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States' positive obligation to create a favourable environment for participation in public debate: a principle in search of a practical effect?

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ABSTRACT

In its seminal decision in *Dink v Turkey*, the European Court of Human Rights recognised that States have a positive obligation, under Article 10, to create a favourable environment for participation in public debate by all persons, enabling them to express their opinions without fear. In the more than decade since, the Court has yet to clarify what the obligation *is*, what it *requires*, and when and how it *applies*. This article traces the recognition and development of the *Dink* principle, critiques the Court's approach to date, and explores the real-world impacts of an unfavourable information environment. It concludes with a concrete recommendation which would ensure greater cohesion within the Council of Europe and give practical effect to the *Dink* principle, while addressing polarisation, disinformation and threats against journalists: media and information literacy initiatives.

KEYWORDS Freedom of expression; safety of journalists; favourable environment for public debate; positive obligations; media and information literacy

Introduction

For more than two decades, the European Court of Human Rights ('ECtHR' or 'the Court') has recognised that States have both negative and positive obligations in respect of freedom of expression, enshrined in Article 10 of the European Convention on Human Rights ('ECHR' or 'Convention'). While States' negative obligations preclude them from unjustifiably interfering with the exchange of information and ideas, the positive obligations doctrine recognises that States may violate freedom of expression where they fail to take steps to secure the effective enjoyment of the right.¹

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¹See e.g. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries* (OUP 2023); Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on*

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This article concerns States' positive obligation to create a favourable environment for participation in public debate by all persons without fear.² First recognised in *Dink v Turkey* (2010), the existence of the obligation (or 'Dink principle') has been reaffirmed on six further occasions, but considered and applied in only three judgments.³ This article takes stock, fourteen years on: it analyses the development of the *Dink* principle to date and its possible import in the Article 10 jurisprudence going forward. Part I lays the groundwork by setting out the recognition and development of the *Dink* principle in the Article 10 jurisprudence. Part II analyses and critiques the jurisprudential trajectory, arguing that the positive obligation to create a favourable environment for participation in public debate has great promise as a standalone obligation incumbent on States, but this potential has not yet been realised. Three critiques are raised. First, significant conceptual uncertainty remains about what exactly the obligation is – that is, what role it is playing within or alongside the other positive obligations recognised under Article 10. Second, the Court has failed to concretise what the obligation *requires*, with the result that it requires either very *little* of States or very *much*, indeed. Finally, the Court's application of the *Dink* principle leaves much to be desired in two respects: first, it frequently refrains from applying it or considering the Article 10 claim in its own right, where findings under other Convention provisions have been made, which may relegate the positive obligation specifically (and Article 10 generally) to a subsidiary position within the Convention; second, where the Court *has* considered the obligation, it has set a concerning threshold for when States fall short, which undermines the effectiveness of the *Dink* principle in ensuring meaningful protection of freedom of expression. In sum, to date, the *Dink* principle appears to have been limited to a protective principle without a practical effect. The Court can, and should, clarify its status as a standalone obligation, concretise the measures which may fulfil the obligation, and ensure it is applied in a manner which renders its protections practical and effective. Doing so would serve to clarify its role in the jurisprudence and offer a benchmark for States' compliance.⁴

Part III examines the practical impact and import of the *Dink* principle and why it matters. In particular, this part delves into the impacts of an *unfavourable* environment for participation in public debate without fear and the reasons why a better-quality information environment may translate

Human Rights (Interstitia 2016); Alistair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004).

²*Dink v Turkey* App no 2668/07 and others (ECHR, 14 September 2010) [137].

³*Uzeyir Jafarov v Azerbaijan* App no 54204/08 (ECHR, 29 January 2015) [68]; *Huseynova v Azerbaijan* App no 10653/10 (ECHR, 13 April 2017) [120]; *Khadija Ismayilova v Azerbaijan* App no 65286/13 and 57270/14 (ECtHR, 10 January 2019) [159]; *Haji and Others v Azerbaijan* App no 3503/10 and others (ECtHR, 1 October 2020) [218]; *Tagiyeva v Azerbaijan* App no 72611/14 (ECtHR, 7 July 2022) [78]; *Gaši and Others v Serbia* App no 24738/19 (ECHR, 6 September 2022) [78].

⁴See Vladislava Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete' (2023) 23 HRLR 1.

to better protections against harassment, including online. This part provides an analytical bridge between the *Dink* principle, the harms that are often occasioned in an unfavourable (and uninformed/misinformed) information environment, and what States' positive obligation *might* entail to create a better-quality information environment. It concludes with a concrete recommendation which could further the aims of the *Dink* principle, ensure the effectiveness of the right to freedom of expression, and provide greater cohesion across organs of the Council of Europe: media and information (MIL) initiatives. Such a development would be consistent with broader measures within the Council of Europe system and with domestic measures being implemented by Member States. Moreover, MIL initiatives would encourage informed public debate and help to foster a more favourable environment for participation in public debate by journalists, civil society and private citizens. In the broader context of mis- and disinformation online,⁵ polarisation,⁶ and threats to journalists across Europe,⁷ this is no time for the Court to back down from its recognition of States' obligations not only as regulators of expression, but as facilitators of expression.

The recognition and development of the *Dink* principle

To date, the Court has recognised four positive obligations in respect of Article 10, which require States to (i) put in place a legislative framework to ensure the public is provided with balanced and pluralistic audiovisual services;⁸ (ii) provide access to information held by the State in some

⁵Misinformation refers to false information that is not intended to cause harm, whereas 'disinformation' refers to false information that is intentionally shared to cause harm: see Claire Wardle and Hossein Derakhshan, 'Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making' Report DGI(2017)09 (Council of Europe 2017); Ronan Ó. Fathaigh, Natali Helberger and Naomi Appelman, 'The Perils of Legally Defining Disinformation' (2021) 10(4) Internet Policy Review 1. A study of 'rumour cascades' on Twitter conducted by MIT researchers found that falsehoods 'diffused significantly farther, faster, deeper, and more broadly than the truth' across categories of information, with falsehoods reaching 1,500 people six times more rapidly than the truth: Cass Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (OUP 2021), citing Soroush Vosoughi, Deb Roy and Sinan Aral, 'The Spread of True and False News Online' (2018) 359 Science 1146.

⁶The European Commission noted, in a recent report: 'Polarisation sows stark divisions without society that can—although do not always—provide an enabling environment for the rise of extremist ideologies and movements'. See European Commission, 'The Media and Polarisation in Europe: Strategies for Local Practitioners to Address Problematic Reporting' (Luxembourg: Publications Office of the European Union, 2023) <home-affairs.ec.europa.eu/system/files/2023-05/ran_the_media_and_polarisation_052023_en.pdf> accessed 7 October 2023. See generally Jennifer McCoy and others, 'Reducing Pernicious Polarization: A Comparative Historical Analysis of Depolarization' Carnegie Endowment for International Peace (May 2022) <carnegieendowment.org/files/McCoy_et_al_-_Polarization_final_3.pdf> accessed 7 October 2023.

⁷Council of Europe, 'War in Europe and the Fight for the Right to Report' Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists (Council of Europe 2023) 10 <rm.coe.int/prems-019323-gbr-2519-annual-report-by-the-partner-organisations-to-th/1680aa743d> accessed 7 October 2023.

⁸*Manole and Others v Moldova* App no 13936/02 (ECHR, 17 September 2009) [99]–[100], [107].

circumstances;⁹ (iii) implement protective security measures to safeguard journalists from violence;¹⁰ and (iv) create a favourable environment for participation in public debate without fear by all persons concerned.¹¹ The recognition of States' positive obligations in respect of freedom of expression recalls the observation that States play three roles in the information ecosystem: first, as *regulators* of others' expression; second, as *facilitators* of expression through passive and active measures; and third, as *participants* in communicative processes.¹² States are not only responsible for regulating or limiting expression; they also play a significant role in enabling the exchange of information and ideas and facilitating the ends the right was meant to achieve.

The Court's recognition that States may interfere with the effective exercise of individuals' freedom of expression in the scope of these latter roles is consistent with the Court's evolutive approach to Convention rights, and with the principle of effectiveness which has been a cornerstone of its jurisprudence over many decades.¹³ It is also further to the Court's frequent observations that, first, freedom of expression is a precondition to a functioning democracy, and second, that the '[g]enuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals'.¹⁴

The Court first recognised States' positive obligation to create a favourable environment for participation in public debate without fear in *Dink v Turkey*. The principle has been reiterated on several occasions since

⁹*Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECHR, 8 November 2016) [127]–[132]; *Centre for Democracy and the Rule of Law v Ukraine* App no 10090/16 (ECHR, 26 March 2020) [87]; *Association Burestop 55 and Others v France* App no 56176/18 (ECHR, 1 July 2021) [108]. See generally Katie Pentney, 'The Right of Access to "Reliable" Information under Article 10 ECHR: From Meagre Beginnings to New Frontiers' (2024) ECHR LR (forthcoming).

¹⁰See e.g. *Özgür Gündem v Turkey* App no 23144/93 (ECHR, 16 March 2000) [42]–[44]. Note that States are also required to conduct an effective investigation into an attack on a journalist under Article 10, as discussed below.

¹¹*Dink* (n 2) [137]; *Uzeyir Jafarov* [68]; *Huseynova* [120]; *Khadija Ismayilova* [159]; *Haji* [218]; *Tagiyeva* [78]; *Gaši* [78] (all n 3).

¹²Mark Yudof, *When Government Speaks: Politics, Law, and Government Expression in America* (University of California Press 1983); Tarlach McGonagle, *Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas* (Intersentia 2011) 189–90, citing Commission on Freedom of Expression, *A Free and Responsible Press* (1947) 136; Thomas I. Emerson, *The System of Freedom of Expression* (Random House 1970) 4, 697–716. See also Katie Pentney, 'Tinker, Tailor, Twitter, Lie: Government Disinformation and Freedom of Expression in a Post-Truth Era' (2022) 22 HRLR 1.

¹³See e.g. Georgios A. Serghides, 'The Principle of Effectiveness as Used in Interpreting, Applying and Implementing the European Convention on Human Rights (its Nature, Mechanism and Significance)' in Iulia Motoc, Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds), *New Developments in Constitutional Law – Essays in Honour of András Sajó* (Eleven International Publishing 2018) 3–4 (the principle of effectiveness 'is the legal basis from which two important doctrines spring and evolve through the case law of the Court: the doctrine of the State's positive obligations to protect human rights and the doctrine that the Convention is a living instrument').

¹⁴*Gaši* (n 3) [77]; *Palomo Sánchez and others v Spain* App no 28955/06 and others (ECHR, 12 September 2011) [59].

