

■ Propaganda and Freedom of the Media

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Executive Summary

This non-paper aims to facilitate the OSCE participating States in formulating national and international law and policy toward the current spread of propaganda intertwined with the conflict in and around Ukraine. It distinguishes two sorts of propaganda in the contemporary world. The first is called propaganda for war and hatred; it demands legal action with appropriate measures in accordance with international human rights law. The second type of propaganda combines all its other faces. It may be against professional standards of journalism, but does not necessarily violate international law.

This non-paper reviews OSCE and other international commitments in regard to hateful international propaganda in the context of the obligations of the participating States on freedom of expression and freedom of the media. The particular focus lies on the relation between Article 19 (on freedom of expression) and Article 20 (on banning war propaganda and incitement to hatred) of the International Covenant on Civil and Political Rights (ICCPR) and its interpretations by the UN Human Rights Committee (UNHRC).

An international policy on propaganda is hampered by the lack of clear definitions of essential terms, which does not allow for a more consistent application on the international and national levels. In particular, national courts and regulators struggle in their analysis of “propaganda,” “hatred,” “incitement” and “war.” At the same time this should not preclude governments from making a greater effort to effectively apply existing, internationally accepted and even required prohibitions in national law.

The non-paper reviews attempts to counteract propaganda through national laws that restrict foreign media messages and foreign media messengers. A check of existing constitutions and national statutes proves that there are traditional legal tools to stop dissemination of hate speech, although such tools might not be widely used by the judiciary. It also examines a few cases of propaganda reviewed by self-regulation bodies of journalists.

The non-paper reiterates the position of the OSCE Representative on Freedom of the Media regarding propaganda during the Ukrainian conflict, expressed earlier in reports to the OSCE Permanent Council, public communiqués and

other statements. It calls for acknowledging the need to find a modern rationale for regulation of hostile propaganda and suggests relevant recommendations to governments, the judiciary, civil society and media organizations in the OSCE region and beyond.

The provided toolbox to respond to the challenges of propaganda, according to the conclusions of the non-paper, includes a legal response and additional instruments, such as:

- Enforcing media pluralism and generally condemning propaganda as inappropriate speech in a democratic nation and the profession of journalism.
- Abolition of government-run media and support of public service media with high professional standards.
- Developing international and intercultural dialogue, such as the dialogue among journalists, other intellectuals, advancing media education, promoting democracy as based on peace, freedom of expression and diversity.
- Empowering activities of national and international human rights and media freedom mechanisms, specialized self-regulatory and co-regulatory bodies, professional organizations and independent monitoring institutions.
- Putting efforts into educational programmes on media and internet literacy.
- Media self-regulation, where it is effective, should remain the most appropriate way to address professional issues, including responses to propaganda for war, hatred and discrimination.

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Foreword

by Dunja Mijatović, OSCE Representative on Freedom of the Media

In the context of the conflict in and around Ukraine, propaganda, counter-propaganda, information wars and hybrid wars are the terms that have become part of our daily discourse.

At the time of the Helsinki Final Act (1975) that laid the foundation for the Organization for 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.¹

Those promises were broken for the first time before and during in the war in former Yugoslavia in the 1990s. Dangerous stereotypes that dominated the Yugoslav state media since the beginning of the crisis significantly contributed to the development of an intolerant atmosphere and influenced people’s beliefs because they increased the feelings of national and religious differences. Creation of an atmosphere of imperilment and general anxiety with constant labelling of enemies – behavior inherited from the old regime in which ideological rivals were persecuted – was now expanded to nationalities. Ethnic intolerance, as the epilogue of cleverly devised propaganda in the media, resulted in practically general support for the ferocious war. Many studies and much research about the role of media in ex-Yugoslav conflict indicated that media, while serving the regime, was producing wars and hatred.

In his book “Forging the war,” Mark Thompson wrote that “verbal violence produced physical violence” and that the war initially started in media. Italian journalist Paolo Rumiz also wrote in his book “Masks for a massacre” that “War was already present in 1988 in headlines and articles.” At the time of war in Bosnia and Herzegovina, many journalists’ articles were dominated by ideological consciousness and based on execution of political plans, rather than professionalism and objectivity. Facts in these articles were interpreted very

¹ See <http://www.osce.org/mc/39501>

imaginatively and they had the form of arbitrary constructions, cleverly designed to achieve political interests. There are many examples to point to how media was instrumental in inciting and injecting hatred among people, violence and ultimately ethnic cleansing.

There are many examples of texts and broadcasts where it can be seen how media was used as propaganda for war. Boro Kontić, a prominent journalist and Director of Media Center in Sarajevo, has been collecting examples of wartime journalism in the former Yugoslavia (1991-1995), mostly those addressing warmongering, propaganda and hate speech. In his 2010 documentary, “Years Eaten by Lions,”² he sent yet another warning and an important reminder on how war propaganda can cause damage to society. He found and interviewed those whose pieces and reports were simply spectacular lies intended to incite hatred and violence and who, in their reports, pointed the finger at individuals or local groups of people who were to be chased out of their town or village, imprisoned, beaten and killed.

Although there is no doubt that the media really did play one of the key and dirtiest roles in the conflicts in the region of the former Yugoslavia, they were only an instrument of politics. There is no doubt that this real responsibility belongs to politicians.

And now forty years later this phenomenon of propaganda jumps to our world straight from the worst times of the Cold War. History is repeating itself as a farce. Stories of conspiracy theories, tortured children, mass graves, rapes and mail parcels with heads of insurgents fill the television screens, all proven by fake testimonies and online videos.

I believe that in the modern world with new technologies and millions becoming involved in journalism through social networks, the weight of ensuring the ethics of the profession should be on the shoulders of editors and other gatekeepers of the news. I call on editors and publishers; I call on governmental authorities wherever they own media outlets directly or by proxy, to stop corrupting the profession, to stop making money from and to stop gaining influence on blood, hate speech and narrow-mindedness.

² *Years Eaten by Lions* dir. by Boro Kontić (2010) See <https://www.youtube.com/watch?v=hrmUhVT3vTk>

Some media are in dire need of self-examination. I believe that propaganda is yet another ugly scar on the face of modern journalism. There is a need to cleanse journalism of fear, propaganda and routine frustration. In the absence of critical journalism, democracy suffers and deliberate misinformation becomes the standard.

In order to raise the awareness of the OSCE participating States to the dangers of this uncontrolled proliferation of propaganda, I issued a Communiqué on Propaganda in Times of Crisis. I noted there that propaganda is dangerous when it dominates the public sphere and prevents individuals from freely forming their opinions and when it distorts pluralism and the open exchange of ideas. These reasons alone are sufficient to keep governments out of the news business.

Governmental authorities in certain countries have taken measures to stop propaganda by banning and blocking radio and television signals and imposing other restrictions, such as ban on entry for journalists and their eviction from governmental press centers. I have made it very clear to all OSCE participating States that censoring for the sake of political expediency is not a democratic tool to counter information wars.

At all times, and especially in difficult times, blocking is not an answer because 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 in danger in societies with dominant state-owned and state-controlled media that can be easily used to promulgate state propaganda.

