarterly* (2013), pp. 935–954; Agnes Callamard, ‘Protect the believers, not the belief’, *The Guardian*, 18 March 2009; Agnes Callamard, ‘Moving the debate on freedom of expression out of the cultural and religious sphere to the spheres of law and politics’ in: *60th Anniversary of the Universal Declaration: Reflections on Human Rights* (Norwegian Ministry of Foreign Affairs, November 2008); and Agnes Callamard, ‘Freedom of speech and offence: why blasphemy laws are not the appropriate response’, in *Equal Voices* (August 2006).

One religion in particular, Islam, is increasingly treated as a public order and national security issue.

In its main report on 'Preventing Terrorism and Countering Violent Extremism that may lead to Terrorism: A Community-Policing Approach', the OSCE warns, that '[s]imply holding views or beliefs that are considered radical or extreme, as well as their peaceful expression, should not be considered crimes'.⁷⁷ It goes on to explain that

“Radicalization” and “extremism” should not be an object for law enforcement counter-terrorism measures if they are not associated with violence, or with another unlawful act (e.g., incitement to hatred), as legally defined in compliance with international human rights law.⁷⁸

It even goes as far as to state that '[e]xtremist individuals or groups who do not resort to, incite or condone criminal activity and/or violence should not be targeted by the criminal-justice system'.⁷⁹

In reality, this is exactly what has happened: in a post-Charlie Hebdo world, legal practices have erred away from the (causal) link to violence or other unlawful acts (e.g. discrimination), reflecting as such the increasing political and social focus on the perceived (non-violent) ideological and religious roots of “terrorism”. The focus is on “extremism” as a body of expressed thoughts and belief and on “extremists” as deviant from mainstreamed and accepted social norms.⁸⁰ And so it is, ironically, that in a post-Charlie Hebdo world, freedom of speech has become increasingly functionalised or instrumentalised in the interest of democracy, a way of life, a way of thinking, and social values.⁸¹

Many of these courts reached the conclusions they did because of their heavy reliance on one main element: content. In fact, the cases presented above, whichever their location, demonstrate the many risks associated with heavy reliance on content analysis. The pitfalls are well exposed by the Russian case related to the Quran. The Court's experts and the Court itself ended up analysing the content of Surahs in exactly the same fashion as the so-called

77 OSCE, *Preventing Terrorism and Countering Violent Extremism and Radicalization that May Lead to Violence: A Community-Policing Approach* (OSCE: 2014), p. 42.

78 *Ibid.*

79 *Ibid.*, p. 43.

80 The French 2015 case law may even go several notches higher in criminalizing what many could easily perceive as bad or insensitive jokes.

81 It will be interesting to research whether social values as opposed to democracy have emerged as the main reference and rational in the recent free speech case law.

“extremists” or Jihadists are often accused of interpreting them: literally, as immutable, and out of their historical context.

Clearly any speech-related crimes require, by their very nature, a review of the content of the speech. But the methodology for content analysis is complex and requires to be balanced with other elements.⁸² The heavy reliance on subjective and inferred interpretations is all the more problematic since little consideration is made of the existence or size of the audience, the means of communicating or distributing the speech, the act involved besides uttering or writing the speech (e.g. advocacy, praise, etc.) This is partly explained by the fact that cases are largely focusing on lesser charges than those of incitement, in the first place that of glorification, material support or conspiracy. On the other hand, there is a well-tested body of legal reasoning on many of the elements pertaining to these crimes (with the possible exception of the US crime of material support), including on such issues as social needs,⁸³ intent,⁸⁴ etc.

In all cases under review in this paper, this evolution was somewhat made possible by pre-Charlie Hebdo developments, including legal developments and amendments, such as the US Patriot Act and the US Supreme Court decision in *Humanitarian Project v. Holder*, the 2001 UK Terrorism Act and subsequent amendments, the November 2014 amendment to the French Press Code, to cite a few. All of these laws and amendments have been sharply criticised by legal experts, academics and civil society for being vague and overbroad.⁸⁵ Judges had the opportunity to address these problems by either providing clear legal directions and tests or, as the aforementioned Norwegian judges had done, deciding that the legal uncertainty created by the vagueness of the law had to benefit the defendant. In none of the cases monitored so far do the judges appear to have done so. One is thus tempted to conclude that in a post-Charlie Hebdo legal world, courts in general have taken short cuts, instrumentalising not only speech to perceived higher needs, but judicial reasoning and practices as well.

82 See for instance European Court of Human Rights cases *Ergin v. Turkey*, *Jersild v. Denmark*, and *Dicle v. Turkey*.

83 See for instance *Zana v. Turkey*, judgement of the Grand Chamber of 25 November 1997, Application No 18954/91, para 51; *Lingens v. Austria*, 8 July 1986, Application No 9815/82, paras. 39–40.

84 See for instance *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 91, 2005 SCC 39.

85 The previously cited Human Rights Watch report provides ample evidence to that effect.