Table 1. Chart of cases.

Case	Article 10 analysis undertaken / <i>Dink</i> principle applied?	Result
<i>Dink v Turkey</i> (2010)	Yes	Violation
<i>Uzeyir Jafarov v Azerbaijan</i> (2015)	No	No violation (not considered)
<i>Huseynova v Azerbaijan</i> (2017)	No	No violation (not considered)
<i>Khadija Ismayilova v Azerbaijan</i> (2019)	Yes	Violation
<i>Haji and Others v Azerbaijan</i> (2020)	Yes (in 1 of 8 applications)	Violation (in respect of 1 of 8 applicants)
<i>Tagiyeva v Azerbaijan</i> (2022)	No	No violation (not considered)
<i>Gaši v Serbia</i> (2022)	Yes	No violation

(see Table 1, below). As will be seen, all of the cases concern journalists, authors and activists who have been threatened or subjected to violent attacks on account of their expressive activities. This section maps the jurisprudential development of the obligation since it was first articulated. The Court's treatment of the principle can be distinguished along two lines: first, judgments in which the *Dink* principle was reaffirmed, but not 'applied' (seemingly because the positive obligation was not triggered); and second, judgments which reaffirm the *Dink* principle and consider whether the positive obligation has been fulfilled.

Recognition: *Dink v Turkey* (2010)

The Court first articulated this positive obligation in its judgment in *Dink v Turkey*. Firat Dink, a Turkish journalist of Armenian origin, had been charged with denigrating Turkish identity in his writing. Shortly after he was convicted, he was killed by ultranationalists. The evidence showed that Turkish authorities were aware of an assassination plot in advance of his murder but failed to act on the information. Mr Dink's family members commenced proceedings against the State for, *inter alia*, failing to protect Mr Dink's life, contrary to Article 2 ECHR, and violating his freedom of expression, contrary to Article 10 ECHR. The Article 10 argument related to his conviction for denigrating Turkish identity, which the applicants argued (and the Court agreed) made him a ready target for extremists.¹⁵

The Court found a violation of the substantive limb of Article 2, as the authorities knew or ought to have known that Mr Dink was particularly susceptible to a fatal attack, and failed to take the necessary measures to prevent the risk to Mr Dink's life.¹⁶ In addition, the Court found a violation of the

¹⁵*Dink* (n 2) [94], [108]. See also *Özgür Gündem* (n 10) [42]–[43].

¹⁶*Dink* (n 2) [70]–[75].

procedural limb of Article 2, on account of the failure to carry out an effective criminal investigation into the assassination.¹⁷ Turning to the Article 10 complaint, the Court noted that the applicants' complaints and the circumstances of the case brought into play the State's positive obligation under Article 10, in recognition of the fact that the meaningful and effective exercise of freedom of expression does not depend simply on State's non-interference, but may compel (in some circumstances) positive measures of protection.¹⁸ The Court held that

positive obligations in this area imply, *inter alia*, that States are required to create, while establishing an effective system of protection for authors or journalists, a favourable environment for participation in public debate by all persons concerned, enabling them to express their opinions and ideas without fear.¹⁹

The Court concluded that the failure of Turkish law enforcement agencies to discharge their duty to protect Mr Dink from attack by ultranationalists, taken together with the guilty verdict handed down by the criminal courts in the absence of any pressing social need, entailed a failure on the part of the government to comply with its positive obligations under Article 10.²⁰

The Court has affirmed the *Dink* principle – or some variation of it – in six subsequent judgments. Despite significant overlap with the factual matrix in *Dink*, the Court has distinguished and failed to apply *Dink* in three judgments and appears to have found violations of the positive obligation articulated in *Dink* only twice.

Reiteration, but non-application: Uzeyir Jafarov, Huseynova and Tagiyeva

In three subsequent cases against Azerbaijan, the Court has reiterated the *Dink* principle, but held that it is not necessary to consider the Article 10 allegations in light of its findings under other provisions of the Convention.

The first such case is *Uzeyir Jafarov v Azerbaijan* (2015), wherein the Court reaffirmed the *Dink* principle but failed to apply it. The applicant alleged that he had been subjected to a violent attack because of his

¹⁷*ibid* [91].

¹⁸*ibid* [106].

¹⁹*ibid* [137] [author's own translation]. A series of cases related to the events in *Dink* were also brought before the ECtHR; however the *Dink* principle was not alluded to: see e.g. *Altug Taner Akcam v Turkey* App no 27520/07 (ECtHR, 25 October 2011) (ongoing threat of prosecution for insulting 'Turkishness' in connection with the applicant's academic work violated Article 10); *Kaboglu and Oran v Turkey* App no 1759/08 and others (ECtHR, 30 October 2018) (applicants' inability to obtain compensation for press articles which comprised threats, insults and hate speech directed against them for their report on minority and cultural rights violated Article 8; the Court did not consider the Article 10 claim separately); *Eminagaoglu v Turkey* App no 76521/12 (ECtHR, 9 March 2021) (disciplinary sanctions imposed on a judicial officer for statements made, including about the prosecution of *Dink*, violated Article 10).

²⁰*Dink* (n 2) [138].

journalistic activities criticising the State's security and defence policies.²¹ The attack resulted in a cranial injury and required in-patient treatment for a seven-day period.²² Mr Uzeyir Jafarov argued that State agents had participated in the attack and that the authorities had failed to carry out an effective investigation.²³ In particular, he alleged that one of the assailants was a police officer in the office investigating the attack. As in *Dink*, at the time of the attack, criminal proceedings were ongoing against the editor-in-chief of the newspaper where the applicant worked for the publication of certain articles.²⁴ The applicant alleged violations of his rights under Articles 3 (the prohibition of torture or inhuman or degrading treatment) and 13 (the right to an effective remedy). He also alleged that the State had breached its positive obligations under Article 10 ECHR for failing to conduct an effective investigation into his attack.²⁵

Two years later, the Court once again reiterated the State's positive obligation, but failed to apply it, in *Huseynova v Azerbaijan* (2017).²⁶ The applicant alleged that her husband – an independent journalist – had been murdered by State agents, that the authorities had failed to conduct an effective investigation, and that the killing of her husband constituted a breach of his freedom of expression, as he had been targeted for his journalistic activity.²⁷ Prior to her husband's death, thirty-four civil and criminal proceedings had been initiated against him for publishing articles critical of State officials, and he regularly received threats because of his articles.²⁸ Mrs Huseynova alleged violations of Article 2 (the right to life) and Article 10 ECHR.

More recently, in *Tagiyeva v Azerbaijan* (2022), the Court reiterated the *Dink* principle but again failed to consider the Article 10 allegations in their own right. The case concerned Rafiq Tagiyev, a writer and columnist who was killed after expressing critical views about Islam. Prior to his death, he had been charged with and convicted of 'incitement to ethnic, racial, social or religious hatred', and sentenced to three years' imprisonment.²⁹ Prior to his incarceration, Mr Tagiyev and his family had been placed under protective custody for security reasons, although these arrangements were terminated upon his release from prison and were not re-established.³⁰ Following Mr Tagiyev's release, he continued to publish articles that were critical of Islam and the theocratic and totalitarian nature of the Iranian

²¹ *Uzeyir Jafarov* (n 3) [68].

²² *ibid* [14].

²³ *ibid* [3].

²⁴ *ibid* [7], [70].

²⁵ *ibid* [70]–[71], relying on *Özgür Gündem* (n 10).

²⁶ *Huseynova* (n 3) [120]–[124].

²⁷ *ibid* [3].

²⁸ *ibid* [8]–[9].

²⁹ *Tagiyeva* (n 3) [9]–[10].

³⁰ *ibid* [8] and [12].

State. He was subsequently stabbed by an unknown assailant and succumbed to his injuries in hospital. Mr Tagiyev's wife brought an application before the ECtHR, relying on Articles 2, 10 and 13 of the Convention, arguing that the State had failed to protect her husband's life, that the criminal investigation into his murder had not been effective, and that he had been targeted because of his publications.³¹

The Court's analysis of the *Dink* principle in its judgments in *Uzeyir Jafarov*, *Huseynova* and *Tagiyeva* is nearly identical. The main difference between the judgments is that in *Uzeyir Jafarov* and *Tagiyeva*, the Court found violations of the procedural limb of Article 2, whereas in *Huseynova*, the Court found a violation of the procedural limb of Article 3. In each case, the Court reiterated the fundamental role of freedom of expression for a functioning democracy as well as the dual obligations (both negative and positive) which States must fulfil in respect of it.³² The Court then reaffirmed that 'the positive obligations under Article 10 of the Convention require States to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear'.³³ Notably, the articulation in all three cases differed slightly from *Dink*: in *Uzeyir Jafarov* and *Huseynova*, no mention was made of the obligation to establish an effective system for the protection of journalists; in *Tagiyeva*, the formulation mirrored *Dink* but 'authors' were specifically mentioned alongside journalists as intended beneficiaries of the 'effective system of protection'.

In each of the judgments, the reiteration of the *Dink* principle was as far as the Court went in the Article 10 analysis: ultimately, the Court declined to examine the Article 10 allegations in their own right. It did so for several reasons. First, the Court distinguished the cases from those in which it had found a violation of the substantive limbs of Articles 2 or 3 ECHR because the State had failed to protect the right to life of a journalist or a journalist had been subjected to the use of force by a State agent.³⁴ In the cases under examination, the Court had found violations of the procedural limbs of Articles 2 and 3, but it had not been established that Azerbaijan had been responsible for the violent attacks or deaths of the individuals concerned.³⁵

³¹ *ibid* [1].

³² *Uzeyir Jafarov* [68]; *Huseynova* [120]; *Tagiyeva* [78] (all n 3).

³³ *ibid* [internal citations omitted].

³⁴ *Uzeyir Jafarov* [69]; *Huseynova* [121]; *Tagiyeva* [79] (all n 3) citing *Dink* (n 2) [137] and *Najafli v Azerbaijan* App no 2594/07 (ECtHR, 2 October 2012) [67].

³⁵ *Uzeyir Jafarov* [69] (it was 'it was not possible to establish that the applicant had been subjected to the use of force by a State agent or that a State agent had been behind the attack on the applicant with the aim of interfering with his journalistic work'); *Huseynova* [121] (the Court 'could not establish that the applicant's husband was murdered by a State agent, that the State was behind the killing or that the State failed to protect his right to life in accordance with its positive obligations'); *Tagiyeva* [79] (it had not been established that the State was 'involved in any way in the death' or that it had failed to fulfil its positive obligation to protect the right to life of the applicant's husband) (all n 3).

