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2014 was a year of transition and controversy in Europe: a new Parliament and new Commission were constituted and Opinion 2/13 of the Court of Justice of the European Union on the EU's accession to the European Convention on Human Rights raised serious questions about the coherence and future character of the human rights protection regimes in Europe.

Across 38 contributions by 61 authors in five sections, the European Yearbook on Human Rights 2015 explains and contextualizes key developments in human rights and provides much needed analysis.

Edited jointly by representatives of four major European human rights research, teaching and training institutions, the Yearbook 2015 covers political and legal developments in the field of the three main organizations charged with securing human rights in Europe: EU, Council of Europe and OSCE, accompanied by a chapter on cross-cutting topics. Now in its seventh edition, the Yearbook remains essential reading for anyone interested in human rights in Europe and the world.

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European Yearbook on Human Rights

edited by
Wolfgang Benedek
Florence Benoît-Rohmer
Matthias C. Kettemann
Benjamin Kneihs
Manfred Nowak

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Andrei RICHTER*

The Relationship between Freedom of Expression and the Ban on Propaganda for War

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Keywords

Freedom of expression, freedom of the media, propaganda for war, incitement to hatred, ICCPR, UN Human Rights Council, OSCE Representative on Freedom of the Media, Council of Europe, ECtHR, ECHR

A Introduction

Last year marked the 100th anniversary of the beginning of the First World War. It is worth to recall the Austro-Hungarian ultimatum to Serbia which precipitated the start of the hostilities. A major demand of the ultimatum was to stop nationalistic propaganda as it flared the existing controversies. It also called to punish those in the civil and military service of Serbia responsible for domestic as well as transnational propaganda in Bosnia and Herzegovina against the Austro-Hungarian Monarchy.¹

The conflict in and around Ukraine in 2014-2015, viewed by some as a prologue

* The analysis and opinions expressed are the author's own, and do not necessarily reflect those of the OSCE.

1 Michael G. Kearney, *The Prohibition of Propaganda for War in International Law* (2007), 23-24.

to World War Three, has invoked heated accusations and counter-accusations of a spread of propaganda for war and hatred. With time the issue has entered the world of political debate, academic conferences and publications.²

In this piece we attempt to review international obligations in regard to hateful international propaganda in the context of freedom of expression and freedom of the media commitments. The focus is on Article 20 (on ban of war propaganda and incitement to hatred) of the International Covenant on Civil and Political Rights and its interpretations by the UN Human Rights Committee and other international bodies. This is followed by a review of relevant European standards.

We look into legal interpretations of the definitions of the key notions for implementation of the international standards notions, such as “propaganda”, “hatred” and “incitement”.

The piece assesses the official position expressed by the OSCE Representative on Freedom of the Media in regard to propaganda during Ukrainian conflict. The need to provide general views and recommendations to the OSCE participating States has brought about, in 2014, a new type of topical statements, communiqués.

Its aim is to deliver a modern rationale for regulation of hostile propaganda and provide relevant recommendations.

B Position of the OSCE Representative on Freedom of the Media

In the Helsinki Final Act (1975) that laid foundation to the Organization on Security and Co-operation in Europe (OSCE), the participating states committed themselves, *inter alia*, to promote in their relations with one another “a climate of confidence and respect among peoples consonant with their duty to refrain from propaganda for wars of aggression” against another participating State.³ Although OSCE commitments are not legally binding they establish or confirm statements of principle.

Almost 40 years later, in 2014, the OSCE Representative on Freedom of the Media, Dunja Mijatović, had to repeatedly call on governmental authorities to stop the uncontrolled proliferation of such propaganda.

2 See, e.g. conference “The Menace of Unreality: Combatting Russian Disinformation in the 21st Century”, Legatum Institute, London (2014), <http://toinformistoinfluence.com/2014/11/07/aar-the-menace-of-unreality-combatting-russian-disinformation-in-the-21st-century> (7 April 2015); Peter Pomerantsev and Michael Weiss, *The Menace of Unreality: How the Kremlin Weaponizes Information, Culture and Money*, Special Report, Institute of Modern Russia, New York (2014), http://www.interpretermag.com/wp-content/uploads/2014/11/The_Menace_of_Unreality_Final.pdf (7 April 2015); Analysis of Russia's Information Campaign Against Ukraine by NATO Strategic Communications Centre of Excellence, Riga (2014), <http://www.stratcomcoe.org/NewsandEvents/News/2014/10/21.aspx> (7 April 2015); Donara Borajan, *The Baltics: Facing up to Russia's Information War. How NATO/EU Strategic Communication Efforts Could Tackle the Issue of Russia's Threat in the Baltic States* (2015), <http://www.albanyassociates.com/notebook/wp-content/uploads/2015/03/Spring-2015-The-Baltic-States.pdf> (7 April 2015).