Only a well-functioning, open, diverse and dynamic media environment can effectively neutralize the effect of propaganda. At the same time, government counter-propaganda, which is often viewed as programming that rebuffs falsehoods in an authoritative way, is neither essentially different from propaganda itself nor an answer to it.

Where a government protects freedom of the media and does not control or influence its output or reduce it to mere propaganda, then the existence of a free exchange of views, both domestically and across borders, can help reduce international tensions and prevent conflicts based on rumor or false information. Laws guaranteeing freedom of expression help the watchdog function of media and civil society immensely by providing benchmarks to measure progress.

We do not always appreciate the importance of these freedoms until they are tampered with through state interference and control.

I strongly believe that media plurality and free media is an antidote to propaganda, as is media literacy campaigns that lead to informed choices. Propaganda may be restricted, but only in narrow, specific instances. The International Covenant on Civil and Political Rights expressly bans propaganda for war and incitement to hatred in Article 20; as does the European Convention on Human Rights in Article 10 and Article 17.

There are specific tools available to fight biased and misleading information, including rules on balance and accuracy in broadcasting; guarantees of the independence of media regulators; vibrant public service broadcasting with a special mission to include all viewpoints; a clear distinction between fact and opinion in journalism and transparency of media ownership.

These tools, taken together, make up professional, courageous and investigative journalism. There is no democracy without such journalism, and there is no future without democracy.

By presenting this non-paper on propaganda and freedom of the media, produced by my Office, I follow recommendations from the OSCE-wide conference “Journalists’ Safety, Media Freedom and Pluralism in Times of Conflict” held in Vienna in June 2015. My hope is that this publication will assist OSCE participating States, policymakers, academia and media professionals throughout the region and beyond.

Vienna, 2 November 2015

1. Introduction

“No one now contests the immense power of images, which are capable of penetrating into the most remote corners of private life; consequently, in order to avoid the fulfilment of premonitions such as that of George Orwell in his novel *1984*³ that audio-visual technology become a means of delivering propaganda, governments strive to forge safeguards to ensure a degree of objectivity and independence, at least in public broadcasting.”⁴ This is what the Advocate-General of the European Court of Justice noted in his 2007 opinion on the nature of public service broadcasting in Germany.

Such safeguards to ensure integrity and independence of the media become an even more a thorny issue in the context of the most recent developments in the region of the Organization for Security and Co-operation in Europe (OSCE). With the technological revolution that eventually makes the maxim of freedom of expression “regardless of frontiers” true, perhaps for the first time in history, such safeguards are increasingly important on the international level. Gone are the Cold War days when radio jamming was the favourite method of authoritarian regimes to stop unwanted messages. Cable, satellite and online communications make it easy to penetrate households with all sorts of messages. Some of the messages might be illegal due to international and national laws; others might be unethical, or disturbing, or simply unorthodox and dissenting.

This non-paper will address a distinction that exists between unlawful speech which is harmful to human rights and dignity and propaganda that might be disdainful, but probably subject to other not legally binding instruments of acceptable international or national control, such as agreements, standards or perceptions.

The danger of propaganda is extremely acute today as it comes in the context of the ongoing conflict in and around Ukraine.

³ It is a commonplace to consider that novel, written in 1948 after the trauma of World War II, not so much as a diatribe against totalitarianism, but as a warning of the subtlety with which such a regime can be established, through manipulation of the media of communication.

⁴ Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 6 September 2007. Case C-337/06. *Bayerischer Rundfunk, Deutschlandradio, Hessischer Rundfunk, Mitteldeutscher Rundfunk, Norddeutscher Rundfunk, Radio Bremen, Rundfunk Berlin-Brandenburg, Saarländischer Rundfunk, Südwestrundfunk, Westdeutscher Rundfunk, Zweites Deutsches Fernsehen v GEWA - Gesellschaft für Gebäudereinigung und Wartung mbH*. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-337/06>.

The recent centennial anniversary of the start of World War I is a good reminder of how it started. The Austro-Hungarian ultimatum to Serbia, which precipitated the start of the hostilities, as a major objective, had to stop nationalistic propaganda because it flared existing controversies. It was 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, feared by some to be a prologue to World War III, has invoked heated accusations and counter-accusations of the spread of propaganda. This debate eventually has led to a number of recommendations regarding counteraction to propaganda.

While dealing with media content is not at the core of the Mandate of the OSCE Representative on Freedom of the Media, this issue may be of concern for a number of reasons.

First, propaganda, when it is pervasive, massive and systematic, is detrimental to freedom of the media. This phenomenon destroys the core of the profession of journalism. It makes journalists hostages of some sort, typically the government's and thus, hitting at the independence of the media. Journalists are forced or bribed to be a mere conduit of the messages. If dominant in a given country, propaganda becomes an instrument to establish authoritarianism, thus, distorting not just pluralism of the media but other basic foundations of a democracy. Meanwhile, it affects the public trust in the free media, in the values and the meaning of the profession.

Second, dangers of propaganda become a useful excuse for governments to restrict or even ban all hostile messages, actual and potential, coming from abroad. Its threat gives a pretext for wider intervention of governments in the media matters, such as licensing, transfrontier broadcasting, as well as issues that supposedly were closed in Europe with the signing of the Helsinki Final Act in 1975.

Third, the Representative find that propaganda is especially dangerous when emanating from the state-owned and state-run, also by proxy, media outlets. A use of public funds to impose a one-sided view is a corrupt practice. The two world wars and the Cold War that followed have proven that media in the hands of governments is a dangerous instrument. One of the key values of modern media systems in Europe is the dual system of broadcasting that consists of public service broadcasting and private media voices. Freedom of the media rests on a strong and independent dual system, not its perverted imitations.

Fourth, propaganda for war and hatred aims at the very foundation of the OSCE principle of comprehensive security in Europe. The use of propaganda in times of conflict has the effect of nothing less than throwing gasoline on an open flame.⁵ Propaganda fuels and contributes to the escalation of conflict. It prevents desired disarmament, security and co-operation. Abandoning hostile propaganda, so-called “moral disarmament,” is therefore considered to be an essential element of general steps to prevent new conflict; it relates to attempts to prevent incitement to war ever taking hold in the minds of people.

⁵ Regular Report of the OSCE Representative on Freedom of the Media to the Permanent Council for the period from 28 November 2013 through 18 June 2014. P. 2. URL: <http://www.osce.org/fom/119957?download=true>

2. International Standards

This idea of “moral disarmament” was first raised in the League of Nations by Poland in 1931; it was first brought into the United Nations in 1947 by the Soviet Union. The idea has not been put into practice in particular because during the Cold War period, liberal democracies 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.⁶

Throughout the Cold War, propaganda was the main weapon used by both sides, while jamming 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 of radio signals has been condemned by the International Telecommunication Convention in 1947 and UN General Assembly in 1950.

An almost forgotten international agreement, although obsolete, remains relevant in this context. The *International Convention concerning the Use of Broadcasting in the Cause of Peace*, a 1936 League of Nations treaty,⁷ binds states to “restrict expression which constituted a threat to international peace and security.” The Convention, to which a few OSCE countries, such as the Russian Federation, Latvia and Estonia, 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 regard 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.

Incidentally, this Convention also prohibits broadcasting false news. It is a good reminder to keep the balance between freedom of expression and an obligation to stop war propaganda and hate speech.