Second, the Court distinguished situations like that in *Özgür Gündem v Turkey*, where domestic authorities were aware of a series of violent actions against journalists but failed to take any action to protect them.³⁶ In the cases at bar, ‘at the time of the events in question’, the individuals concerned had not been subjected to violence or threats of violence.³⁷ Moreover, none had requested protection from the domestic authorities prior to the attacks.³⁸ Thus, the Court held that the only issue remaining under Article 10 concerned whether the right to freedom of expression had been violated on account of the domestic authorities’ failure to conduct effective investigations into the attack on the applicant (in the case of *Uzeyir Jafarov*) and the killings of the applicants’ husbands (in *Huseynova* and *Tagiyeva*).³⁹ In each case, the Court declined to examine the complaints under Article 10 separately as they arose from the same set of facts as those already examined under the procedural limbs of Articles 2 and 3, for which violations had been found.⁴⁰ It was accordingly ‘not necessary’ to undertake the Article 10 analysis.⁴¹

Notably, the Court’s refusal to consider the Article 10 claim was a point of particular critique in a Joint Partly Dissenting Opinion in *Huseynova*.⁴² Judges Nussberger and Vehabović held that finding a violation of Article 2 was necessary, but ‘not sufficient in order to capture adequately the human-rights violations in this case’.⁴³ The judges noted that an analysis under Article 10 ‘does have an added value’, and urged an approach which considers the procedural limb of Article 2 read together with Article 10 to adequately reflect the destructive effect on democracy, political pluralism and human rights where journalists are murdered for their expression.⁴⁴

Reiteration and application: Khadija Ismayilova, Haji and Gaši

In several additional cases, the Court has reiterated the *Dink* principle and examined the complaint under Article 10 separately. These cases further illustrate the high bar that has been set for the positive obligation to be triggered, and the lack of clarity about its requirements even in those instances where it is considered.

The first such case was *Khadija Ismayilova v Azerbaijan* (2019). The applicant – an investigative journalist in Azerbaijan (and a frequent applicant before the Court) – alleged violations of her rights under Articles 6

³⁶ibid [80], citing *Özgür Gündem* (n 10) [44].

³⁷*Uzeyir Jafarov* [70]; *Huseynova* [122]; *Tagiyeva* [80] (all n 3).

³⁸ibid.

³⁹*Uzeyir Jafarov* [71]; *Huseynova* [123]; *Tagiyeva* [81] (all n 3).

⁴⁰*Uzeyir Jafarov* [71]–[72]; *Huseynova* [123]–[124]; *Tagiyeva* [81]–[82] (all n 3).

⁴¹ibid.

⁴²*Huseynova* (n 3) Joint Partly Dissenting Opinion of Judges Nussberger and Vehabović.

⁴³ibid [4].

⁴⁴ibid [12]–[14].

(the right to a fair trial) and 8 (respect for private and family life) as well as Articles 10 and 13 of the Convention arising from the State's failure to protect her from unjustified intrusions into her personal life linked to her work as a journalist.⁴⁵ In particular, following the publication of articles critical of the government for alleged corruption and human rights abuses, the applicant was threatened and intimidated in several ways, including the recording and release of intimate images from a hidden camera installed in her bedroom.⁴⁶ The applicant complained that the ensuing criminal investigation was ineffective, and that the publication of detailed information about her private life by the prosecuting authorities had been unlawful.⁴⁷

With respect to the Article 10 claim specifically, the applicant argued that the harassment was part of a pattern of politically-motivated smear campaigns against journalists in Azerbaijan, and that the State had failed to fulfil either of its negative and positive obligations in respect of her freedom of expression.⁴⁸ The Court held that the entirety of the complaint was appropriately considered from the standpoint of the State's positive obligations under Article 10.⁴⁹ In its assessment under Article 10, the Court reiterated the *Dink* principle and cautioned that interference with freedom of expression may have a 'chilling effect', particularly where serious crimes are committed against journalists.⁵⁰ The Court ultimately held that the State had failed to comply with its positive obligation flowing from Article 10.⁵¹ It did so on the basis of several factors: the general situation in the country concerning the freedom of expression and safety of journalists, taking note in particular of 'reports of physical attacks and other types of alleged persecution of journalists, and the perceived climate of impunity for such acts'; the fact that the criminal acts committed against the applicant were linked to her journalistic activities; and the applicant's repeated attempts to bring to the attention of the authorities her concerns that she was the victim of a concerted campaign in retaliation for her journalism.⁵² In these circumstances, the Court held that the threat of public humiliation and the flagrant invasion of the applicant's privacy were linked to (or should have been treated as linked to) her journalistic activities, and required the

⁴⁵*Khadija Ismayilova* (n 3) [3]. Only the Article 10 claim is addressed here. It concerned 'the threatening letter [enclosing stills of the images and telling her to cease her journalistic activities], the unauthorised installation of wires and hidden cameras in her flat, the dissemination of the covertly filed videos and related newspaper articles in pro-government newspapers, the ineffectiveness of the investigation and lack of remedies against the inaction of prosecuting authorities, as well as the publication of the status report by the investigating authorities': see [151].

⁴⁶*ibid* [9]–[20].

⁴⁷*ibid* [21]–[61].

⁴⁸*ibid* [153]–[154]. The publication of the status report was tied specifically to a breach of the State's negative obligation.

⁴⁹*ibid* [160].

⁵⁰*ibid* [159].

⁵¹*ibid* [166].

⁵²*ibid* [161]–[163].

State ‘to take positive measures to protect the applicant’s journalistic freedom of expression’.⁵³ Instead, significant flaws and delays in the criminal investigation conducted as well as unjustified public disclosures by the investigating and prosecuting authorities had ‘further compounded the situation ... contrary to the spirit of an environment protective of journalism’.⁵⁴ Thus, the State had failed to comply with its positive obligation to protect the applicant in the exercise of her freedom of expression, thereby violating Article 10.

The following year, the Court released its judgment in *Haji and Others v Azerbaijan* (2019), concerning eight journalists subjected to attacks in the course of their journalistic activities. While the facts of each application differed slightly, each applicant alleged that State actors had participated in the attacks or had been present but failed to intervene to prevent or stop them. For instance, the second applicant alleged that he was beaten by numerous police officers, and his camera seized, while documenting police brutality at a demonstration.⁵⁵ The sixth applicant alleged that he was attacked and his camera broken by a public official while photographing a largescale eviction and demolition. The seventh applicant, Mr Abbasov, was attacked while recording a protest by individuals against their eviction and the demolition of their houses on land claimed by a State-owned oil company (‘SOCAR’). SOCAR’s security guards ordered the applicant to stop recording the protest; when he refused, up to twenty security guards knocked him to the ground and hit him repeatedly with rubber truncheons, kicked his head, ribs and abdominal area, and swore at him. Police officers were present at the scene but did not intervene; the applicant alleged that the police officers prevented others who witnessed the attack from helping him.⁵⁶ Mr Abbasov lost consciousness during the attack and was subsequently hospitalised for twelve days. The medical certificate indicated that he sustained a traumatic brain injury, a concussion, two broken ribs, and a torn right eyelid; he subsequently underwent eye surgery.⁵⁷

Each of the eight applicants in *Haji* argued that the State had violated, *inter alia*, their Article 10 right to freedom of expression.⁵⁸ The Court once again reiterated that States have both negative and positive obligations in respect of freedom of expression, and that the positive obligations under Article 10 included the *Dink* principle.⁵⁹ It continued, ‘It cannot be disputed that the physical ill-treatment of journalists while the latter are performing

⁵³ *ibid* [164].

⁵⁴ *ibid* [165].

⁵⁵ *Haji* (n 3) [27]–[31].

⁵⁶ *ibid* [115].

⁵⁷ *ibid* [118], [121].

⁵⁸ All applicants argued that their Article 10 right had been violated. However, there was some variation in the claims made under Articles 3, 6, 8, and 13.

⁵⁹ The formulation used in *Uzeyir Jafarov and Huseynova* was also employed here, but only *Dink* was cited: see *Haji* (n 3) [218].

their professional duties seriously hampers their exercise of the right to receive and impart information'.⁶⁰ Turning to the application of the *Dink* principle in the respective applications, however, the Court found that the State had failed to comply with its positive obligation in respect of only one of the eight applicants (Mr Abbasov). The remaining applicants' cases were distinguished on the same basis as *Uzeyir Jafarov*, *Huseynova* and *Tagiyeva* and therefore the Court held it was not necessary to examine their complaints under Article 10 separately.⁶¹ With respect to Mr Abbasov, the Court's analysis mirrors to a significant extent that in *Khadija Ismayilova*. The Court held that the entirety of his complaint fell to be considered from the standpoint of the State's positive obligations under Article 10.⁶² It noted that the State was responsible for Mr Abbasov's ill-treatment because the police had failed to stop it and protect him, and in addition the criminal investigation into the attack had not progressed.⁶³ Finally, the Court referred to its relevant case law in respect of Azerbaijan under Article 10 (citing, among other cases, *Khadija Ismayilova*) and reports of physical attacks and persecution of journalists in a climate of impunity in the country.⁶⁴ The Court concluded that the ill-treatment of Mr Abbasov was linked to (or should have been treated by the investigating authorities as if it was linked to) his journalistic activities, and that Article 10 required the State to take positive measures to protect his journalistic freedom of expression. Its failure to do so constituted a violation of Article 10.⁶⁵ Notably, in both *Khadija Ismayilova* and *Haji*, the Court did not particularise which positive obligation(s) the State had failed to fulfil (whether the obligation to implement protective security measures to safeguard journalists from violence, or to create a favourable environment for participation in public debate without fear).

Most recently, in *Gaši and Others v Serbia* (2022), the Court again reiterated and considered the application of the *Dink* principle; however, unlike the cases just discussed, the Court declined to find a violation of Article 10.⁶⁶ The application was brought by journalists and civil society activists who were outspoken critics of the government. They participated in protests concerning the demolition of certain houses and installations in Belgrade, which became the subject of articles on right-wing websites and TV appearances. In essence, the articles alleged that the protests were funded and orchestrated by foreign operatives who sought to overthrow the government,

⁶⁰ *ibid.*

⁶¹ *ibid* [227]–[229].

⁶² *ibid* [221].

⁶³ *ibid* [222]–[223].

⁶⁴ *ibid* [224].

⁶⁵ *ibid* [226].