3 Conference on Security and Co-operation in Europe. Final Act, Helsinki (1975), <http://www.osce.org/mc/39501?download=true> (7 April 2015).

The key 2014 document in this regard is probably the Communiqué on Propaganda in Times of Crisis where Mijatović made it 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. 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.⁴

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 as 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.⁵

Mijatović pointed to specific tools that already exist in the area of media regulation for dealing with biased and misleading information. These include rules on balance and accuracy in broadcasting; independence of media regulators; prominence of public service broadcasting with a special mission to include all viewpoints; a clear distinction between fact and opinion in journalism; transparency of media ownership, etc.⁶

As an additional response, OSCE participating States were encouraged to support and promote the existence and effective implementation of ethical standards by different media actors and invest in media literacy so that citizens make informed and sober choices. An understanding and respect for professional standards by media actors, as well as transparency of the media, are essential to prevent and minimize the dangers of propaganda, noted Mijatović.⁷

She concluded by saying that today, as it was a century ago, “state media is again the main vehicle of propaganda. As it is dangerous for peace and security, it should be transformed into true public service media or privatized”.⁸

The very first communiqué by the Representative though was a response to governmental authorities that have taken measures to stop hostile foreign propaganda by banning or blocking radio and television signals. When summarizing her position on the issue she referred to the Helsinki Final Act and the signatories’ pledge to fulfil their obligations as set forth in the international declarations and agreements in the area of free expression, including international agreements on human rights. She reminded the participating states of the provisions of the International Covenant on Civil and Political Rights (ICCPR) and that restrictions provided should only be ones that are clearly spelled out in national law and applied only when they are necessary to protect other fundamental values and rights.⁹

4 Communiqué by OSCE Representative on Freedom of the Media on propaganda in times of conflict, Vienna (15 April 2014), <http://www.osce.org/fom/117701> (7 April 2015).

5 Ibid.

6 Ibid.

7 Ibid.

8 Ibid.

9 Communiqué by OSCE Representative on Freedom of the Media on blocking television channels, Vienna (27 March 2014), <http://www.osce.org/fom/116888>.

She pointed to the procedures in this regard that should make restrictions respected all across the region:

- restrictions should be adopted by lawful institutions, such as legislatures, in accordance with the rule of law; and
- an independent court system should in place.

She noted that in her opinion, at all times, and especially in difficult times, blocking is not the answer to propaganda as it leads to arbitrary and politically motivated actions: “limits on media freedom for the sake of political expediency lead to censorship and, when begun, censorship never stops.” The answer lies in more debate and media pluralism which is under danger in societies with the dominance of state-owned and state-controlled media as they can be easily used to promulgate state propaganda. OSCE participating States were called to stop the information war and manipulation with the media. In this regard she recalled the need to strengthen and further develop compliance with relevant OSCE principles and commitments, including alleged serious instances of intolerance by participating States which utilize media in violation of the principles referred to in the OSCE documents.¹⁰

She also explained her objections to imposing other restrictions, such as a ban on entry for Russian journalists or their eviction from governmental press centres in Ukraine.¹¹

We see that in her communiqués the OSCE Representative makes clear references to the international standards. Those standards have a disturbed history of many decades.

C International Standards

The idea of “moral disarmament”, considered as an essential element of general steps to prevent new wars, focused on how to prevent incitement to war taking hold in the minds of people. This idea was first raised in the League of Nations by Poland in 1931; it was first brought into the United Nations in 1947 by the Soviets. The liberal democracies then opposed resolutions against “war propaganda” and “ideological aggression” by pointing that it was enlightenment and the exposure of warmongers that should lead to peace, not suppression of speech.¹²

During the Cold War, propaganda was the main weapon used by both sides, while jamming of foreign radio broadcasts was probably a defence instrument used by the East. At the same time such jamming of radio signals, though rarely recognized by the Soviets, was almost never explained by counteracting war propaganda or discriminating speech. It was interpreted by their nature of being generally aggressive, “hostile and subversive” to communist ideology and internal order. In itself, jamming has been condemned by the International Telecommuni-

¹⁰ Ibid.

¹¹ Communiqué by the OSCE Representative on Freedom of the Media on denial of entry of journalists from one OSCE participating State to another, Vienna (3 April 2014), <http://www.osce.org/fom/117092>.