6 Murty B. S. *The International Law of Propaganda: The Ideological Instrument and World Public Order* (New Haven Studies in International Law and World Public Order). Kluwer, 1989. P. 233-234.

7 URL: <https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=509&chapter=30&lang=en>

2.1 United Nations

In the post-WWII world this balance is best exemplified in Article 19 and Article 20 of the *International Covenant on Civil and Political Rights* (ICCPR). 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 paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

While the above provisions of Article 19 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.

The importance of efforts to prevent wars and discrimination relative to the value of human rights is widely known and clear enough: modern history is abundant with examples of funneling aggression and incitement of racism and intolerance giving rise to military hostilities, genocide and crimes against humanity. Propaganda for war and calls for discrimination and violence based on nationality, race or beliefs result in abuses of core human rights stipulated in the ICCPR; they also assault 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). Such exercise of freedom of expression often has an aim to destroy the rights and freedoms of the weaker parts of the population, an attack on humanity itself.

Propaganda for war is, in fact, a form of incitement to violence based on advocacy of national, racial or religious hatred.

The two paragraphs of Article 20 are intrinsically connected. 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 propaganda for war and war itself. *Travaux préparatoires* of Article 20 allows one to claim that the first paragraph of Article 20 meant direct incitement to war while the second paragraph meant antecedent propaganda for war. Moreover, some states insisted on keeping the second paragraph because a prohibition of propaganda for war would not be in itself effective for securing a lasting peace and preventing conflicts.⁸

Commentators tend to agree that prohibition of propaganda for war and hate speech includes the responsibility of governments, not just the mass media, and other private players. A key aspect of the debate on prohibition of war propaganda is 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.⁹

Scholars also point 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.”¹⁰

A study of the interplay and balancing between Article 19 and Article 20 in the case law is an exceptionally interesting exercise, more an artistic one than

⁸ Kearney, Michael G. *The Prohibition of Propaganda for War in International Law*. Oxford University Press, 2007. P. 128, 131.

⁹ *Ibid.* P. 5-6.

¹⁰ *Ibid.* P. 9, see also p. 101, 134, 142-145, 168.

scientific.¹¹ Nonetheless, the process of searching this balance undoubtedly brings us closer to realizing the mutually reinforcing values of free speech and equality.¹²

Anyone interested in the relationship between Article 19 and Article 20 would necessarily turn to the so-called General Comments No. 11 and No. 34 by the UN Human Rights Committee (UNHRC).¹³

The *General comment No. 34* has become a manual to anyone studying and interpreting the freedom of expression provisions of the ICCPR. The document articulates, in particular (paragraph 50), that “a limitation that is justified on the basis of Article 20 must also comply with Article 19, paragraph 3,” and then (in paragraph 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,¹⁴ including at the 2008 seminar held by the UNHRC on Articles 19 and 20 of the ICCPR.¹⁵ It is also repeated in other documents approved by the UNHRC.¹⁶

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

11 Pech, Laurent, *Balancing Freedom of the Press with Competing Rights and Interests: A Comparative Perspective*, in Eoin O'Dell (ed), *Freedom of Expression* (Aldershot: Ashgate) (2004). Available at SSRN: <http://ssrn.com/abstract=909507>. P.3.

12 Colliver, Sandra. *Hate Speech Laws: Do they Work?* In: Sandra Colliver, ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (London: University of Essex, 1992). P. 374. URL: <http://www.article19.org/data/files/pdfs/publications/striking-a-balance.pdf>.

13 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 (Article 20)”. URL: <http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf>; 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. URL: <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>.

14 Such as Manfred Nowak in his monumental book “U.N. Covenant on Civil and Political Rights – CCPR Commentary” (2nd rev. ed.). Kehl am Rhein: Engel, 2005. The First edition was in 1993.

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

16 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Conclusions and recommendations emanating from the four regional expert workshops organized by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012. Para. 18. URL: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

interpretation, just noting that there is no contradiction *per se* between Articles 19 and 20.¹⁷

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 this non-paper 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 the classroom.¹⁸ The three other cases that the UNHRC ever communicated on Article 20 are also of little help: One of them deals with anti-Semitic statements distributed via recorded telephone messages;¹⁹ another is based on a complaint of a Holocaust denier²⁰ while the third case involves publication in a local newspaper of an open letter with a call to evict Roma.²¹ 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 there is no doubt about the inherent interconnectivity between all human rights, there are certain merits of scrutinizing the reliability of the compliance conclusion of *General comment No. 34*.²²

First, by itself Article 20 does not set out a human right. While indeed it numerically follows Article 19, and some (Partsch, 1981) even refer to it as paragraph 4 of Article 19, Article 20 certainly establishes a separate norm.

17 "...these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities." (para 2 of General comment No. 11). URL: <http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf>.

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

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

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

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

22 Richter, Andrei. The Relationship between Freedom of Expression and the Ban on Propaganda for War. In: European Yearbook on Human Rights 2015. W. Benedek, F. Benoit-Rohmer, M. Kettmann, B. Kneihns, M. Nowak (Eds.). Graz : Intersentia, 2015. P. 496.

Others argue that the strong coherence between the two articles is based on their “drafting history” (McGonagle, 2008).²³

At the same time it may be seen that Article 20 serves the human rights of non-discrimination and life as specified in Articles 26 and 6. It may also be interpreted in the context of the right of thought as stipulated in Article 18 (Richter, 2015a).

The aims of the Articles 19 and 20 are different and complementary: while Article 19 (3) takes 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 against people.

Second, there is a major dissonance in the method of enforcement of provisions of Article 20 and paragraph 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”).²⁴ Thus the restrictions set by Article 19 are permissive, while those in Article 20 are obligatory.

Third, there is *no need* to make Article 20 in comply with Article 19. There is a more general common ground for both articles. Article 5(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 should be interpreted as *not including* war propaganda and hate speech that constitutes incitement to discrimination, hostility or violence.

Freedom of expression under the ICCPR should be interpreted as not including war propaganda and hate speech that constitutes incitement to discrimination, hostility or violence.

²³ As quoted in: Callamard, Agnes. Expert Meeting of the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence. UN HCHR, October 2-3, 2008, Geneva. (Article 19). URL: <http://www.article19.org/data/files/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf>

²⁴ URL: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

Regarding the conditions of restricting free expression on these grounds, there is a common reference to paragraph 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),²⁵ 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.”

It is worth noting the point that it is Article 19 that should be put in context of Article 20, as it should not permit “greater restrictions on hate speech than Article 20 (2) required.”²⁶ In other words, “prohibition established in accordance with the terms of Article 20 cannot found a violation of Article 19.”²⁷ Experts agree by saying that Article 20(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.”²⁸

Of particular interest are the early resolutions of the UN General Assembly (110 (II), 290 (IV), 380 (V)) that addressed the issue of dangerous propaganda and affirmed condemnation of “propaganda against peace.” It is important to note that even then the General Assembly elaborated on the problem, stating that such propaganda includes not just incitement to conflicts or acts of aggression, but also “measures tending to isolate the peoples from any contact with the outside world, by preventing the Press, radio and other media of communication

²⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (1950). URL : <http://conventions.coe.int/treaty/en/treaties/html/005.htm>

²⁶ Mendel, Toby. (2012). Does International Law Provide for Consistent Rules on Hate Speech? In *The Content and Context of Hate Speech: Rethinking Regulation and Responses*. Eds.: M. Herz and P. Molnár. Cambridge: Cambridge University Press. P. 419.