⁶⁶ Note that a request for referral to the Grand Chamber was rejected in January 2023: see <hudoc.echr.co.int/eng#%7B%22itemid%22:%5B%22003-7554645-10379777%22%5D%7D> accessed 15 February 2024.

radicalise the populace and incite conflict. An article posted on the daily media platform 'Informer' stated that a number of persons were 'actively participating in this project' and published photos of the applicants and others alongside the text.⁶⁷ The article had more than 100 comments, some of which 'referred to domestic traitors and mercenaries, failed journalists, the easily corrupted, "sold souls", western pets ... , extremists and trash'.⁶⁸ The editor-in-chief of Informer then went on TV and repeated the allegations, and referred specifically to two of the three applicants as part of the 'project'.⁶⁹

The applicants launched a criminal complaint for racial and other discrimination as well as a breach of the right to equality, arguing that the articles and TV shows had 'spread ideas and theories which promoted and incited hatred, discrimination and violence against a group' based on protected characteristics.⁷⁰ A police investigation was initiated, but the complaint was ultimately rejected. Further appeals were similarly unsuccessful, and the applicants thereafter brought an application before the ECtHR, arguing that 'the State had not discharged its positive obligation to protect them from the threats and media campaign against them, which had intimidated and dissuaded them from continuing to express their opinion on public matters'.⁷¹

In considering the Article 10 claim, the Court reiterated the importance of freedom of expression as a precondition for a functioning democracy, and that the effective exercise of the freedom may require States to fulfil negative and positive obligations.⁷² Departing from its previous jurisprudence on the *Dink* principle, however, the Court indicated that the determination of whether or not a positive obligation *exists* requires that 'regard ... be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual'.⁷³ Moreover, the scope of the positive obligation 'will inevitably vary' in light of the diversity of situations across Contracting States, difficulties in policing modern societies, and resource allocation decisions.⁷⁴ Finally, the Court noted that positive obligations must not be interpreted in such a way that they impose an impossible or disproportionate burden on the authorities.⁷⁵

With this framing set out, the Court affirmed that the positive obligations under Article 10 require States to create, while establishing an effective system for the protection of journalists, a favourable environment for

⁶⁷ *Gašić* (n 3) [8].

⁶⁸ *ibid* [9].

⁶⁹ *ibid* [10].

⁷⁰ *ibid* [13].

⁷¹ *ibid* [64].

⁷² *ibid* [77].

⁷³ *ibid*.

⁷⁴ *ibid*.

⁷⁵ *ibid*.

participation in public debate.⁷⁶ The Court proceeded to assess whether the obligation had been complied with in the circumstances of the case, and ultimately held that it had.⁷⁷ In particular, the Court noted that although the applicants felt threatened following the publications and broadcast at issue, ‘none of them has ever in fact been subjected to any act of violence’.⁷⁸ It also pointed to other remedies which were available to, but not pursued by, the applicants (including civil proceedings for hate speech and requesting a reply to and/or rectification of the information published).⁷⁹ Though the Court took note of the broader picture – concerning reports on the (lack of) safety of journalists in Serbia and on physical attacks and other forms of persecution of journalists – it held that in ‘the specific circumstances of the present case’, the prosecutor’s decision to reject the complaint was not unreasonable, arbitrary or based on an unacceptable assessment of the relevant facts.⁸⁰

In a Concurring Opinion, Judge Koskelo noted ‘considerable hesitation’ in joining the majority in concluding that there had been no violation of Article 10, as freedom of expression had been wielded as a sword against the applicants in order to suppress their ability to protest and express their opinions.⁸¹ Thus, the case was not about the chilling effect that arises from *sanctioning* critics, but rather the chilling effect that may arise ‘through the *failure to impose sanctions* on those who seek to attack others for the usual exercise of their freedoms’ not through debate but through ‘attempts to stigmatise the opponents as traitors and conspirators, that is to say, enemies of the State, instead of treating them as legitimate participants and interlocutors in the normal affairs and controversies of society’.⁸² Judge Koskelo cautioned:

The dangers of such aggressive, potentially toxic and intimidating smear campaigns for the conditions, and the quality, of necessary democratic debates and exchanges of arguments should not be underestimated. After all, the ultimate aim of freedom of expression is to enable and to maintain democracy, not to undermine it.⁸³

Thus, Judge Koskelo went on to state that

it is indeed very important in the interest of protecting democracy to uphold the positive obligations incumbent on the States Parties to create, by establishing an effective system for the protection of journalists as well as members of civil society, a favourable environment for participation in public debate.⁸⁴

⁷⁶ibid [78] citing *Dink* (n 2) [137], *Huseynova* [120] and *Khadija Ismayilova* [158] (both n 3).

⁷⁷ibid [84].

⁷⁸ibid [80].

⁷⁹ibid [82].

⁸⁰ibid [83].

⁸¹ibid, Concurring Opinion of Judge Koskelo [5]

⁸²ibid [5] [emphasis added].

⁸³ibid.

⁸⁴ibid [6].

In her view, the particular circumstances of the case combined with the broader context of the safety of journalists and the environment of media freedom in the country ‘were of such a nature as to create a heightened duty of scrutiny on the part of the domestic authorities in connection with the positive obligations arising for them under Article 10’.⁸⁵ However, due to the limited information available to the Court, she ‘voted in favour of finding no violation of Article 10 despite the doubts expressed’.⁸⁶

Taking stock: A (protective) principle with limited (practical) effect?

The jurisprudence leaves significant uncertainty about the status and scope of the *Dink* principle. It is not clear: (i) what the positive obligation *is*; (ii) what it *entails*; and (iii) when failure to comply amounts to a rights *violation*. The questions are related, but I take each one in turn.

The first is what, in fact, the *Dink* principle is (or is understood to be by the Court, Member States and other Council of Europe organs like the Committee of Ministers). Is it a standalone positive obligation arising under Article 10? Is it subsumed within – or analogous to – the obligation to implement protective security measures to safeguard journalists from violence? Or is it best understood as an overarching obligation, which encompasses and is fulfilled by compliance with other obligations, such as ensuring the safety of journalists, guaranteeing media pluralism, and providing access to information? There is reason to believe the Court views it as a standalone obligation: the language of ‘everyone’ is, after all, broader than the obligation pertaining to the safety of journalists specifically, and the positive obligation to ensure the safety of journalists had already been recognised in its own right years earlier.⁸⁷ This view appears to be shared by the Committee of Ministers of the Council of Europe. Several texts adopted by the Committee of Ministers suggest that the obligation is conceived alongside – but separate from – other positive obligations incumbent on the State. For instance, the 2016 Recommendation ‘on the protection of journalism and safety of journalists and other media actors’ lists the *Dink* obligation as one positive obligation ‘among others’, which include putting in place an effective system of protection for authors and journalists; affording protection against physical violence and intimidation; protecting life; investigating fatalities; and the duty to prevent torture and ill-treatment.⁸⁸ Similarly, the 2018

⁸⁵ *ibid* [9].

⁸⁶ *ibid* [10].

⁸⁷ *Özgür Gündem* (n 10[42]–[44]).

⁸⁸ Council of Europe, Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors (adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers’ Deputies) [12]. See also Council of Europe, Declaration of the Committee of Ministers on the protection of journalism and

Recommendation ‘on media pluralism and transparency of media ownership’ stipulates that States have a positive obligation ‘to foster a favourable environment for freedom of expression, offline and online, in which everyone can exercise their right to freedom of expression and participate in public debate effectively’.⁸⁹ Yet on the other side of the ledger, the only cases in which the Court has considered the obligation to date are those concerning journalists, authors and activists who have been subjected to threats and attacks, and it is difficult to discern in the Court’s analysis what (if any) role the *Dink* principle is playing from one case to the next.⁹⁰ Similarly, the Committee of Ministers’ articulation of what a ‘favourable environment for freedom of expression’ means leaves some doubt about its status as a standalone – rather than overarching or analogous – principle to be fulfilled, as discussed below.

This relates to the second issue: what the obligation *requires* of States (and, by extension, what protective scope it extends to rights-holders). Neither the jurisprudence to date nor the texts adopted by the Committee of Ministers provide much clarity on this question. For instance, the Court has (in some cases) suggested that the obligation requires that State actors refrain from committing or abetting violent attacks, or alternatively that they protect individuals when threats of violence are known or ought to have been known by the State.⁹¹ However, in others, the obligation seems to be cast more broadly: the Court will have regard for the broader role played by the State in enabling the decay in the information environment and spurring on the threats or acts of violence and harassment through, for instance, criminal proceedings, inflammatory public statements, a culture of impunity for crimes committed against journalists, and so on.⁹² Some on the Court appear to conceive of the positive obligation more broadly still: a Joint Concurring Opinion in *OOO Memo v Russia* (2022) referred to the *Dink* principle in relation to defamation proceedings brought by a public authority.⁹³ The concurring judges held that in such circumstances it is ‘incumbent on the domestic courts to provide compelling reasons capable of demonstrating convincingly that members of the media acted in bad

safety of journalists and other media actors (adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers’ Deputies) [7].

⁸⁹Council of Europe, Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership (adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers’ Deputies) [1.2].

⁹⁰It is also notable that the former President of the Court, Robert Spano, has implied that the positive obligations under Article 10 are linked: ‘States are required to establish an effective mechanism for the protection of authors and journalists *in order to create a favourable environment for participation in public debate of all those concerned* ...’: see Robert Spano, ‘Conflict Prevention or Conflict Resolution: What Role for the European Court of Human Rights?’ (2023) 7(2) *Irish Juridical Studies Journal* 5, 6.

⁹¹See e.g. *Uzeyir Jafarov; Huseynova; Haji; Gaši* (all n 3).

⁹²See e.g. *Dink* (n 2); *Tagiyeva; Khadija Ismayilova* (both n 3).