¹² Bhagavatula Satyanarayana Murty, *The International Law of Propaganda: The Ideological Instrument and World Public Order* (1989), 233-234.

cation Convention in 1947 and UN General Assembly in 1950.¹³

An almost forgotten international agreement, although non-effective, remains relevant to our purposes. The International Convention concerning the Use of Broadcasting in the Cause of Peace, a 1936 League of Nations treaty,¹⁴ binds states to “restrict expression which constituted a threat to international peace and security”. The Convention, to which a few modern countries¹⁵ at least formally remain parties, obligates governments to prohibit and stop any broadcast transmission within their territories that are “of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory”. It also contains a similar mandate in regards to “incitement to war against another high contracting party”. This provision makes no distinction between the speech of the state and the speech of private individuals. The Convention also prohibits the broadcasting of false news.¹⁶

This Convention is a good reminder on the interrelation of freedom of expression and an obligation to stop war propaganda and hate speech. In the post-WWII world this interrelation is best exemplified in Articles 19 and 20 of the International Covenant on Civil and Political Rights. The former says:

- 1 Everyone shall have the right to hold opinions without interference.
- 2 Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- 3 The exercise of the rights provided for in para. 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.¹⁷

While the above provisions of Article 19 of the ICCPR on freedom of expression and its possible limitations are well-researched and rehearsed, there is less academic and political focus on Article 20, which stipulates:

- 1 Any propaganda for war shall be prohibited by law.
- 2 Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.¹⁸

13 International Telecommunication Convention, Atlantic City (1947); UN GA Res. 424 (V) (14 December 1950), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/060/22/IMG/NR006022.pdf?OpenElement> (7 April 2015).

14 International Convention concerning the Use of Broadcasting in the Cause of Peace, Geneva (23 September 1936), <https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=509&chapter=30&lang=en> (7 April 2015).

15 Including the Russian Federation, Latvia and Estonia.

16 International Convention concerning the Use of Broadcasting in the Cause of Peace (1936).

17 International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by UN GA Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (7 April 2015).

18 Ibid.

The importance of efforts to prevent wars and discrimination in relation to the values of human rights is widely known and clear enough: modern history is abundant with examples of funnelling aggression and incitement of racism and intolerance giving rise to military hostilities, genocide and crimes against humanity. Propaganda for war as well as calls for discrimination and violence based on nationality, race or beliefs result in abuses of core human rights stipulated in the ICCPR, they also attempt at the “inherent dignity” and “equal and inalienable rights of all members of the human family” as the “foundation of freedom, justice and peace in the world” (as provided in its Preamble).¹⁹ An exercise of freedom of expression for propaganda for war and hatred thus has an aim to destroy the human rights and freedoms of the weaker parts of the population, an aim at the humanity itself.

D Propaganda for War and Hate Speech

The two paragraphs of Article 20 of the ICCPR are intrinsically interconnected. Propaganda for war is in fact a form of incitement to violence based on advocacy of national, racial or religious hatred. Such incitement to violence often leads to direct propaganda for war and wars as such. *Travaux préparatoires* of Article 20 allow to claim that the first para of Article 20 meant direct incitement to war while the second paragraph – antecedent propaganda for war. Moreover, some states insisted on keeping the second para because a prohibition of propaganda for war by itself would not be in itself effective for securing a lasting peace and preventing conflicts.²⁰

Commentators tend to agree that prohibition of propaganda for war and hate speech includes responsibility of the governments, not just the mass media and other private players. Kearney (2007) considers a key aspect of the debate on prohibition of war propaganda the issue of whether the term is limited to direct “incitement to war” or whether it additionally encompasses propaganda which serves either as a means of preparation for a future war or to preclude peaceful settlement of disputes.²¹

Kearney also points out that while powerful media corporations are indeed able to use their own initiative and means to disseminate such propaganda, which, say, a beleaguered government torn by civil strife cannot counteract, it is unlikely to be “launched without at least implicit support of a third state”.²²

This observation made at the times of dominant traditional media stays true in the modern world of tremendous significance of the social media, blogging and citizen journalism. Without trolls and DDoS attacks sponsored by governments manipulating users’ minds will not be as effective today if effective at all.