²⁷ McGoldrick, D. (1991). *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights*. Oxford: Clarendon Press. P.491.

²⁸ Whitton John B., Larson Arthur. *Propaganda: Towards Disarmament in the War of Words*. New York: Oceana Publications, 1964. P. 256.

from reporting international events, and thus hindering mutual comprehension and understanding between peoples.” The UN also stated that the third intrinsic element of propaganda for war would be taking “measures tending to silence or distort the activities of United Nations in favour of peace or to prevent their peoples from knowing the views of other States Members.”²⁹ Establishing a link between propaganda for war and suppression of free speech, the General Assembly pointed out that propaganda’s success is generally possible when the media are deprived of its freedom to report on relevant events and dissenting opinions.

A number of UN instruments relate to the prohibition of racial discrimination, which includes the prevention of **propaganda of racist views and ideas**. This can be found in, for example, the 1945 *United Nations Charter* (paragraph 2 of the Preamble, Articles 1 para. 3, 13 para. 1 (b), 55 (c) and 76 (c)), the 1948 *Universal Declaration of Human Rights* (Articles 1, 2 and 7) and the 1966 *International Covenant on Civil and Political Rights* (Articles 2 para. 1, 20 para. 2 and 26).

The most directly relevant treaty is the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination*, which has been ratified by almost all the OSCE participating States, although 10 of them, including the United States, made reservations related to Article 4 of that Convention. This article provides:

“States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:

(a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of

²⁹ Resolution 381 of the General Assembly of the United Nations “Condemnation of propaganda against peace”. URL: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/059/79/IMG/NR005979.pdf?OpenElement>

another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;”

2.2 Council of Europe

The Convention for the Protection of Human Rights and Fundamental Freedoms, often called as the European Convention on Human Rights (ECHR) is the founding document of the Council of Europe. Its text contains no equivalent to Article 20 of the ICCPR.³⁰ The question thus arises: Do members of a 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?³¹

The question seems to be a rhetorical one, as commentators and case law of the European Court of Human Rights (ECtHR, or the Court), the key instrument of implementation of the European Convention on Human Rights, often point to Article 17 of the ECHR as an instrument to counteract war propaganda and hate speech. Article 17 (“Prohibition of abuse of rights”) 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.”

This article empowers the ECtHR to affirm any activity 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, which says as follows:

30 Unlike another regional mechanism, the American Convention on Human Rights, which in Article 13 (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.” URL: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

31 Hampson, Françoise J. Freedom of expression in situations of emergency and armed conflict. In: *Freedom of Expression: Essays in honour of Nicolas Bratza*. Casadevall, J. et al. (eds.). Strasbourg: Council of Europe, 2012. P. 456.

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In other words, the Court believes that exercising the right to freedom of expression on objectives that are contrary to the text and spirit of the ECHR is not protected by the ECHR itself.

Any activity against the human rights (such as, right to life and non-discrimination) may not rely on the protection of the ECHR in general, including Article 10 on freedom of expression.

The Court has held that a “remark directed against the Convention’s underlying values” is removed from the protection of Article 10 by Article 17.³² Thus, in the case of *Garaudy v. France*,³³ 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 *Norwood v. the United*

³² See *Lehideux and Isorni v. France*, 23 September 1998, §§ 53 and 47, *Reports of Judgments and Decisions* 1998-VII, and *Orban and Others v. France*, no. 20985/05, § 34, 15 January 2009.

³³ No. 65831/01, ECHR 2003-IX.

*Kingdom*³⁴ and *Pavel Ivanov v. Russia*³⁵, which concerned the use of freedom of expression for Islamophobic and anti-Semitic purposes, respectively.

In *Molnar v. Romania*³⁶ the Court had to determine the case of a person who had been convicted of distributing visual propaganda material (posters) in which the content stirred up inter-ethnic hatred, discrimination and anarchy. The Court found that the posters discovered at the Applicant's home contained various messages expressing his own opinions. While some of the messages were not shocking as far as their content was concerned, others could have contributed to tensions within the population, especially in the Romanian context. In that connection, the Court took particular note of the messages containing references to the Roma minority and the homosexual minority. Through their content, these messages sought to arouse hatred toward the minorities in question, constituted a serious threat to public order and ran counter to the fundamental values underpinning the Convention and a democratic society. Such acts were incompatible with democracy and human rights because they infringed the rights of others; on that account, in accordance with Article 17 of the Convention, the applicant again could not rely on his right to freedom of expression.

On the contrary, the ECtHR did not apply Article 17 of the Convention when it found that the rejection by a politician of the legal characterisation as “genocide” of the 1915 events was not per se such as to incite hatred against the Armenian people. The applicant had never been prosecuted or convicted for seeking to justify genocide or for inciting hatred. Therefore, the Court found his disputed conviction an “interference” with the politician’s exercise of the rights provided in Article 10.³⁷

The ECtHR also has solid case law on Article 10 alone that can be applied in the context of propaganda. The Court has maintained in a number of judgments that the right to freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any section of the community³⁸ and, more recently, *Mouvement raëlien suisse v.*

34 No. 23131/03, ECHR 2004-XI.

35 No. 35222/04, 20 February 2007.

36 No. 16637/06, 23 October 2012.

37 *Perinçek v. Switzerland*, no.27510/08, 17 December 2013. Grand Chamber, 15 October 2015.

38 *Stoll v. Switzerland* ([GC], no. 69698/01, § 101, ECHR 2007-V.

*Switzerland*³⁹ and *Animal Defenders International v. the United Kingdom*⁴⁰. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society. In addition, journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation.⁴¹

The Court has consistently ruled that Article 10 does not guarantee unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it “duties and responsibilities,” which also apply to the media. These duties and responsibilities are liable to assume significance when there is a question of endangering, for example, national security and the territorial integrity of a State.⁴² As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly and the need for any restrictions must be established convincingly.

By reason of the “duties and responsibilities” inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists for reporting on issues of general interest is subject to the proviso that they are acting in good faith to provide accurate and reliable information in accordance with the ethics of journalism.⁴³

The test of necessity in a democratic society requires the Court to determine whether the “interference” complained of corresponded to a “pressing social need,” whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient.⁴⁴

In the case of *Zana v. Turkey*⁴⁵ the Grand Chamber of the Court looked into the nature of the statement by former mayor of Diyarbakir in an interview published in a major national daily newspaper on a terrorist organization, the Kurdistan Workers Party (PKK). Although the particular phrase contained both a contradiction and an ambiguity, the judgment concluded that the prison term imposed on the mayor was not a violation of Article 10. It could not be looked

39 No. 16354/06, § 48, ECHR 2012.

40 No. 48876/08, § 100, ECHR 2013.

41 See, the *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997.

42 *Han v. Turkey*, no. 50997/99, 13 September 2005.

43 See *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports*1996-II, § 39, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I.