⁹³*OOO Memo v Russia* App no 2840/10 (ECtHR, 15 March 2022) Joint Concurring Opinion [9].

faith or in flagrant disregard of the tenets of responsible journalism when making allegedly defamatory statements’.⁹⁴ ‘Any failure to do so’, they continued, ‘would run contrary to the positive obligation under Article 10 of the Convention requiring States to create a favourable environment for participation in public debate by all persons concerned, enabling them to express their opinions and ideas without fear’.⁹⁵

At the same time, the Committee of Ministers has taken an overly expansive approach to the requirements of the *Dink* principle. Its 2014 Declaration ‘on the protection of journalism and safety of journalists and other media actors’ suggests that the obligation has several components: eradicating impunity; refraining from judicial intimidation by restricting disclosure of information of public interest; prompt and free access to information as a general rule; and protections of journalistic sources.⁹⁶ The 2016 Recommendation is more explicit and specific, still: it indicates that a favourable environment has ‘a number of essential features which collectively create the conditions in which freedom of expression and information and vigorous debate can thrive’.⁹⁷ These features include the provision of access to information; the vitality of the media ecosystem; media pluralism and diversity of media content; and having regard to the specific risks and threats faced by members of vulnerable groups who are targeted in the course of their work.⁹⁸ The recommendation further stipulates that the exercise of the right of freedom of expression ‘without fear’ implies that at minimum, ‘the safety, security and protection are guaranteed effectively in practice for everyone’.⁹⁹ Fear can arise from harassment, threats and cyberattacks, as well as other illegal behaviour, but it ‘can also be generated by (the threat or reasonable expectation of) a range of legal, political, socio-cultural and economic pressures’.¹⁰⁰ The 2018 Recommendation stipulates that the *Dink* principle applies ‘online and offline’ and that ‘such an environment encompasses the rights to privacy and data protection, and the right to access information on issues of public interest’.¹⁰¹ Moreover, States should guarantee that the media are free and pluralistic; ensure frameworks to safeguard editorial independence and operational autonomy; ensure transparency of media ownership; and promote media literacy.¹⁰²

In sum, to date the requirements of the *Dink* principle have yet to be concretised in a manner that will render its protections meaningful and effective.

⁹⁴ibid.

⁹⁵ibid.

⁹⁶Declaration (2014) (n 88) [7]–[9].

⁹⁷Recommendation (2016) (n 88) [13].

⁹⁸ibid [13]–[16]. On this latter point, the recommendation calls for a ‘systematic, gender-sensitive approach ... to prevent and combat these specific dangers, as well as to counter the underlying societal customs, practices, gender stereotypes, prejudices and discrimination on which they feed’.

⁹⁹ibid [18].

¹⁰⁰ibid.

¹⁰¹Recommendation (2018) (n 89) [1.2].

¹⁰²ibid [1.3]–[1.7].

The *Dink* principle must surely impose a greater obligation on States than merely refraining from committing acts of violence against journalists, or investigating them when they occur. It is, after all, a positive obligation to create a positive environment for participation in public debate, not a negative obligation to refrain from creating (or allowing) a negative environment to take hold. Requiring only abstention from violence or failures to investigate threats and attacks puts the bar too low for States (and too high for applicants); the obligation must surely be intended to promote an environment where attacks against journalists, authors and activists do not occur in the first place. At the same time, the Recommendations of the Committee of Ministers seem to suggest that the creation of a ‘favourable environment’ comprises everything from data protection and privacy rights to media pluralism to restraint from judicial intimidation. The obligation requires either very *little* of States or very *much*, indeed.

This critique is not unique to the *Dink* obligation but is perhaps emblematic of the challenges inherent in the Court’s approach to positive obligations generally. States retain discretion as to which measures to pursue to fulfil their positive obligations, consistent with their margin of appreciation and with the Court’s subsidiary role.¹⁰³ While the principle of subsidiarity provides that States have the primary responsibility for securing Convention rights and freedoms, subject to the Court’s supervisory jurisdiction, the margin of appreciation accords States certain manoeuvrability in determining how they go about doing so.¹⁰⁴ The Court is required to navigate and analyse the alternative measures that the State *could have* adopted in order to determine whether the failure to do so constitutes a violation under the relevant Convention article. As Vladislava Stoyanova explains, this may draw the Court into the realm of rulemaking, rather than rule application.¹⁰⁵

In addition, positive obligations sometimes raise causation and due diligence issues where the proximate source and cause of harm suffered was not an act of the State, but rather some intervening external cause – such as violence from a third party¹⁰⁶ or the occurrence of a natural

¹⁰³Stoyanova (n 4) 3–4, 22. Stoyanova explains that these tensions are not unique to positive obligations: they may also arise where the Court is assessing a State’s negative obligations. However, the *scope* of choices is broader in the context of positive obligations in light of the alternatives available (see 3, 9–10). Note that both concepts are now reflected in the language of the ECHR: Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms entered into force on 1 August 2021. It adds a new recital to Art 1 which affirms that ‘the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the [ECtHR] established by this Convention’. CETS 213 (Strasbourg, 24.VI.2013).

¹⁰⁴See e.g. *Özgür Gündüm* (n 10) [43]; *Gaši* (n 3) [77].

¹⁰⁵Stoyanova (n 4) 3–4, 22.

¹⁰⁶*Opuz v Turkey* App no 44301/02 (ECHR, 9 June 2009); *Talpis v Italy* App no 41237/14 (ECHR, 2 March 2017).

disaster.¹⁰⁷ In such circumstances, determining the boundaries for state responsibility for the omission – including that it was the ‘but for’ cause of the interference with the right or interest protected by the Convention – is a challenge.¹⁰⁸

The potentially boundless scope of measures a State *could* take to fulfil its positive obligations – in conjunction with the absence of a coherent theory of the positive obligations which may flow from the Convention – casts doubt on the foreseeability, quality and legitimacy of the Court’s decisions.¹⁰⁹ These criticisms are particularly foregrounded where the Court ‘break[s] new ground’ in setting down a new protective principle, as it did in articulating the *Dink* principle.¹¹⁰

Finally, beyond what the positive obligation *is* and what it *requires*, a third issue is when the obligation arises and when a State’s failure(s) to comply with it amount to a rights *violation*. On the first point, the Court has shown reluctance to consider the principle (or the broader Article 10 claim) or to apply it. In four cases, the Court reiterated the *Dink* principle as a positive obligation on the State flowing from Article 10, but then declined to examine the Article 10 claim on the facts presented. This refusal to consider the Article 10 claim in its own right is troubling, as it may stunt the development of the positive obligation. Vladislava Stoyanova’s framework – which elucidates the levels of concreteness used by the Court in framing States’ positive obligations – is instructive in this regard.¹¹¹ Stoyanova distinguishes three such levels, ranging from the most abstract to the most concrete: at Level 1, it frames the general positive obligations under the relevant Article(s); at Level 2, it frames the general positive obligations under the relevant Article(s) in the *specific context* of the case, for instance in the context of attacks against journalists;¹¹² and at Level 3, it concretises these obligations in the specific case and assesses whether there has been a breach of the obligation owed. The Court thus establishes ‘general guidance for state conduct’ at Levels 1 and 2, which will have impacts beyond the four corners of the case before it even if it does not find a violation at Level 3.¹¹³

¹⁰⁷*Tătar v Romania* App no 67021/01 (ECHR, 27 January 2009); *Budayeva and Others v Russia* App no 15339/02 and others (ECHR, 20 March 2008).

¹⁰⁸Stoyanova (n 4) 8, citing Steel, *Proof of Causation in Tort Law* (2015). See generally Vladislava Stoyanova, ‘Causation between State Omission and Harm Within the Framework of Positive Obligations under the European Convention on Human Rights’ (2018) 18 HRLR 309.

¹⁰⁹Stoyanova (n 1) 2–3; Pierre Thielbörger, ‘Positive Obligations in the ECHR after the *Stoicescu* Case: A Concept in Search of Content?’ (2012) *European Ybk HR* 259, 261. Arguably, the Court’s somewhat contradictory findings in the face of largely analogous factual underpinnings – particularly as concerns Azerbaijan – lends some credence to these criticisms.

¹¹⁰Stoyanova (n 1) 3.

¹¹¹Stoyanova (n 4).

¹¹²See eg Stoyanova’s analysis of the framing of positive obligations in the context of domestic violence in *Kurt v Austria* App no 62903/15 (ECtHR [GC], 15 June 2021); Stoyanova (n 4).

¹¹³Stoyanova (n 4) 34.

Applying Stoyanova's framework, the Court has reaffirmed that States owe positive obligations under Article 10 (Level 1) and articulated the protective principle that such obligation requires that they create a favourable environment for participation in public debate in seven cases (Level 2). But it has only found a failure to comply with this obligation on (seemingly) three occasions, first in *Dink* and again in *Khadija Ismayilova* and *Haji* in respect of one of eight applicants (Level 3). In these latter cases, it is unclear whether it is in fact the *Dink* obligation that the State has failed to fulfil, rather than the co-existing obligation to ensure a framework for the safety of journalists. Moreover, five of the seven cases that have reaffirmed the *Dink* principle were against Azerbaijan, only two of which resulted in findings that the State had failed to comply with its positive obligations to protect the journalists' freedom of expression. The Court in both *Khadija Ismayilova* and *Haji* (in respect of the seventh applicant) referred to the general situation of violence against journalists and the climate of impunity in the country. Yet in the remaining cases, the Court was seemingly not persuaded that the State had been (sufficiently) involved in or responsible for the attacks – or put on notice about the threat to the individuals' lives – to ground a finding that the positive obligation arose in the circumstances. Neither the general situation of violence and impunity, nor the 'chilling effect' that such a climate can foster, played a significant role in the analysis.

With respect to when a State's failure to comply with the obligation results in a finding that Article 10 has been violated, the Court has repeatedly wedded its analysis of the *Dink* principle under Article 10 to its analysis and conclusions under Articles 2 and 3 of the Convention. This calls into question the standalone value of Article 10 claims, as explicitly addressed in the Joint Dissenting Opinion in *Huseynova* and hinted at in the Concurring Opinion in *Gaši*. The result for the applicants in the cases discussed above is that to the extent the Article 10 claim was assessed at all, it did not add much to the overall conclusions: the Court either relied on its findings under the *substantive* limbs of Articles 2 and 3 to ground its finding of a violation of Article 10, or it held that in light of its findings under the *procedural* limbs of Articles 2 and 3, a separate analysis of the allegations in respect of the right to freedom of expression was not necessary. The superseding obligation of the ECHR, set out in Article 1, is that States shall secure to everyone within their jurisdiction the rights and freedoms set out – which include the right to life, the prohibition of torture, and the right to freedom of expression.¹¹⁴ The Court's treatment of Article 10 in the cases discussed above (and the positive obligations which States must fulfil to ensure its protection) leaves much to be desired from the perspective

¹¹⁴ECHR, Article 1.

of the indivisibility and equal status of all rights and freedoms recognised in the Convention.

The Court has also set some concerning and contradictory precedents for the threshold of violence that must be met for the State to be required to act. For instance, in *Gaši*, the Court noted that the applicants had not ‘in fact’ been subjected to violence, a factor which was in part responsible for its holding that no violation of Article 10 had occurred. To require that such violence materialise makes the *Dink* principle a paper tiger, and calls into question the autonomous nature (and added benefit) of an Article 10 claim in this context when, by definition, it would also amount to a violation of Articles 2 or 3 of the Convention. Moreover, the Court referred in several cases to the fact that it had not been established that the State had been ‘behind the attack’ or ‘involved in any way in the death’ of the individual concerned.¹¹⁵ While this is relevant to an Article 2 claim, it should not be decisive in an Article 10 claim in which the State’s positive obligation to create a favourable environment for participation in public debate is the central issue.