19 Ibid.

20 Kearney (2007), 128, 131.

21 Ibid., 5-6.

22 Ibid., 9, see also 101, 134. 142-145, 168.

E Interplay between Articles 19 and 20 of the ICCPR

A study of the interplay and balancing between Articles 19 and 20 in the case law is an exceptionally interesting exercise, more an artistic one than scientific.²³ Nonetheless, the process of searching this balance undoubtedly brings us closer to realizing the mutually reinforcing values of free speech and equality.²⁴

Anyone interested in the relationship between Articles 19 and 20 would necessarily turn to the so-called General Comments No. 11 and No. 34 by the UN Human Rights Committee (UNHRC).²⁵ This issue was closely reviewed in General comment No. 34 which has become a manual to anyone studying and interpreting the freedom of expression provisions of the ICCPR. The document articulates, in particular (para. 50), that “a limitation that is justified on the basis of Article 20 must also comply with Article 19, para. 3”, and then (in para. 52) that “in every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with Article 19”. The above conclusions of General comment No. 34 clearly follow the opinions expressed by various scholars,²⁶ including at the seminar held by the UNHRC on Articles 19 and 20 of the ICCPR in 2008.²⁷

It is worth noting that the earlier General Comment, No. 11, which is devoted to interpretation and compliance with Article 20, does not make such a direct interpretation, just noting that there is no contradiction as such between Articles 19 and 20.²⁸

This assumption of submission of Article 20 to Article 19, like other provisions of General Comment No. 34, is based on communications provided to and reviewed by the UNHRC. Unfortunately, its paragraph on the relationship between Articles 19 and 20 was built only on one such communication. This particular case has limited value for our purposes as it refers to a complaint on a transfer of a teacher to a non-teaching position following a continued spread of his anti-Semitic views in

23 Laurent Pech, *Balancing Freedom of the Press with Competing Rights and Interests: A Comparative Perspective*, in: Eoin O'Dell (ed.), *Freedom of Expression* (2004), 3, <http://ssrn.com/abstract=909507> (7 April 2015).

24 Sandra Colliver, *Hate Speech Laws: Do they Work?* in: Sandra Colliver (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (1992), 363-376, 374, <http://www.article19.org/data/files/pdfs/publications/striking-a-balance.pdf> (7 April 2015).

25 Human Rights Committee (19th session), Geneva (29 July 1983). General Comment No. 11 “Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)”, <http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf> (7 April 2015); Human Rights Committee (102nd session), Geneva (11-29 July 2011), General Comment No. 34 “Article 19: Freedoms of opinion and expression”, CCPR/C/GC/34, <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf> (7 April 2015).

26 Such as Manfred Nowak in his monumental book *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd rev. ed.) (2005). The first edition was in 1993.

27 Agnes Callamard, *Expert Meeting of the Links Between Arts. 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*. UN HCHR (2-3 October 2008), Geneva, <http://www.article19.org/data/files/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf> (7 April 2015).

28 “[...] these required prohibitions are fully compatible with the right of freedom of expression as contained in Art. 19, the exercise of which carries with it special duties and responsibilities.” para. 2 of General Comment No. 11 (1983).

the classroom.²⁹ We find that the three other cases that the UNHRC ever communicated on Article 20 also of little help: one of them deals with anti-Semitic statements distributed via recorded telephone messages;³⁰ another is based on a complaint of a Holocaust denier;³¹ while the third case involves a publication in a local newspaper of an open letter with a call to evict Roma.³² All of them argue that freedom of expression of the complainants was rightfully limited due to the prohibition of ethnic and religious hatred and in order to protect the right of the communities to live free from fear of incitement, a value that could not be achieved in the circumstances by less drastic means.

While we do not doubt the inherent interconnectivity between all human rights, we would like to scrutinize the reliability of the compliance conclusion of the General Comment No. 34.

First, by itself Article 20 does not set out a human right. While indeed it numerically follows Article 19, and some even refer to it as part 4 of Article 19, Article 20 certainly establishes a separate norm. Others argue that the strong coherence between the two articles is based on their “drafting history”.³³

Rather, we see that Article 20 serves the human rights to non-discrimination and to life as specified in Articles 26 and 6 of the ICCPR. It may also be interpreted in the context of the right of thought as stipulated in its Article 18.

The aims of the Articles 19 and 20 are different and complementary: while Article 19 para. 3 aims to take into account the harm that freedom of expression may inflict upon the rights or reputations of others, national security, public order, or public health or morals, Article 20 aims to prevent loss of life and discrimination of humans.

Second, we see a major dissonance in the method of enforcement of provisions of Article 20 and para. 3 of Article 19. While in Article 20, the Covenant *requires* the specific response from the State: direct legal *prohibition* by law – most likely by criminal law – Article 19 only *allows* limited *restriction* under certain necessary conditions (“may ... be subject to certain restrictions”).³⁴ Thus the restrictions set by Article 19 are of the permissive nature, while those in Article 20 are obligatory for implementation by the states.

Third, we see no need to put Article 20 in compliance with Article 19. There is a more general common ground for both articles. Article 5 para. 1 of the ICCPR emphasises that “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant”. In this sense, freedom of expression under the ICCPR shall be inter-

29 *Malcolm Ross v. Canada*, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000), <http://www1.umn.edu/humanrts/undocs/736-1997.html> (7 April 2015).

