

Legal Attempts to Restrict Propaganda Broadcasts Related to Crisis in and around Ukraine, 2014-15

(Presentation by Andrei Richter, Director, Office of the Representative on Freedom of the Media, OSCE) at the Justice for Free Expression conference at Columbia University, New York, on 11 March 2015, see <http://globalfreespeech.columbia.edu/event/justice-free-expression-2014>)

Last year marked the 100 year anniversary of the start of the First World War. It is relevant to remember that the Austro-Hungarian ultimatum to Serbia which precipitated the start of the hostilities had a major objective to stop nationalistic propaganda as it flared the existing controversies. It aimed to punish those in the civil and military service of Serbia responsible for domestic as well as transnational propaganda against Austro-Hungarian Monarchy in Bosnia and Herzegovina.

The conflict in and around Ukraine in 2014-15, viewed by some as prologue to the World War Three, has invoked heated accusations and counter-accusations of a spread of war propaganda and hate speech. First activists of EuroMaidan, who later became the new Ukrainian elite, and then other observers pointed to the tremendous increase of coverage of Ukrainian affairs in the Russian media, especially on television. Of concern was a heated barrage of messages against what was labelled on Moscow's TV "Kiev junta", "fascist nationalists", "extremists", and "militants", who came to power as a result of a "coup d'état", etc. These ugly characters were opposed by brave "people's governors and mayors", "supporters of federalization" and, finally, "local militia". With time the issue has entered the world of political debate, academic conferences and publications.

In preparations to this speech I have reviewed existing international law, such as International Covenant on Civil and Political Rights and the European Convention on Human Rights, including the problem of definitions therein, such as definitions of "propaganda", "war", "incitement" and "hatred." Then I researched into the case law and national statutory law in Lithuania, Moldova, Ukraine, decisions of national media regulators in these countries, as well as in Latvia and the UK, decisions of the media council in Russia. Of particular interest was the emerging draft legislation, especially in Ukraine and Lithuania.

Having analyzed the decisions of the regulators and the courts we detect the following five trends:

1) The courts and regulators generally base their decisions on **national constitutions and statutory law**. They do not necessarily find a solid base there.

The laws of all countries involved ban censorship and stipulate, in very strong words, freedom of expression and freedom of the media. Suspension of retransmission of foreign broadcasts for a limited time is foreseen in the law of Lithuania, Latvia and Moldova, though not in Ukraine or UK.

National law allows restrictions on hate speech. While some of the constitutions (Latvia, Ukraine) do not mention propaganda for war, it is banned in relevant media law of Latvia, Lithuania, Moldova and Ukraine. Provisions on national security and its component, informational security, serve as a basis for decisions taken in Ukraine and also in Latvia.

The courts refer to these provisions explaining their decisions. Temporary suspension for three months was the sanction used in Lithuania and Latvia. In Moldova it was a suspension of advertising for 3 days. In Ukraine the administrative courts have deliberated on the merits of complaints by the national regulator since March 2014, and it looks that such an extended trial is caused by political rather than legal considerations. In particular, the court might be expecting changes in legislation that will enable them ban Russian channels with a solid base in law.

2) Out of the **international documents** it was the European Convention on Transfrontier Television (ECTT) and its EU equivalent, the Audiovisual Media Services Directive (AVMSD) that were most often invoked. The AVMSD was brought forward in Latvia and Lithuania to determine grounds for jurisdiction over Russian broadcasters de jure registered and licensed in the EU. As to the ECTT, the logic referred to it in several rulings in Ukraine was that it was the ECTT (in article 4) that guaranteed its parties respect of article 10 of the European Convention on Human Rights (ECHR). As Russia was not such a party this provision apparently did not apply. Ukrainian law speaks of the need of the programmes rebroadcasted from outside this zone to be adapted to the ECTT and Ukrainian law which was used as another argument to discriminate against Russian channels. As to direct references to the ECHR itself, it is quoted only in the Latvian

regulator's ruling. The articles quoted are both 10 ("Freedom of expression") and 17 ("Prohibition of abuse of rights"). It also referred to six cases adjudicated by the European Court of Human Rights (ECtHR). This may be caused by general lack of hate speech provisions in the ECHR. Even the cases of the ECtHR referred to dealt rather with issues of pluralism in public broadcasting; the need for journalists to observe professional ethics and the general design of the ECHR to maintain and promote the ideals and values of a democratic society. None of the courts or regulators so far has made any references to the the International Covenant on Civil and Political Rights, either articles 19 or 20. The reasons could be inconclusive interpretations of the meaning of article 20 by the UN Human Rights Committee, as well as by more convenient substitution of article 19 of the ICCPR with article 10 of the ECHR, the latter being far more familiar instrument duly interpreted by the ECtHR.