In sum, applying Stoyanova’s framework, the Court has largely confined itself to articulating that a positive obligation to create a favourable environment for participation in public debate without fear exists, without elaborating on what it means or requires in practice and without concretising the omissions that will amount to a breach. This reluctance to move beyond Level 2 may stunt the further development and concretisation of the principle, as ‘every documentation of a breach at Level 3 is a way of signalling what more concrete measures might be considered as required for complying with positive obligations’.¹¹⁶

The positive obligations doctrine has ‘enormous potential for strengthening the right to freedom of expression’.¹¹⁷ Yet tracing the *Dink* principle from its recognition through to its most recent treatment reveals that there is still some way to go before this potential is fully realised. For the principle to have greater practical effect, several lingering questions need to be addressed: what the positive obligation is; what it entails; and when failure to comply will amount to a violation of Article 10.

Towards cohesion and clarity within the Council of Europe

Where, then, does this leave us, and why does it matter? This section attempts to answer these questions. It starts by setting out what the impacts of an *unfavourable* environment for participation in public debate

¹¹⁵*Uzeyir Jafarov* [69]; *Huseynova* [121]; *Tagiyeva* [79] (all n 3).

¹¹⁶*Stoyanova* (n 4) 25.

¹¹⁷Tarlach McGonagle, ‘Positive obligations concerning freedom of expression: mere potential or real power?’ in Council of Europe, *Journalism at Risk: Threats, challenges and perspectives* (Council of Europe 2015) 9, 10.

without fear may be – particularly for journalists – and why a better-quality information environment may translate to better protections against harassment, including online. It then borrows from the Committee of Ministers’ Recommendations, referred to above, which have suggested one particularly promising initiative States could proactively pursue to improve the unfavourable information environment, in furtherance of the *Dink* principle: media and information literacy (MIL) initiatives.¹¹⁸ While Recommendations of the Committee of Ministers are not binding on Member States, the Court has looked to them in previous Article 10 cases for elaboration of what States’ obligations might entail.¹¹⁹ The Court should do so again to breathe life back into the *Dink* principle, concretise its scope, and reaffirm its status as a standalone obligation (separate and apart from the obligation to protect the safety of journalists). In sum, the duty articulated in *Dink* is a *positive* one, requiring States to create a favourable environment for participation in public debate by all persons without fear. It is not a *negative* obligation not to threaten or attack journalists, or to investigate crimes after they have been committed. Such a construction of the obligation is too little, and comes too late. At the heart of the *Dink* principle is the creation of an environment where such crimes don’t occur in the first place. This section foregrounds this distinction, explains its import and urges a path forward which is preventative and proactive to create a favourable information ecosystem in which all can participate without fear.

The impacts of an unfavourable environment and the import of a better-quality information environment

A recent report by the LSE Commission on Truth, Trust and Technology (led by leading political, industry, legal and academic figures) identified ‘five giant evils of the information crisis’.¹²⁰ The first evil – confusion – is generated by ‘rapid media change’¹²¹ and increased by ‘information pollution at a global scale’.¹²² The second – cynicism – is evidenced by a global trend in which ‘citizens are losing trust, even in trustworthy sources’, which is further amplified by ‘the deliberate exploitation of system vulnerabilities through information warfare and the spread of false information, destabilizing public confidence and fomenting social

¹¹⁸Recommendation (2018) (n 89) [1.7]; Council of Europe, Recommendation CM/Rec(2022)4 of the Committee of Ministers to member States on promoting a favourable environment for quality journalism in the digital age (adopted by the Committee of Ministers on 17 March 2022 at the 1429th meeting of the Ministers’ Deputies) Preamble, [2.5.4], [3].

¹¹⁹See eg *Manole* (n 8) [109]; *Khadija Ismayilova* (n 3) [69].

¹²⁰LSE Commission on Truth, Trust and Technology, ‘Tackling the Information Crisis: A Policy Framework for Media System Resilience’ (2020) 10.

¹²¹*ibid* 11.

¹²²Wardle and Derakhshan, ‘Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making’ (Council of Europe 2017) 4.

antagonism'.¹²³ The third evil – fragmentation – ‘means that although citizens have access to potentially infinite information, the pool of agreed facts on which to base societal choices is diminishing’.¹²⁴ The fourth – irresponsibility – relates to social media platforms which amplify the reach of misinformation in areas such as politics and the health sector, which can have serious and harmful consequences for individuals and the public.¹²⁵ The final evil – apathy – refers to citizens’ disengagement from society and loss of faith in democracy (though the authors acknowledge that this is ‘part of a longer-term trend and is harder to pin down with evidence’).¹²⁶ ‘A well-established tactic of information warfare’, the authors conclude, ‘is to sap morale by continuous attrition through the propagation of misinformation’.¹²⁷

The real-world impacts of these ‘evils’ – particularly confusion, cynicism, fragmentation and apathy – can be serious and varied, as the cases discussed above demonstrate. In her dissenting opinion in *Gaši*, Judge Koskelo referred to the dangers of ‘aggressive, potentially toxic and intimidating smear campaigns for the conditions, and the quality, of necessary democratic debates and exchanges of arguments’.¹²⁸ These dangers were visited upon Mr Uzeyir Jafarov, Ms Khadija Ismayilova, Mr Haji and others; and they were fatal for Mr Dink, Mr Huseynov and Mr Tagyiev.

However, the impacts of a poor information environment extend more broadly. For instance, the COVID-19 pandemic was accompanied by an ‘infodemic’ which was enabled and amplified by the internet and social media platforms and which ‘undermine[d] the global response and jeopardize[d] measures to control the pandemic’.¹²⁹ This is in part because, like many other challenges, ‘the impact of the COVID-19 pandemic depends on the actions of individual citizens and, therefore, the quality of the information to which people are exposed’.¹³⁰ The resulting impacts are varied: Many have died from false information about COVID-19 cures (such as ingesting alcohol and methanol-based cleaning products¹³¹),

¹²³LSE Commission (n 120) 11.

¹²⁴*ibid* 11.

¹²⁵*ibid* 11–12. Though this is an important issue, it is outside the scope of the present article.

¹²⁶*ibid* 12.

¹²⁷*ibid* 12.

¹²⁸*Gaši* (n 3) Concurring Opinion of Judge Koskelo [5].

¹²⁹World Health Organization, ‘Managing the COVID-19 infodemic: Promoting healthy behaviours and mitigating the harm from misinformation and disinformation’ Joint statement by WHO, UN, UNICEF, UNDP, UNESCO, UNAIDS, ITU, UN Global Pulse, and IFRC (23 September 2020) <[who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation](https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation)> accessed 18 October 2023.

¹³⁰Gordon Pennycook and others, ‘Fighting COVID-19 Misinformation on Social Media: Experimental Evidence for a Scalable Accuracy-Nudge Intervention’ 31(7) *Psychological Science* 770, 770.

¹³¹MD Saiful Islam and others, ‘COVID-19-Related Infodemic and Its Impact on Public Health: A Global Social Media Analysis’ (2020) 103(4) *American Journal of Tropical Medicine and Hygiene* 1621; Ashish Gupta and others, ‘Understanding Patterns of COVID Infodemic: A Systemic and Pragmatic Approach to Curb Fake News’ (2022) 140 *Journal of Business Research* 670.

telecommunication employees have been assaulted and harassed and infrastructure destroyed over claimed links between 5G and the virus.¹³² Journalists reporting on COVID-19 have been subjected to harassment, death threats and physical violence,¹³³ with studies showing that women and minority journalists are disproportionately targeted.¹³⁴ The ‘evils’ identified in the LSE Report have also been evident during and after elections – as illustrated most acutely by the storming of the U.S. Capitol on 6 January 2021¹³⁵ – and in respect of climate change science and policy.¹³⁶ Most recently, the ‘deluge’ of false information shared concerning the Russian invasion of Ukraine and the conflict between Israel and Hamas has stoked violence and bred further confusion, cynicism and fragmentation, both within and beyond the States’ borders and on- and offline.¹³⁷

The information environment may impact individuals’ desire and willingness to participate in public discourse and debate where doing so may expose them to harassment, abuse or even violence. For instance:

Numerous studies have illustrated how racist and sexist abuse, for example, causes psychological effects such as social anxiety, fear, and diminished confidence; physiological effects such as increased heart rate and stress; and in some cases, jeopardizes the physical safety of the targets and their loved ones. These

¹³²Adam Satariano and Davey Alba, ‘Burning Cell Towers, Out of Baseless Fear They Spread the Virus’ *New York Times* (11 April 2020) <[nytimes.com/2020/04/10/technology/coronavirus-5g-uk.html](https://www.nytimes.com/2020/04/10/technology/coronavirus-5g-uk.html)> accessed 18 October 2023.

¹³³Patrick Egwu, ‘In a Nation Polarized by COVID-19, Canadian Women Journalists Suffer Online Abuse’ Reuters Institute, University of Oxford (26 July 2022) <reutersinstitute.politics.ox.ac.uk/news/nation-polarised-covid-19-canadian-women-journalists-suffer-online-abuse> accessed 18 October 2023; UNESCO, ‘Threats that Silence: Trends in the Safety of Journalists’ in *Journalism is a Public Good: World Trends in Freedom of Expression and Media Development: 2021/2022 Online Report*, 18 <unesco.org/reports/world-media-trends/2021/en/safety-journalists> accessed 18 October 2023; Article19, ‘Kenya: Journalists Attacked and Silenced during COVID-19 Pandemic’ (30 September 2020) <article19.org/resources/kenya-journalists-attacked/> accessed 18 October 2023; Attila Mong, ‘“It is Becoming Unbearable.” Journalists Say they have Become “scapegoats” at Anti-Vaccine Protests’ Committee to Protect Journalists (4 October 2021) <cpj.org/2021/10/it-is-becoming-unbearable-journalists-say-they-have-become-scapegoats-at-anti-vaccine-protests/> accessed 18 October 2023.

¹³⁴Egwu (n 133); Posetti and others, ‘The Chilling: Global Trends in Online Violence against Women Journalists’ UNESCO 2021 <unesdoc.unesco.org/ark:/48223/pf0000377223> accessed 18 October 2023.

¹³⁵Elizabeth Culliford, ‘Online Misinformation that Led to Capitol Siege is “radicalization,” say Researchers’ Reuters (12 January 2021) <reuters.com/article/us-misinformation-socialmedia-idUSKBN29H2HM> accessed 18 October 2023.