30 *J. R. T. and the W. G. Party v. Canada*, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2, 25 (1984), <http://www1.umn.edu/humanrts/undocs/html/104-1981.htm> (7 April 2015).

31 *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996), <http://juris.ohchr.org/Search/Details/654> (7 April 2015).

32 *Maria Vassilari, et al. v. Greece*, Communication No. 1570/2007, U.N. Doc. CCPR/C/95/D/1570/2007 (2009), <http://juris.ohchr.org/Search/Details/1482> (7 April 2015).

33 Callamard (2008), 9.

34 International Covenant on Civil and Political Rights (1966).

preted as *not including* war propaganda and hate speech that constitutes incitement to discrimination, hostility or violence.

Regarding the conditions of restricting free expression on these grounds, there is a common reference to para. 3 of Article 19, which stipulates that restrictions must be *provided by law*. But Article 20 speaks of the same. What is always necessary is to comply with the definition of what is “law”. Here, General comment No. 34 – based on communications of the UNHRC – rightfully points out that a “law” must be characterized by its formulation with sufficient precision and accessibility to the public; further, such “law” may not confer unfettered discretion for the restrictions, and these limitations must conform to the principle of proportionality and not be overbroad.

As to the scrutiny of restrictions by the *needs of democracy*, for a reason, unlike Article 10 of the European Convention on Human Rights (ECHR),³⁵ Article 19 (of the ICCPR) does not mention this criteria (as distinct from Articles 21 and 22, for example). On the contrary, Article 20, by design, though not by definition, purports its ban on propaganda for war and hate speech to an ultimate “necessity in a democratic society”.

In this regard we tend to agree with Toby Mendel (2012), who believes that it is rather Article 19 that should be put in context of Article 20, as it should not permit “greater restrictions on hate speech than Article 20 para. 2 required”.³⁶ An opposite opinion, according to Mendel, will in fact present the first threat to the potentially consistent ICCPR framework. The second threat would be a broad scope to interpret Articles 19 and 20 so that states adopt broad national law on hate speech while formally respecting their provisions. Dependency of judgment on restrictions on their context is the third threat to consistency between Articles 19 and 20: whether certain words are indeed harmful to the public interests relies on their meaning and impact, which in turn is determined on context.³⁷

In the words of McGoldrick, “prohibition established in accordance with the terms of Article 20 cannot found a violation of Article 19”.³⁸ Whitton and Larson agree by saying that Article 20 para. 1 presents only the “hard-core minimal offence ... that could and should be prohibited by domestic legislation, ”and as such it should not lead to an “increase in the threat to the freedom of speech”.³⁹

F Definition of “Propaganda for War”

For national application of the ban on propaganda of war and incitement to hatred, it is important to define several key words, starting with “propaganda”.

Propaganda is not always considered a negative phenomenon. In the English-speaking world the term “propaganda” acquired negative connotation as a

35 Convention for the Protection of Human Rights and Fundamental Freedoms (1950), <http://conventions.coe.int/treaty/en/treaties/html/005.htm> (7 April 2015).

36 Toby Mendel, Does International Law Provide for Consistent Rules on Hate Speech?, in: Michael Herz and Peter Molnár (eds.), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (2012), 419.

37 Ibid., 419-423.

38 Dominic McGoldrick, *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights* (1991), 491.

39 John B. Whitton and Arthur Larson, *Propaganda: Towards Disarmament in the War of Words* (1964), 256.

result of the World War II and of general distaste of Goebbels's Ministry of Propaganda and Education. In 1928 the now classical American author on propaganda, Edward Bernays, not only defined propaganda as "a consistent, enduring effort to create or shape events to influence the relations of the public to an enterprise, idea or group", but also described at length the benefits of propaganda for social benefits, education and emancipation of women. He made the following conclusion: "Only through the wise use of propaganda will our government, considered as the continuous administrative organ of the people, be able to maintain that intimate relationship with the public which is necessary in a democracy."⁴⁰

In the Russian-speaking world, the implication of the term underwent partial transformation in the process of collapse of the USSR in 1991. Then, propaganda was deplored and ridiculed, but only in its communist political and ideological meaning, as in "Soviet propaganda". Other types of propaganda, such as "propaganda for healthy life" have remained admissible and plausible.