44 See *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, § 62.

45 No. 69/1996/688/880, 25 November 1997.

at in isolation and had had a special significance in the circumstances of the case – the interview had coincided with murderous attacks carried out by the PKK on civilians in southeast Turkey. Thus the eventual support given to the PKK, described as a “national liberation movement,” had had to be regarded as likely to aggravate an already explosive situation in that region. The penalty imposed could therefore reasonably have been regarded as answering a pressing social need and interference in the issue was found proportionate to legitimate aims pursued. The judgment said, “at a time when serious disturbances were raging in south-east Turkey such a statement – coming from a political figure well known in the region – could have an impact such as to justify the national authorities’ taking a measure designed to maintain national security and public safety.”

In *Kommersant Moldovy v. Moldova*,⁴⁶ the ECtHR found violation of Article 10 as the newspaper (Kommersant Moldovy) was forced to close without detailed reason or identification as to which published phrases threatened national security and territorial integrity. The newspaper published a series of articles criticizing the authorities of Moldova for their actions in respect of the breakaway Moldavian Republic of Transdniestria (MRT) and reproducing harsh criticism of the Moldovan government by certain MRT and Russian leaders. The domestic courts ordered the closure of the newspaper as it considered the articles had exceeded the permissible limits in the law by endangering the territorial integrity of Moldova, national security and public safety and creating the potential for disorder and crime, thus violating the Constitution. The domestic courts did not specify which expression or phrase constituted a threat but maintained that the articles did not represent a fair summary of public statements by public authorities.

The ECtHR found that although the newspaper was subsequently re-registered under the name “Kommersant-Plus,” its closure constituted an interference with the newspaper’s right to freedom of expression. The interference could be considered to have pursued the legitimate aims of protecting the national security and territorial integrity of the Republic of Moldova, given the sensitive topic dealt with in the disputed articles and the sometimes harsh language used. However, the ECtHR said, the domestic courts did not give relevant and sufficient reasons to justify the interference, essentially limiting them to repeat the applicable legal provisions. The domestic courts did not specify which elements of the newspaper’s articles were problematic and in what way they endangered the national security and the territorial integrity of the country or defamed the

⁴⁶ No. 41827/02, 9 January 2007.

president and the country. The domestic courts avoided all discussion of the necessity of the interference. The only analysis made was limited to the issue of whether the articles could be considered as good-faith reproductions of public statements for which the newspaper could not be held responsible in accordance with the domestic law. In light of the lack of reasons given by the domestic courts, the ECtHR found their judgments were not based on an acceptable assessment of the relevant facts.

In the case of *Ceylan v. Turkey*⁴⁷ the Applicant, a trade union leader, was sentenced to one year and eight months in prison and loss of certain political and social rights for the “offence to incite the population to hatred and hostility by making distinctions based on ethnic or regional origin or social class.” The ECtHR found the sentence disproportional as the article in question, despite its virulence, did not encourage the use of violence or armed resistance or insurrection. In the Court’s view, this is a factor which must be taken into consideration.

The same argument of lack of incitement was used in *Erdoğdu and İnce v. Turkey*.⁴⁸ Here the applicants were convicted of disseminating separatist propaganda through the magazine of which they were the editor and a journalist. The Court observed that the magazine had published an interview with a Turkish sociologist in which the latter had explained his opinion on potential changes in the Turkish state’s attitude to the Kurdish question. It found that the interview had been analytical in nature and had not contained any passages which could be described as an incitement to violence. The domestic authorities did not appear to have had sufficient regard to the public’s right to be informed of a different perspective on the situation in southeast Turkey, however unpalatable that perspective might have been for them. In the Court’s view, although the reasons given by the Istanbul National Security Court for convicting and sentencing the applicants had been relevant, they could not be considered sufficient to justify the interference with the applicants’ right to freedom of expression.

At the same time, it is important to know that only in *Perinçek v. Switzerland* (see above) the ECtHR case law refers to “propaganda for war” and, even there, in passing.

⁴⁷ No.23556/94, 8 July 1999.

⁴⁸ Nos. 25067/94 and 25068/94, ECHR 1999-IV.

The ECtHR recognizes that in considering the scope of “separatist propaganda against the indivisibility of the State... it may be difficult to frame laws with absolute precision and that a certain degree of flexibility may be called for to enable the national courts to assess” it. It ruled that “[h]owever clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.”⁴⁹

Many other cases of the ECtHR on complaints in the context of propaganda dealt with issues of pluralism in public broadcasting; the need for journalists to observe professional ethics and the general design of the Convention to maintain and promote the ideals and values of a democratic society.

As to the work of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, particular attention should be paid to the *Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis*, as by “crisis” the document also considers wars. Its text guides media professionals to provide “accurate, timely and comprehensive information” as they “can make a positive contribution to the prevention or resolution of certain crisis situations by adhering to the highest professional standards and by fostering a culture of tolerance and understanding between different groups in society.”⁵⁰

2.3. European Union

The Charter of Fundamental Rights of the EU provides in Article 11(1) that everyone has the right to freedom of expression.⁵¹ This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. According to Article

⁴⁹ *Başkaya and Okçuoğlu v. Turkey*, nos. 23536/94 and 24408/94, 8 July 1999.

⁵⁰ Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis (*Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies*). URL: <https://wcd.coe.int/ViewDoc.jsp?id=1188493>.

⁵¹ The Charter of Fundamental Rights of the European Union is addressed, according to its article 51, to the bodies of the European Union and to the member States when they apply the EU law. The application of the principle of subsidiarity gives pre-eminence to national Constitutional protections. The provisions of the European Convention on Human Rights also determine the scope and the interpretation of the rights protected in the Charter, despite the fact that the European Union as such is not a signatory of the ECHR.

11(2) of the Charter, the freedom and pluralism of the media shall be respected.

Article 52(1) of the Charter of Fundamental Rights stipulates that any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

The Audiovisual Media Services Directive (Article 3(1))⁵² of the EU stipulates that Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by the Directive.

Article 3(2) of the Directive also allows derogating from the principle of freedom of reception and retransmissions of television broadcasting on their territory from other Member States under certain condition. These conditions include manifest, serious and grave infringements of Article 6, which stipulates as follows:

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

In the *Mesopotamia Broadcast / Roj TV* joint case⁵³, the European Court of Justice ruled based on the predecessor of Article 6 – Article 22a of Council Directive on Transfrontier Television.⁵⁴ The Court wrote:

Mesopotamia Broadcast, a Danish holding company with its registered office in Denmark, is the holder of a Danish television licence for the channel Roj TV, also a Danish company. The latter broadcasts programmes by satellite, mainly in Kurdish,

⁵² 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). URL: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:en:PDF>

⁵³ Joint cases C-244/10 and C-245/10 *Mesopotamia Broadcast and Roj TV v Federal Republic of Germany* [22 September 2011] ECR I-08777.