¹³⁶Maxine Joselow, ‘Election Misinformation Helped Fuel the Jan. 6 Capitol Attack. Now, Climate Misinformation Threatens the Planet’ *Washington Post* (6 January 2022) <[washingtonpost.com/politics/2022/01/06/election-misinformation-helped-fuel-jan-6-capitol-attack-now-climate-misinformation-threatens-planet/](https://www.washingtonpost.com/politics/2022/01/06/election-misinformation-helped-fuel-jan-6-capitol-attack-now-climate-misinformation-threatens-planet/)> accessed 18 October 2023; Treen, Hywel T.P. Williams & Saffron J. O’Neill, ‘Online misinformation about climate change’ (2020) 11 *WIREs Climate Change* 1.

¹³⁷OECD, ‘Disinformation and Russia’s War of Aggression against Ukraine: Threats and Governance Responses’ *OECD Ukraine Hub* (3 November 2022) <read.oecd.org/10.1787/37186bde-en?format=pdf> accessed 19 October 2023; Stephanie Burnett, Stephen Farrell and Hardik Vyas, ‘Disinformation surge threatens to fuel Israel-Hamas conflict’ Reuters (18 October 2023) <reuters.com/world/disinformation-surge-threatens-fuel-israel-hamas-conflict-2023-10-18/> accessed 19 October 2023; Dan Milmo, ‘X criticised for enabling spread of Israel-Hamas disinformation’ *The Guardian* (9 October 2023) <theguardian.com/technology/2023/oct/09/x-twitter-elon-musk-disinformation-israel-hamas> accessed 19 October 2023.

outcomes lead those targeted with abusive speech to self-censor to avoid negative effects, to withdraw from political and civic participation, and to abandon employment and educational opportunities.¹³⁸

Moreover, these effects may not be equally borne: studies show that ‘online harassment is more common for women and nonbinary people, particularly women of color, queer women, and women in the public eye’.¹³⁹ Harassment, abuse and vitriol directed disproportionately at marginalized communities – including women, ethnic and racial minorities, and 2SLGBTQIA+ persons – may serve to further marginalise or silence their voices and contributions. This can take different forms, from pushing them to the margins, causing self-censorship, or silencing them altogether by prompting their withdrawal from the public sphere or from public service.¹⁴⁰ The self-censorship and removal of marginalised groups from ‘influential spaces for democratic deliberation’ ought to be a concern for us all.¹⁴¹ As Alice Marwick explains, ‘If women, people of color, and [2S]LGB[TQIA+] internet users are shying away from contributing because of well-founded fears of retaliation, their voices will be missing from this important civic sphere’.¹⁴²

Towards a ‘well-informed and media-literate society’

In the years since the Court’s judgment in *Dink* was released, the Committee of Ministers has adopted several recommendations which have acknowledged the serious concerns of the current information environment and provided guidance on measures States could implement to fulfil their obligation to create a favourable environment for participation in public debate (discussed above). I alluded to several recommendations above, but I will focus in particular on the Recommendation adopted in 2022 ‘on promoting a favourable environment for quality journalism in the digital age’, which draws explicit links between States’ positive obligations in respect of

¹³⁸Mary Anne Franks, ‘Freedom From Speech’ (2022) *Georgetown Journal of Law & Public Policy* 865, 870.

¹³⁹Alice Marwick, ‘Morally Motivated Networked Harassment as Normative Reinforcement’ (2021) *Social Media + Society* 1, 2 (and citations therein).

¹⁴⁰*ibid* 8 (echoing previous research that targets of harassment ‘experience depression, anxiety, and other negative emotional consequences’ and that these consequences ‘often lead to self-censorship on the part of the target, causing them to decrease their online public presence’).

¹⁴¹Franks (n 138) 871. See also Danielle Keats Citron, ‘Cyber Civil Rights’ (2009) 89 *BUL Review* 61, 105 (‘An online discourse which systematically under-represents people ... cannot effectively process our various attitudes and convert them into truly democratic decisions’); Leslie Regan Shade and Madison Trusolino, ‘“It’s the Power, Stupid”: Facebook’s Unequal Treatment of Gendered Hate Speech’ (2016–2018) Vol II *Canadian Yearbook of Human Rights* 195, 199–200; Lucina Di Meco, ‘“Gender trolling” is Curbing Women’s Rights – and Making Money for digital platforms’ *The Guardian* (17 February 2023) <theguardian.com/global-development/2023/feb/17/gender-trolling-women-rights-money-digital-platforms-social-media-hate-politics> accessed 19 October 2023.

¹⁴²Alice Marwick, ‘A New Study Suggests Online Harassment is Pressuring Women and Minorities to Self-Censor’ *Quartz* (24 November 2016) <qz.com/844319/a-new-study-suggests-online-harassment-is-persuading-women-and-minorities-to-self-censor/> accessed 19 October 2023.

freedom of expression and the threats of a polluted and toxic information ecosystem.¹⁴³ The Guidelines on promoting quality journalism in the digital age, appended to the recommendation, situate the guidelines in the current ‘post-truth’ climate.¹⁴⁴ The guidelines recognise, in particular, that the spread of disinformation and online propaganda represent growing threats to democracies; that in the current environment of ‘intensified political partisanship, unscrupulous politicians use a “fake news” agenda to launch self-serving attacks against critical media, undermining the legitimacy of journalism’; and that individuals’ trust in media and in politics, institutions and expertise has declined in many States to ‘a worryingly low level’.¹⁴⁵ Thus, the recommendation is concerned with the unfavourable environment in which journalists are often forced to operate and looks to its causes and consequences.

In response to this threat, the Guidelines include the following recommendation for how States might go about creating or restoring a favourable environment for quality journalism, under the heading ‘Ethics and quality: rebuilding and maintaining trust’:

[D]isinformation undermines trust in the media and threatens the reliability of information that feeds public debate and democracy. Concerted national and/or transnational efforts to address disinformation and propaganda should receive full support from States in a manner that does not undermine their independence. ... As information manipulation feeds on divisions and tensions, strengthening the resilience and cohesion of societies should be a long-term European goal. *A well-informed and media-literate society (including journalists, the media, online platforms, non-governmental organisations and individuals) is an essential part of the defence against information manipulation in democratic societies.*¹⁴⁶

There are several takeaways from this recent recommendation. First, the focus on the harmful impacts of ‘information manipulation’ on democratic societies, and the objective of a ‘well-informed and media-literate society’, mirror the Court’s calls for a favourable environment for participation in public debate. In this sense, the recommendation recognises the importance of ‘fire-prevention’ initiatives in tandem with ‘fire-fighting’ efforts.¹⁴⁷ Moreover, it recognises that the authorities play various roles beyond regulators in the information ecosystem, including as facilitators of and participants in expression.¹⁴⁸

¹⁴³Recommendation (2022) (n 118).

¹⁴⁴*ibid.* Guidelines [6]–[7].

¹⁴⁵*ibid.*

¹⁴⁶*ibid.* [2.5.4] [emphasis added].

¹⁴⁷For a similar argument in respect of hate speech, see Katie Pentney and Tarlach McGonagle, ‘The Opportunities and Challenges of Addressing Hate Speech with Artificial Intelligence’ Submission to the OSCE Representative on Freedom of the Media #SAIFE Public Consultation (September 2020) 3 <static1.squarespace.com/static/6017084c7afdae55cedadcd1/t/602449cfe6856f1d71ecd1a1/1612991092425/Submission.pdf> accessed 7 October 2023.

¹⁴⁸See Pentney (n 12).

Second, the recommendation's reference to a 'well-informed' society harkens back to one of the ECtHR's earliest cases, *Sunday Times v United Kingdom (no 1)*, concerning reporting on ongoing litigation into the postnatal effects of thalidomide.¹⁴⁹ The Court noted in *Sunday Times* that Article 10 safeguards 'the right of the public to be *properly* informed'.¹⁵⁰ This qualifier – 'properly' – was dropped in subsequent cases,¹⁵¹ although the Court has alluded to States' duty to ensure that the public has access to 'impartial and accurate information and a range of opinion and comment' in subsequent cases.¹⁵²

Finally, the recommendation focuses on the processes necessary to achieve these ends, from strengthening resilience and social cohesion to restoring trust in the media and the reliability of information that feeds public debate and democracy. This is consistent with the Court's approach to safeguarding rights which are practical and effective, rather than theoretical or illusory, and its recognition that States may have positive obligations of action in addition to negative obligations of restraint to secure the rights to which they have signed on.¹⁵³

More than a decade after *Dink*, this recommendation (together with the ones preceding it, discussed above) reinforces the importance of a 'favourable environment' for participation in public debate and sheds light on the measures which States can implement to achieve it. It may also signal a willingness to recognise that the threats to expression and the goalposts for what the right might achieve have shifted since the ECHR was drafted more than seventy years ago. Print, radio and television were the only means of mass communication when the ECHR came into being, at a time when one of the main threats to expression was the absence of choice. The digital age has fundamentally challenged these assumptions and shifted these realities. It has ushered in a great expansion in the information and ideas that are available, the ways we consume news media and the kinds of communicators to which we are exposed – from bloggers to 'influencers' to foreign disruptors to automated bots. While the traditional news media previously served as the primary gatekeeper and sifter of information and ideas, it now competes with the likes of Facebook, WhatsApp and TikTok as the dominant source of news.

¹⁴⁹*Sunday Times v United Kingdom (no 1)* App no 6538/74 (ECHR, 26 April 1979) [66].

¹⁵⁰*ibid* [emphasis added].

¹⁵¹It has however been referenced in three dissenting opinions: *Verlagsgruppe News GMBH v Austria (no 2)* App no 10520/02 (ECHR, 14 December 2006) (per Judge Herndl, [1]); *Observer and Guardian v United Kingdom* App no 13585/88 (ECHR, 26 November 1991) (per Judge Morenilla, [7]); and *Rashkin v Russia* App no 69575/10 (ECHR, 7 July 2020) (per Judge Elosegui, [17] who noted 'In this era of "fake news", citizens deserve to be properly informed and treated as rational beings'). It was also cited by Montenegro in support of sanctions imposed on a journalist: *Koprivica v Montenegro* App no 41158/09 (ECHR, 22 November 2011) [55]. See Wouter Hins and Dirk Voorhoof, 'Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights' (2007) 3:1 European Constitutional Law Review 114, 117 (and fn 10).

¹⁵²*Manole* (n 8) [101] [emphasis added]; *Association Burestop* (n 9) [108]. See Pentney (n 9).

¹⁵³*Airey v Ireland* App no 6289/73 (ECHR, 9 October 1979) [24].