A freedom of expression watchdog, Article 19, points out that there is no agreed definition of propaganda for war or hate speech in international law.⁴¹ McGonagle (2011) echoes this observation by pointing to "war" and "propaganda" as two instances of "definitionally problematic terms". He notes that "propaganda" is a sufficiently broad notion "to cover a range of different types of expression which vary in terms of the harmfulness of their content, the sophistication of their presentation and strategies of dissemination and the gravity of their effects".⁴² Kearney (2007) credibly argues that a distinct crime of "direct and public incitement to aggression", or propaganda for war, should be included in the Rome Statute of the International Criminal Court.⁴³ He further states that the meaning of propaganda for war is "only as imprecise as states wish it to be".⁴⁴ Indeed, there are different regional or national styles in restricting propaganda for war in law, ranging from a liberal approach in the US, UK and Hungary, to a more strict approach in France and Germany.⁴⁵

In the definitional context it is worth noting a set of historic legal acts, national laws on protection of peace adopted in 1950-1951 by a number of socialist countries from Mongolia to East Germany. The USSR law "On protection of peace" (1951), in particular, announced war propaganda "a gravest crime against humanity" as it "undermines the cause of peace" and "creates the danger of a new war".⁴⁶ There are no known cases of applying these declarative laws.

40 Edward L. Bernays, *Propaganda* (1928), <http://www.historyisaweapon.org/defcon1/bernprop.html> (7 April 2015).

41 Callamard (2008), 6.

42 Tarlach McGonagle, *Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas*, School of Human Rights Research Series 44, (2011), 272.

43 Kearney (2007), 191-242.

44 Ibid., 189.

45 Callamard (2008), 6.

46 The USSR law "On protection of peace" (*Закон СССР "О защите мира"*) of 12 March 1951, <http://www.bestpravo.ru/sssrgn-normy/t8r.htm> (7 April 2015). Its legal status in modern Russia remains unclear. In 2012 the State Duma (parliament) considered a draft law recognizing the USSR law not applicable in the Russian Federation. The Duma's Committee on Constitutional Law and Governance and the Legal Department made their separate conclusions on the basis that that the USSR law was still effective in Russia. On the contrary, the Government filed an opinion saying that there was no need to denounce the USSR law as the relations prescribed in it

Definitional broadness does not necessarily bring about vagueness of the notion. Any distinct formula of propaganda, nationally or internationally, will have to take into account the scope of the crime suggested by the UNHRC in General comment No. 11: it “extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations”.⁴⁷

While the UNHRC refers to *all* forms of propaganda, it makes an important exclusion from the scope of the crime by saying that “[t]he provisions of Article 20, para. 1, do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations”.⁴⁸ By self-defence, the Charter means exclusively measures taken by a Member of the United Nations “if an armed attack occurs against” it.⁴⁹ Other forms of propaganda inciting to such manifestations of violence as civil war or rebellion against the government are either treated under Article 20 para. 2 or Article 19 para. 3 of the ICCPR in the context of the Preamble of the Universal Declaration of Human Rights.⁵⁰ In the context of the emerging second Cold War in Europe it is important to watch attempts to include within the meaning of propaganda for war a propaganda for and conduct of an “ideological war”, an “information warfare” or a “hybrid war”.

It is important to note the comment of the UNHRC that, for the purposes of Article 20, it does not matter “whether such propaganda or advocacy has aims which are internal or external to the State concerned”.⁵¹ This conclusion underlines the transfrontier nature of the prohibition.

UN General Assembly, in one of its earlier resolutions, gave a rather clear definition to war propaganda by saying that it “[c]ondemns all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke or encourage a threat to the peace, breach of the peace, or act of aggression”.⁵² The UN thus gave an intent or a threat of hostilities as criteria for the illegal act.

were already regulated in the Russian legislation and the USSR law was thus non-effective anymore. Two days after the receipt of the Government's conclusion the Duma resolved to reject the draft law. See Resolution of the State Duma of the Federal Assembly of the Russian Federation of 12 December 2012, N 1385-6 “On draft Federal law, N 146002-6 “On recognizing as invalid on the territory of the Russian Federation of the USSR Law “On protection of peace” (*Постановление ГД ФС РФ “О проекте Федерального закона N 146002-6 “О признании недействующим на территории Российской Федерации Закона СССР “О защите мира”*)” (*Собрание законодательства РФ*)” (24 December 2012), N 52, *см.* 7404.

47 General Comment No. 11 (1983), para. 2.

48 Ibid.

49 Charter of the United Nations, San Francisco (26 June 1945), Art. 51, <http://www.un.org/en/documents/charter/chapter7.shtml> (7 April 2015).

50 “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”, Universal Declaration of Human Rights. Adopted by the General Assembly of the United Nations on 10 December 1948, <http://www.un.org/en/documents/udhr> (7 April 2015).