3) At least several of the decisions of regulators were instigated by state **security agencies**, such as Secret Police of Latvia and the Council on National Security and Defence (RNBO) of Ukraine and were based on their conclusions and their monitoring of the content. These agencies apparently put pressure on the independent national regulators, which took urgent decisions sometimes without verifying the validity of complaints.

4) **Context** of an imminent threat of Russia's aggression was a major factor in determining the level of the danger of war propaganda and hate speech of its broadcasts. It was particularly noted in decisions taken in Ukraine and Latvia, where it was also found as an argument of the national security agencies.

5) Another interesting aspect of the existing case law is what is not there – and there are **no known criminal charges** brought against individual journalists or editors for dissemination hate speech which is part and parcel of the criminal law of these countries.

In 2014 OSCE Representative on Freedom of the Media, Dunja Mijatović has repeatedly called on governmental authorities to stop the uncontrolled proliferation of propaganda. In her Communiqué on Propaganda in Times of Crisis, published on 15 April 2014, she noted that propaganda is dangerous when it dominates the public sphere and prevents individuals from freely forming their opinions, thus distorting pluralism and the open exchange of

ideas. For that reason governments should keep their hands off the news business, she said.

Mijatović also responded to governmental authorities that have taken measures to stop foreign propaganda, by banning or blocking radio and television signals or imposing other restrictions, such as ban on entry for Russian journalists or their eviction from governmental press centres in Ukraine. She made it very clear to all OSCE participating States that censoring propaganda is not the way to counter it. Only a well-functioning open, diverse and dynamic media environment can effectively neutralize the effect of propaganda.

The Representative provided the following recommendations to OSCE participating States:

- Stop manipulating media; stop information and psychological wars.
- Ensure media plurality and free media as an antidote to propaganda.
- Refrain from introducing new restrictions; existing laws can deal with extreme propaganda.
- Invest in media literacy for citizens to make informed choices.
- Reform state media into genuine public service broadcasting.

Today's world is interconnected with cultural and trade links more than ever; real transborder dissemination of information is made possible due to modern technologies; international travel becomes affordable for many. We argue that under these conditions propaganda for war becomes effective and makes sense only if there is a strong dominance of the governmental control of the media and/or tacit support of hate speech by the government.

War propaganda can sustain in the media only when and where the government does not act against it. The silence of state prosecutors and courts on war propaganda, harassment by the law-enforcement agencies of the civil society critical of such policy, political attempts to isolate oppositional voices make it successful, at least in the short term.

If enforced in a judicial manner that is complacent with the rule of law, prohibition of propaganda for war and hatred assists and not restricts further enjoyment of freedom of expression. To make this manner effective it should firmly rely on clear-cut definitions of crimes and a solid basis in normative acts. So far the national practice in the countries studied fails to prove this is the case. The courts struggle in their analysis of propaganda, hatred, incitement and war.

There are international reasons of this failure. They might be found in the following chain of developments:

1. unwillingness of some states to restrict their own aggressive narratives in this context,
2. their refusal to bring this issue to international bodies,
3. fear of some governments to unacceptably endanger free expression by putting this issue on international agenda,
4. and resulting inability of international bodies to provide clear guidelines.

“The gravest of man-made calamities to accost our world over the centuries – the Inquisition, the slave trade, the Holocaust, the Soviet Union Gulag, the genocides in Cambodia or Rwanda – not only involved but actually *required* a totalizing control of expression, opinion and, at times, even conscience... Hatred needs and is fed by censorship, which, in turn, is needed to nurture incitement to the actual commission of atrocity crimes. The lesson is clear: In our efforts to prevent mass atrocities, the free flow of information and freedom of expression are ultimately are our key allies – not our enemies.”¹

¹ Callamard, Agnes (2014). The Contribution of Media and Information to an Effective Strategy of Prevention to Atrocity Crimes. Speech at UN Headquarters. URL: <http://globalfreespeech.columbia.edu/publication/contribution-media-and-information-effective-strategy-prevention-atrocity-crimes>