The democratisation of news providers beyond the traditional press has been beneficial in many respects, including adding voices, perspectives and attention to stories of marginalised groups that were previously less seen or heard. However, this same democratisation in who constitutes ‘the press’ has also made it more difficult for users to identify the source and reliability of the information they interact with online. Algorithms can amplify polarising content, foment echo chambers and create a breeding ground for disinformation to fester and take hold – although the extent and impact of echo chambers and filter bubbles are contested.¹⁵⁴ Broader economic and social factors further compound and complicate things, including the advent of 24-hour news cycles, a profit-driven media facing dwindling demand and the rise of citizen journalists. In the digital realm, speed and reach are prioritised above all else, and profit is driven by increases in user-engagement, which is fostered by factors including polarisation and clickbait. In sum, the challenges we are now facing relate much more to how we sift through, process, engage with and understand the barrage of information and ideas to which we are constantly exposed, rather than obtaining access to a sole news source.¹⁵⁵

With this shifting reality in mind, if there is indeed scope to further develop and concretise States’ positive obligation to create a favourable environment for participation in public debate, one worthy focal point could be mitigating the spread of mis- and disinformation – or its harmful effects on individuals who are particularly targeted by it (as in *Khadija Ismayilova* and *Gaši*). This is the focus of the final section.

MIL initiatives as a possible pursuit

MIL initiatives could be an avenue States pursue to promote a ‘well-informed and media literate society’ and a more favourable environment for discourse to ensue. Such efforts are already underway in many Member States, and would be consistent with the Committee of Ministers’ recent recommendation and with the Court’s articulation of the *Dink* principle.

There appear to be several benefits to conceiving of MIL initiatives as one of the measures available to States to fulfil their positive obligation to create a

¹⁵⁴See e.g. Samuel Rhodes, ‘Filter Bubbles, Echo Chambers, and Fake News: How Social Media Conditions Individuals to be Less Critical of Political Information’ (2022) 39(1) Political Communication 1. Cf Amy Ross Arguedas and others, ‘Echo Chambers, Filter Bubbles, and Polarisation: A Literature Review’ (Reuters Institute, Oxford, January 2022) 5 (suggesting that echo chambers are ‘much less widespread than is commonly assumed’ and finding ‘no support for the filter bubble hypothesis’) <reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Echo_Chambers_Filter_Bubbles_and_Polarisation_A_Literature_Review.pdf>; Petter Törnberg, ‘How Digital Media Drive Affective Polarization through Partisan Sorting’ (2022) 119(42) *PNAS* 1 <pnas.org/doi/epdf/10.1073/pnas.2207159119>. With thanks to Richard Mackenzie-Gray Scott for these prompts and provocations.

¹⁵⁵That is not to discount ongoing concerns about censorship: see e.g. *Ahmet Yildirim v Turkey* App no 3111/10 (ECHR, 18 December 2012); *Wikimedia Foundation, Inc v Turkey* App no 25479/19 (ECHR, 1 March 2022).

favourable environment for participation in public debate. First, the majority of Member States are already pursuing such measures domestically, although the standards and quality vary by region.¹⁵⁶ This may streamline (or simplify) the Court's finding that MIL initiatives fall within the *Dink* principle – or at least weigh against criticisms that the Court is engaging in rulemaking rather than rule application. Second, such programs are aimed at encouraging critical thinking and promoting resilience against the harms that may be posed by the spread of false and misleading information and by polarisation in the digital age. Unlike (reactive) regulatory measures geared at the removal of disinformation online or the targeting of individuals who share it, MIL initiatives do not limit individuals' right to impart information or interfere with the public's right to receive it. Rather, they seek to shape the quality of the discourse and empower critical engagement and participation in public debate.¹⁵⁷ Finally, in addition to functioning as an 'antidote' to information disorder, MIL initiatives may also serve to reinforce the 'societal relevance and civil value of journalism' and to create a more resilient citizenry in the face of attempts to discredit journalism.¹⁵⁸ In this sense, MIL initiatives can create 'pockets of resistance' to attacks on journalists, increasing the public's desire to fight impunity for such crimes and to push for greater media freedom and journalism safety more broadly.¹⁵⁹

While there is no current compulsion for States to implement and promote MIL initiatives,¹⁶⁰ they could be a worthwhile avenue for the Court to consider in developing and concretising the *Dink* principle for the modern information age. Tarlach McGonagle notes that the Court has 'shown its awareness of the complexity and overwhelming nature of the

¹⁵⁶See European Audiovisual Observatory, 'Mapping of Media Literacy Practices and Actions in EU-28' (Strasbourg 2016) <digital-strategy.ec.europa.eu/en/library/reporting-media-literacy-europe> accessed 7 October 2023; Media Literacy Index 2023 (June 2023) [MLI Index] 7–9 <osis.bg/wp-content/uploads/2023/06/MLI-report-in-English-22.06.pdf> accessed 7 October 2023 ('The geographical pattern of the distribution of the [ranking] clusters shows East-West and North-South divide with the Balkan countries and the Caucasus trailing behind').

¹⁵⁷The focus on MIL initiatives is not to discount or detract from broader systemic efforts to address mis- and disinformation online, including the European Union's Strengthened Code of Practice on Disinformation, the Digital Services Act or the proposed European Media Freedom Act. These measures may also have a role to play in improving the information environment. However, they have been the subject of scholarly and civil society critique and are not addressed here: see e.g. Paolo Cavaliere, 'The Truth in Fake News: How Disinformation Laws Are Reframing the Concepts of Truth and Accuracy on Digital Platforms' (2022) 3 ECHR LR 481.

¹⁵⁸Silvia Chocarro and others, 'Understanding the Link between a Media and Information Literate Society and the (Un)-Safety of Journalism' (2020) Paper presented at the Academic Conference on the Safety of Journalists, World Press Freedom Conference 2020 <article19.org/resources/media-and-information-literacy-protect-journalists/> accessed 7 October 2023.

¹⁵⁹*ibid.*

¹⁶⁰Note that the revised Audiovisual Media Services Directive requires Member States of the European Union to 'promote measures that develop media literacy skills': Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) OJ L 095 Art 33a.

online information and communications environment, which calls for clear legal frameworks to guide expressive conduct online’.¹⁶¹ MIL initiatives provide further guardrails and supports for a favourable environment for public debate, online and offline. Indeed, MIL has become ‘essential for individuals to be able to appreciate the consequences of communicative engagement in the digital age’.¹⁶² ‘On such reasoning’, McGonagle argues, ‘it is only a small step to argue that the promotion of MIL falls squarely within States’ positive obligation to foster a favourable environment for participation in public debate by everyone’.¹⁶³

In the midst of the rampant spread of mis- and disinformation in the digital sphere and increasing polarisation, encouraging constructive engagement with the digital realm may be a means for States to mitigate the harms of such mis- and disinformation and polarisation for individual users, protecting the public (and public discourse) in the process.¹⁶⁴ Doing so would further the aims of the *Dink* principle by proactively fostering an environment in which all can participate in public debate without fear.

Conclusion

The *Dink* principle was articulated by the Court more than a decade ago. Though the Court has reiterated the positive obligation on more than a handful of occasions in the years since, the *Dink* principle has been limited to an important protective principle without a practical effect. This contribution has outlined three issues which warrant attention and clarification. First, it remains unclear what exactly the *Dink* principle is (whether a standalone, subsumed or overarching obligation for States to fulfil). Second, neither the Court nor the Committee of Ministers has clarified what it requires in practice, or how broadly or narrowly its requirements extend. Third, the jurisprudence casts significant doubt on when the obligation arises and when States have failed to satisfy its requirements, such that a violation of Article 10 has occurred. On the first point, the Court

¹⁶¹Tarlach McGonagle, ‘*Melike v. Turkey*’ (ECtHR, 35686/19) – Social media ‘likes’ and freedom of expression: the ECtHR’s tentative considerations’ European Human Rights Cases Updates (22 November 2021) [14] [emphasis added] <ehrc-updates.nl/commentaar/211792?skip_boomportal_auth=1> accessed 7 October 2023.

¹⁶²*ibid.*

¹⁶³*ibid.* The purpose here is not to dictate how many MIL efforts, of what type, and by whom, would be needed or necessary to satisfy the requirements of Article 10. That would need to be determined on a case-by-case basis, and could vary from one context to the next.

¹⁶⁴There are other possibilities, too – including greater transparency and accountability rules for private platforms around how their content is promoted and prioritised by algorithmic or other means, the pursuit of media norms and ethical standards for new media actors and private platforms, and even taxation on digital advertising to fund public service digital media. These are interesting initiatives but fall outside the scope of the present contribution. See generally Ethan Zuckerman, ‘The Case for Digital Public Infrastructure’ Knight Institute (17 January 2020) <knightcolumbia.org/content/the-case-for-digital-public-infrastructure> accessed 7 October 2023.

has neglected to consider Article 10 allegations in their own right where violations of the procedural limbs of Articles 2 and 3 ECHR have been found (as seen in *Uzeyir Jafarov, Huseynova, Tagiyeva* and in seven of eight applications in *Haji*). This relegates Article 10 generally, and the *Dink* principle specifically, to a subsidiary position within the Convention. On the second point, where the Court has considered whether the positive obligation under Article 10 has been satisfied, its judgments set a problematic threshold for when States fall short – requiring that threats of violence have been acted upon (as in *Gaši*) or that the violence had been committed by or acquiesced in by State actors (as in *Dink* and the seventh applicant in *Haji*). This calls into question the standalone value of the obligation (separate and apart from other positive obligations which have been recognised) and its effectiveness in ensuring meaningful protection of freedom of expression. The result is that the *Dink* principle has not yet lived up to its promise in fostering the meaningful and effective exercise of freedom of expression by all persons without fear.

The positive obligation to create a favourable environment for participation in public debate must surely require more than the absence of overt hostility and violence by public authorities, and investigations into threats of violence after they have occurred. In the oversaturated digital age, this positive obligation ought to compel preventative, bottom-up measures to fight against the degradation and deterioration of the information environment in the first place. This contribution has argued that MIL initiatives may be an appealing option and one which furthers cohesion and clarity within the Council of Europe. The harms of an unfavourable environment for public discourse – propelled by the spread of mis- and disinformation as well as fragmentation, polarisation and apathy – to democratic institutions and to mechanisms of accountability have been recognised. If they are to be holistically addressed, States must proactively fulfil their positive obligation and role as facilitators of expression to ensure that even if the end-result of a ‘well-informed’ society cannot be achieved in any absolute sense, the processes to enable and encourage it are being actively and appropriately pursued. For that goal, MIL initiatives are one valuable element.

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