51 General Comment No. 11 (1983), para. 2.

52 Resolution adopted by the General Assembly. 110 (II). Measures to be taken against propaganda and the inciters of a new war (108th Plenary Meeting (3 November 1947)), <http://www.un-documents.net/a2r110.htm> (7 April 2015).

As to the methods employed in propaganda for war that would allow courts to distinguish it from other forms of speech, Nowak points out that it constitutes “intentional, well-aimed influencing of individuals by employing various channels of communication to disseminate, above all, incorrect or exaggerated allegations of fact. Also included thereunder are negative or simplistic value judgements whose intensity is at least comparable to that of provocation, instigation, or incitement”.⁵³

G Other Definitions

Definitional problems exist with the notion of “*hatred*”, a crucial term to understand Article 20 para. 2. “There is no universally accepted definition of the expression ‘hate speech’”, the European Court of Human Rights (ECtHR) confirms.⁵⁴

Mendel explains that existing formulas are circular,⁵⁵ as they are defining “hatred” through “hate” and “hate” through “hatred”. Indeed, even the Council of Europe’s Committee of Ministers’ Recommendation No. (97) 20 on “hate speech”, describes the term as

“covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”.⁵⁶

While there is also lack of distinct definitions of “*incitement*” in international law, we find fewer problems in its interpretation on the national level, as it seems to be part and parcel of criminal law in relation to incitement to lawlessness.

For example, the Criminal Code of Germany establishes that an inciter is “whoever intentionally induces another to intentionally commit an unlawful act” (Article 26, Incitement).⁵⁷

The Russian Supreme Court interprets Article 282 (Incitement of hatred or enmity, as well as denigration of human dignity) of the Criminal Code of the Russian Federation with the following explanation: “Under actions aimed at the incitement of hatred or enmity, courts should understand, in particular, statements that are justifying and (or) asserting the necessity of genocide, mass repressions, deportations, commitment of other illegal acts, including the use of violence against members of any nation, race, adherents of a particular religion, and other groups of individuals. Criticism of political organizations, ideological

53 Nowak (2005), 472.

54 European Court of Human Rights, Factsheet on hate speech, Strasbourg (2013), http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf (7 April 2015).

55 Mendel (2012), 427.

56 Council of Europe, Committee of Ministers, Recommendation No. (97) 20 of the Committee of Ministers to member states on “hate speech”, Adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers’ Deputies, [http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec\(97\)20_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf) (7 April 2015).

57 Criminal Code (*Strafgesetzbuch, StGB*), as promulgated on 13 November 1998, Federal Law Gazette I, 945, 3322, <http://www.iuscomp.org/gla/statutes/StGB.htm#26> (7 April 2015).

and religious associations, and political, ideological or religious beliefs, national or religious customs in itself should not be construed as an act aimed at inciting hatred or enmity.⁵⁸ Thus, this interpretation makes a reasonable attempt to differentiate dangerous incitement and non-dangerous criticism of political and religious bodies, certain ideological or religious beliefs, the latter being protected from judicial persecution.

In its turn, the ECtHR attempts to differentiate dangerous and non-dangerous incitement, illegitimate and legitimate violence.⁵⁹ Its response is not so clear cut because the ECHR contains no equivalent to Article 20 of the ICCPR.⁶⁰ The question thus arises: Do members of the targeted group have to wait for some of them to be killed or do they have some means under the ECHR, such as Article 10 ("Freedom of expression"), of obliging the State to act before then?⁶¹

H European Standards

The question seems to be a rhetorical one, as commentators and case law of the ECtHR often point to Article 17 of the ECHR, as an instrument to counteract war propaganda and hate speech. This article ("Prohibition of abuse of rights") empowers the ECtHR to affirm any activity aimed against the human rights specified in it (such as, in particular, right to life and non-discrimination) as activity that may not rely on the protection of the ECHR in general, including Article 10 on freedom of expression. In other words, using the right to freedom of expression for ends which were contrary to the text and spirit of the Convention is not protected by the ECHR. Article 17 is worded as follows:

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."⁶²

58 Resolution of the Supreme Court of the Russian Federation of 28 June 2011, N 11 "On judicial practice on the criminal cases of extremist crimes" (*Постановление Пленума Верховного Суда РФ "О судебной практике по уголовным делам о преступлениях экстремистской направленности"*), <http://www.rg.ru/2011/07/04/vs-dok.html> (7 April 2015).

59 Giovanni Bonello, Freedom of expression and incitement to violence, in: Casadevall, J. et.al. (eds.), *Freedom of Expression: Essays in honour of Nicolas Bratza* (2012), 349-359.

60 Unlike another regional mechanisms, the American Convention on Human Rights, which in Art. 13 para. 5 stipulates: "Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law." See http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm (7 April 2015).