⁵⁴ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997.

throughout Europe and the Middle East. It commissions programmes from, among others, a company established in Germany. In 2006 and 2007 government authorities in Turkey lodged complaints with the Danish Radio and Television Board, that, by its programmes, Roj TV supported the objectives of the Kurdistan Workers Party (PKK), which is classified as a terrorist organisation by the European Union. The national regulator gave a ruling on those complaints which held that Roj TV had not infringed the Danish rules implementing Articles 22 and 22a of the Directive. The broadcasts did not incite hatred on grounds of race, sex, religion or nationality, but merely broadcast information and opinions, while the violent TV images reflected the real violence in Turkey and the Kurdish areas. Later, in 2008, the German Federal Interior Ministry, took the view that the operation of the Roj TV television channel conflicts with the 'principles of international understanding' within the meaning of the Law on associations, read in conjunction with the Basic Law. It prohibited Mesopotamia Broadcast and Roj TV from carrying out its activities promoting the PKK in Germany that violate the scope of the Law on associations. In particular, the Ministry based its decision on the fact that Roj TV's programmes called for the resolution of the differences between Kurds and Turks by violence, including in Germany, reflecting to a large extent the militaristic and violent approach on the differences. The plaintiffs each brought a court action seeking to have that decision set aside on the grounds that according to the Directive only the Danish authorities may exercise control over those activities.

The judgment of the European Court of Justice was that the Directive's ban on any incitement to hatred on grounds of race, sex, religion or nationality also covers facts such as those of national law prohibiting infringement of the principles of international understanding. The Directive's regulation on jurisdiction does not preclude a Member State from adopting measures against a broadcaster established in another Member State, pursuant to a general law such as the Law on associations, provided that those measures do not prevent retransmission per se in the receiving Member State of television broadcasts made by that broadcaster from another Member State, this being a matter to be determined by the national court.

This decision served as a basis for the 2015 European Commission Decision issued in response to the notification by Lithuania of certain alleged infringements of Article 6 of the Directive in programmes of RTR Planeta, a Russian-language channel retransmitted in Lithuania via cable and satellite.⁵⁵ In particular, it reviewed the arguments of the Lithuanian authorities that the content of the broadcaster's programmes instigated discord and a military climate and referred to demonization and scapegoating with reference to the situation in Ukraine. Reportedly they were aimed at creating tension and violence among Russians, Russian-speaking Ukrainians and the broader Ukrainian population. Meanwhile, Lithuania has a sizable Russian-speaking minority which appears to be the target of RTR Planeta programming. Some of the statements could also be considered as inciting tension and violence between the Russians and the Ukrainians and also aimed against the EU and NATO States. The programmes could be considered to foster a feeling of animosity or rejection. The Lithuanian authorities also found that the statements made in these programmes could be considered as incitement to hatred, since they involve express language that can be considered, on the one hand, as an action intended to direct specific behaviour and, on the other hand, as creating a feeling of animosity or rejection with regard to a group of persons.

The European Commission decided that Lithuania had sufficiently demonstrated that there had been infringements of manifest, serious and grave character of the prohibition of incitement to hatred in the television broadcast of RTR Planeta on two occasions in the 12 months prior to the notification of 24 February 2015 and that the infringement persisted. The measures taken by Lithuania were found not discriminatory and were proportionate to the objective of ensuring that media service providers comply with the rules of Article 6 of the Directive, according to which audiovisual media services do not contain any incitement to hatred based on race or nationality.

In order to ensure the effectiveness of Article 3 of the Directive, the European Commission was required to examine only the effects of the decision of the Lithuanian authorities on freedom of expression which exceed those which are intrinsically linked to the suspension of retransmission of RTR Planeta. The EC concluded that the freedom of expression of the broadcaster had been affected

⁵⁵ On the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of 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. 10.07.2015. C(2015) 4609 final. URL: http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=10299

by Article 3 of the Directive for the purpose of stopping incitement to hatred. Under the circumstances of this case, given that the qualification of these programmes was validly decided by the Lithuanian authorities and also that the procedure of Article 3(2) of the Directive was followed by the authorities; the Commission concluded that the measures taken by Lithuania were compatible with European Union law.

Currently the European Commission is examining a similar notification, this time by the National Electronic Mass Media Council (NEPLP) of Latvia, of alleged infringements of Article 6 of the Directive in programmes of Rossiya RTR, a Russian-language channel retransmitted in Latvia via cable and satellite. The NEPLP said that the broadcast of the channel would be stopped in case of repeated violations.⁵⁶

⁵⁶ Media watchdog warns Russian channel. 24 September 2015. Public broadcasting of Latvia. URL: <http://www.lsm.lv/en/article/societ/society/media-watchdog-warns-russian-channel.a147161/>

3. Definitions

The terminology relating to offences of propaganda for war and hatred is rather vague in international law and national legislation. This contributes to the risk of a misinterpretation of restrictions provided in the ICCPR. 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 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.”⁵⁷

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.⁵⁸

A freedom of expression watchdog, ARTICLE 19, points out that there is no agreed definition of **propaganda** (of war) or **hate speech** in international law.⁵⁹ Some (i.e. McGonagle, 2011) echo this observation by pointing to “war” and “propaganda” as two instances of “definitionally problematic terms.” They note

57 Bernays, Edward (1928). Propaganda. New York: Liveright. URL: <http://www.historyisaweapon.org/defcon1/bernprop.html>.

58 Richter, Andrei. (2015a). The Relationship between Freedom of Expression and the Ban on Propaganda for War. In: European Yearbook on Human Rights 2015. W. Benedek, F. Benoit-Rohmer, M. Kettemann, B. Kneih, M. Nowak (Eds.). Graz: Intersentia., P. 498.

59 Callamard, Agnes. (2008). Expert Meeting of the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence. UNHCHR, 2-3 October 2008, Geneva. London, UK: ARTICLE 19. URL: <http://www.article19.org/data/files/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf> .

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.”⁶⁰ Others (Kearney, 2007) credibly argue 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.⁶¹ They further state that the meaning of propaganda for war is “only as imprecise as states wish it to be”.⁶²

There is a need to distinguish—at the level of law and policy—two sorts of propaganda in the media.

Therefore there is a need to distinguish—at the level of law and policy—two sorts of propaganda in the media. The first is propaganda for war, as well as national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as defined in international and national law. It is illegal and therefore demands judicial action with the appropriate measures in line with international human rights law standards. The second type of propaganda combines all the rest. It may be an inappropriate and scornful activity; it damages the profession of journalism, but does not necessarily call for legal action.

Definitional broadness does not necessarily bring about vagueness of the notion. Any distinct formula of propaganda for war, 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.”⁶³

While the UNHRC refers to *all* forms of propaganda for war, it makes an important exclusion from the scope of the crime by saying that “[t]he provisions of article 20, paragraph 1, do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence

60 McGonagle, Tarlach. (2011). *Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas*, School of Human Rights Research Series Volume 44. Cambridge-Antwerp-Portland: Intersentia. P.272.

61 Kearney, Michael G. (2007). *The Prohibition of Propaganda for War in International Law*. Oxford, UK: Oxford University Press. P. 191-242.

62 Ibid. P. 189.

63 United Nations 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 (Article 20)”. Paragraph 2. URL: <http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf>.

in accordance with the Charter of the United Nations.”⁶⁴ By self-defence, the Charter means exclusively measures taken by a Member of the United Nations “if an armed attack occurs against” it.⁶⁵ Other forms of propaganda inciting to such manifestations of violence, as civil war or rebellion against the government, are either treated under Article 20(2) or Article 19(3) of the ICCPR in the context of the Preamble of the Universal Declaration of Human Rights⁶⁶. In the current context in Europe it is important to watch attempts to include within the meaning of propaganda for war propaganda for and conduct of an “ideological war”, “information warfare” or a “hybrid war”.⁶⁷

It is also 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.”⁶⁸ This conclusion underscores the transfrontier nature of the prohibition.