61 Françoise J. Hampson, Freedom of expression in situations of emergency and armed conflict, in: Josep Casadevall et al. (eds.), *Freedom of Expression: Essays in honour of Nicolas Bratza* (2012), 456.

62 Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

The Court has held in particular that a “remark directed against the Convention’s underlying values” is removed from the protection of Article 10 by Article 17.⁶³ Thus, in the case of *Garaudy v. France*,⁶⁴ which concerned, inter alia, the conviction for denial of crimes against humanity of the author of a book that systematically disputed such crimes perpetrated by the Nazis against the Jewish community, the Court found the applicant’s Article 10 complaint incompatible *ratione materiae* with the provisions of the Convention. It based that conclusion on the finding that the main content and general tenor of the applicant’s book, and thus its “aim”, were markedly revisionist and therefore ran counter to the fundamental values of the Convention, namely justice and peace, and inferred from that observation that he had attempted to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which were contrary to the text and spirit of the Convention. The Court reached the same conclusion in two other judgments, which concerned the use of freedom of expression for Islamophobic and anti-Semitic purposes respectively.⁶⁵ The ECtHR also refers to Article 20 of the ICCPR in a number of cases.⁶⁶

Lack of clear definitions of essential notions of Article 20 of the ICCPR does not help apply it in a more consistent way on the international and national levels, where the courts struggle in their analysis of propaganda, hatred, incitement and war. At the same time this should not preclude governments to make more efforts to apply prohibitions in the national law.

I Conclusions

Western liberal democracies seem to be still suffering from the Cold war syndrome when the idea to refrain from propaganda for war and hatred was met by them with lukewarm response due to fears of harming free expression and suspicion of anything coming from the Soviet bloc.⁶⁷ In particular, the US officials commented at *travaux préparatoires* of Article 20 para. 1 that the problem of propaganda and incitement was best treated by the “freest possible flow of information making facts available to the people”, as well as by individual self-discipline, “rather than by the enactment of laws that played into the hands of those who would attempt to restrict freedom of speech entirely”.⁶⁸ Moreover until the current crisis in and around Ukraine, as well as masterful PR experiments by the ISIS, any enthusiasm for concerted international action to stop it appears to have dissipated.

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

63 See *Lehideux and Isorni v. France* (23 September 1998), paras. 53 and 47, Reports of Judgments and Decisions 1998-VII, and *Orban and Others v. France*, No. 20985/05, para. 34 (15 January 2009); *Perinçek v. Switzerland* (17 December 2013), para. 45).

64 *Garaudy v. France* ((dec.), No. 65831/01, ECHR 2003-IX (extracts)).

65 See *Norwood v. the United Kingdom* ((dec.), No. 23131/03, ECHR 2004-XI) and *Pavel Ivanov v. Russia* ((dec.), No. 35222/04 (20 February 2007)).

66 Such as *Perinçek v. Switzerland* (17 December 2013), para. 25.

67 Kearney (2007), 78-79, 111.

68 Ibid., 119, 103.

only if there is a strong dominance of the governmental control of the media and/or tacit support of hate speech by the government.

A resilient free media system is an antidote to hatred. No major private media company can by itself dominate the minds of modern men and women with the narrative of destruction. Self- and co-regulation bodies in the media field provide for an early warning in this respect. On the contrary a media system where the governmental broadcasters dominate the field and attempt to control the minds of the population through the typical propaganda set of "suppression, distortion, diversion and fabrication"⁶⁹ establishes an environment where its menace is real.

Propaganda for war and hatred can sustain in the media only when and where the government does not act against it. The silence of state prosecutors and courts on such 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.

We see no logic in subordinating an international ban on propaganda for war and hatred to the international standards on freedom of expression and freedom of the media. First, a ban on propaganda is not a human right but serves the human rights to non-discrimination and to life. The international standards on freedom of expression take into account the harm that this freedom may inflict, while a ban on incitement aims to prevent loss of life and discrimination of humans. Second, we note that the ban is required from the states, while limitations on freedom of expression are only allowed in the national law. Finally, there is no need to put one in compliance with another, as freedom of expression and freedom of the media should not include propaganda for war and hate speech that constitutes incitement to discrimination, hostility or violence.

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 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 a number of states to restrict their own aggressive narratives in this context;
- 2 their refusal to bring this issue to international bodies;
- 3 fear of some other governments to unacceptably endanger free expression by putting this issue on international agenda;
- 4 and resulting inability of international bodies, first of all the UN, to provide clear guidelines regarding propaganda of war and hatred.

69 Frederick E. Lumley, *The Propaganda Menace* (1933), 116-117.