The 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 any threat to the peace, breach of the peace, or act of aggression.”⁶⁹ The UN thus gave an intent or a threat of hostilities as the criteria for the illegal act.

As for the methods employed in propaganda that would allow courts to distinguish it from other forms of speech, scholars point out that they constitute “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

64 Ibid.

65 Charter of the United Nations. San Francisco, 26 June 1945. Article 51. URL: <http://www.un.org/en/documents/charter/chapter7.shtml>.

66 “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”. The Universal Declaration of Human Rights. Proclaimed by the General Assembly of the United Nations on 10 December 1948. URL: <http://www.un.org/en/documents/udhr/>

67 Richter, Andrei. (2015a). The Relationship between Freedom of Expression and the Ban on Propaganda for War. In: European Yearbook on Human Rights 2015. W. Benedek, F. Benoit-Rohmer, M. Kettemann, B. Kneih, M. Nowak (Eds.). Graz : Intersentia. P. 499.

68 United Nations 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 (Article 20)”. Paragraph 2. URL: <http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf>.

69 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. URL: <http://www.un-documents.net/a2r110.htm>.

whose intensity is at least comparable to that of provocation, instigation, or incitement.”⁷⁰

Definitional problems exist with the notion of “**hatred**”- a crucial term to understand Article 20 (2). “There is no universally accepted definition of the expression ‘hate speech,’” the ECtHR observes.⁷¹

Experts explain that existing formulas are circular, as they are defining “hatred” through “hate” and “hate” through “hatred.”⁷² 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.”⁷³ It is widely criticized for lack of clarity of boundaries of the notion.⁷⁴

Another Council of Europe instrument, the *Additional Protocol to the Convention on Cybercrime*, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, further attempts to define criminally punishable “racist and xenophobic” speech. In particular, it includes public insults or threats “with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics.”⁷⁵

Of particular relevance is the “*Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination,*

70 Nowak, Manfred. (2005). U.N. Covenant on Civil and Political Rights – CCPR Commentary” . Kehl am Rhein (2nd rev. ed.). Germany: Engel. P. 472.

71 European Court of Human Rights, Factsheet on hate speech (2013). URL: http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf

72 Mendel, Toby. (2012). Does International Law Provide for Consistent Rules on Hate Speech? In: The Content and Context of Hate Speech: Rethinking Regulation and Responses. M. Herz and P. Molnár (Eds.). Cambridge, UK: Cambridge University Press. P. 427.

73 URL: [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)

74 Верховский А. М. (2014). Уголовное право стран ОБСЕ против преступлений ненависти, возбуждения ненависти и языка вражды. М.: Центр «Сова». P.23.

75 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. CETS No.: 189. 28.01.2003. URL: <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm>. So far the Additional Protocol is ratified by 24 OSCE participating States.

hostility or violence” released by the UN Office of the High Commissioner for Human Rights (OHCHR) in 2012. The Rabat Plan of Action represents an effort in clarifying governments’ obligations to prohibit incitement to hatred, while providing coherent protection to the rights to freedom of expression and freedom of religion. The Rabat Plan of Action, when dealing with terminology, refers to the *Camden Principles on Freedom of Expression and Equality* (Camden Principles), drafted by ARTICLE 19.⁷⁶ Under “hatred” and “hostility”, the Camden Principles understand “intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”⁷⁷

Hate speech should be distinguished from **genocide**, which is a somewhat different and clearly defined legal concept. It denotes an aggravated internationally wrongful act for which responsibility may be also attributed either to a State or to a private individual. In accordance with Article 2 of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*⁷⁸, this crime “means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.”

⁷⁶ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012. Paragraph 19. URL: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

⁷⁷ The Camden Principles on Freedom of Expression and Equality. ARTICLE 19, Global Campaign for Free Expression. London, 2009. Principle 12. URL: <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>

⁷⁸ Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948. URL: <http://www.hrweb.org/legal/genocide.html>

Alongside with genocide, a direct and public incitement to commit genocide shall be punishable in accordance with this UN Convention (Article 3), ratified by almost all OSCE participating States.

On the basis of Article 5 of the Rome Statute, the crime of genocide falls under the jurisdiction of the International Court of Justice (ICJ). According to the case law of the ICJ and the International Criminal Tribunal for Rwanda, for the crime of genocide to be established, it is not sufficient for the members of a particular group to be targeted because they belong to that group, but the acts in question must at the same time be perpetrated with intent to destroy the group as such in whole or in part. Genocide is therefore a very narrow legal concept which, moreover, is difficult to prove.

Hate speech should be distinguished from **hate crimes**, generally described as “criminal acts motivated by bias toward a victim’s real or perceived group affiliation. A victim of a hate crime may be targeted based on race, ethnicity, gender, sexual orientation, disability, and/or religion. Hate crime incidents include acts such as physical assault, bullying, harassment, and intentional damage to property.”⁷⁹ It should be noted in this context that many forms of hateful activity, such as marches, meetings and maintaining websites, do not necessarily constitute a crime.

Hate crimes are criminal acts motivated by bias or prejudice toward particular groups of people. To be considered a hate crime, the offence must meet two criteria. The first is that the act constitutes an offence under criminal law. Secondly, the act must have been motivated by bias.⁸⁰

There is also lack of distinct definitions of “**incitement**” in international law, or interrelation between “incitement” and a wider term of “advocacy” of hatred. There are fewer problems in its judicial interpretation, at least on the national level, as the term seems to be part and parcel of criminal law in relation to incitement to lawlessness.

79 Cortés, Carlos E.(2013). Multicultural America: A Multimedia Encyclopedia. Thousand Oaks, US: Sage. P. 1032.

80 URL: <http://hatecrime.osce.org/> .

For example, the Criminal Code of Germany establishes that the one who incites is “whoever intentionally induces another to intentionally commit an unlawful act” (Article 26, Incitement).⁸¹

The Russian Supreme Court recently interpreted 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 justify and (or) assert 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 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.”⁸² 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. Here the Supreme Court trailed attempts by the ECtHR to differentiate dangerous and non-dangerous incitement, illegitimate and legitimate violence.⁸³

In the *Roj TV* case (described above), the European Court of Justice, following the opinion of the Advocate-General (determined by the usual meaning of the terms in everyday language), interpreted the words “incitation” and “hatred” as referring to, first, an action intended to direct specific behaviour and, second, a feeling of animosity or rejection with regard to a group of persons: thus, the concept “incitement to hatred” “is designed to forestall any ideology which fails to respect human values, in particular initiatives which attempt to justify violence by terrorist acts against a particular group of persons.”⁸⁴ “Incitement to hatred, observed the Advocate-General, actually means seeking to create a feeling of animosity toward, or rejection of another person, which leads to the person who

81 Criminal Code (Strafgesetzbuch, StGB). Promulgated on 13 November 1998 (Federal Law Gazette I, p. 945, p. 3322). Translation by the Federal Ministry of Justice. URL: <http://www.iuscomp.org/gla/statutes/StGB.htm#26>.

82 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”). URL: <http://www.rg.ru/2011/07/04/vs-dok.html>.

83 Bonello, Giovanni. Freedom of expression and incitement to violence. In: Freedom of Expression: Essays in honour of Nicolas Bratza. Casadevall, J. et.al. (Eds.). Strasbourg, France: Council of Europe, 2012. Pp. 349-359.

84 Joint cases C-244/10 and C-245/10 *Mesopotamia Broadcast and Roj TV v Federal Republic of Germany* (22 September 2011) ECR I-08777. Paragraph 42 and 41.

experiences that feeling no longer being able to live harmoniously, and therefore in understanding, with that other person.”⁸⁵

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 the fears of harming free expression and suspicion of anything coming from the Soviet bloc. ⁸⁶ At that time, the US delegates, in particular, commented at *travaux preparatoires* of Article 20 (1) of the ICCPR 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.” ⁸⁷ Moreover, until the current crisis in and around Ukraine, as well as with masterful public relations experiments by the ISIS, any enthusiasm for concerted international action to stop it appears to have dissipated.

85 Opinion of Advocate General Bot delivered on 5 May 2011 Joined Cases C-244/10 and C-245/10 *Mesopotamia Broadcast A/S METV and Roj TV A/S v Bundesrepublik Deutschland*. URL: <http://curia.europa.eu/juris/document/document.jsf?docid=80715&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=334641> .

86 Kearney, Michael G. (2007). *The Prohibition of Propaganda for War in International Law*. Oxford, UK: Oxford University Press. Pp. 78-79, 111.

87 *Ibid.* P. 119, 103.

4. OSCE hate speech commitments

In the Helsinki Final Act (1975) that laid foundation for the Organization for 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. Moreover, this has been considered a measure related to giving effect to the Decalogue of Principles Guiding Relations between participating States.⁸⁸

In the Helsinki Final Act the participating States committed themselves to a duty to refrain from propaganda for wars of aggression against each other.

Beginning with the Helsinki Final Act, the now 57 participating States of the OSCE region have adopted a significant number of politically binding commitments relating to what has become known as the human dimension of the OSCE’s comprehensive security concept.

“While these documents do not have the character of legally binding treaties under international law, they represent political commitments, adopted by consensus and binding on each participating State. As they are all adopted by consensus, they are, as it were, of immediate effect, are immediately applicable and can be invoked by any citizen or OSCE government directly vis-à-vis any government of a participating State. Moreover, OSCE commitments reinforce, rather than duplicate, obligations contained in international law and conventions, as they contain a commitment to implement those and to do so in good faith.”⁸⁹

The OSCE commitments related to equality, tolerance and non-discrimination include provisions related to the role of the media in both preventing and combating acts motivated by prejudice, intolerance and hatred.

The OSCE participating States condemn cases of utilizing media in violation of the principles referred to in the **Budapest Document** (1994) in particular. They pledged to promote effective measures aimed at eradication of manifestations

⁸⁸ URL: <http://www.osce.org/mc/39501>.

⁸⁹ OSCE human dimension commitments. Volume 1, Thematic compilation. Preface. Warsaw: ODIHR, 2011. P. XIII.

of intolerance and especially of aggressive nationalism, racism, chauvinism, xenophobia and anti-Semitism.⁹⁰ This policy followed in the Decisions of the Rome Council Meeting.⁹¹

Further, the **Summit Declaration** (para 27), adopted in Istanbul in 1999, says:

We commit ourselves to ensuring the freedom of the media as a basic condition for pluralistic and democratic societies. We are deeply concerned about the exploitation of media in areas of conflict to foment hatred and ethnic tension and the use of legal restrictions and harassment to deprive citizens of free media (...)

The OSCE **Strategy to Address Threats to Security and Stability in the Twenty-First Century** (Maastricht 2003) contains (in para 37) the following principle:

While fully respecting freedom of expression, the OSCE will strive to combat hate crime which can be fuelled by racist, xenophobic and anti-Semitic propaganda on the Internet.

In Sofia, 2004, the foreign ministers confirmed several Permanent Council Decisions as Annexes to its Decision No. 12/04 **on Tolerance and Non-discrimination**. In particular, it included Permanent Council Decision No. 621: **Tolerance and the Fight against Racism, Xenophobia and Discrimination** which said:

The Permanent Council, (...)

In order to reinforce our common efforts to fight manifestations of intolerance across the OSCE region,

Decides,

1. The participating States commit to: (...)

- Encourage the promotion of tolerance, dialogue, respect

⁹⁰ Budapest Document: Towards a Genuine Partnership in a New Era (Summit of Heads of State or Government). 5-6 December 1994, Budapest. Chapter VIII. Paragraph 25.

⁹¹ Document of the Fourth Meeting of the CSCE Council of Ministers. 30 November – 1 December 1993, Rome. Chapter X ("Declaration on Aggressive Nationalism, Racism, Chauvinism, Xenophobia and anti-Semitism").

and mutual understanding through the Media, including the Internet; (...)

It also confirmed, in the same Annex, Permanent Council Decision No. 633: **Promoting Tolerance and Media Freedom on the Internet** with its specific decision that:

5. Participating States should study the effectiveness of laws and other measures regulating Internet content, specifically with regard to their effect on the rate of racist, xenophobic and anti-Semitic crimes;
6. Participating States should encourage and support analytically rigorous studies on the possible relationship between racist, xenophobic and anti-Semitic speech on the Internet and the commission of crimes motivated by racist, xenophobic, anti-Semitic or other related bias;
7. The OSCE will foster exchanges directed toward identifying effective approaches for addressing the issue of racist, xenophobic and anti-Semitic propaganda on the Internet that do not endanger the freedom of information and expression. The OSCE will create opportunities, including during the annual Human Dimension Implementation Meeting, to promote sharing of best practices;

By Decision No. 13/06 on **Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding** (Brussels 2006) the OSCE Permanent Council, recognized (in para 9)

(...) the essential role that the free and independent media can play in democratic societies and the strong influence it can have in countering or exacerbating misperceptions, prejudices and in that sense encourages the adoption of voluntary professional standards by journalists, media self-regulation and other appropriate mechanisms for ensuring increased professionalism, accuracy and adherence to ethical standards among journalists;
(...)

This position of the OSCE foreign ministers was reconfirmed, in particular in Madrid (MC Decision No. 10/07 **on Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding**).

The post of the OSCE Representative on Freedom of the Media, established in 1997, was given the **Mandate** to help strengthen and further develop compliance with principles and commitments, including rectifying serious instances of intolerance by participating States which utilize media in violation of the principles referred to in the Budapest Document, Chapter VIII, paragraph 25, and in the Decisions of the Rome Council Meeting, Chapter X (see above). The Representative thus “may forward requests, suggestions and comments to the Permanent Council, recommending further action where appropriate.”⁹²

OSCE commitments in the field of freedom of expression and freedom of the media should not be understood or interpreted in parallel to the legal standards described in the previous pages. As stated in the Helsinki Final Act, there is a mutual interplay and reinforcement between both international instruments. In other words, OSCE commitments include notions and language which can only be properly interpreted and implemented through the extensive criteria and parameters provided by the international law standards.

⁹² Decision No. 193 of the Permanent Council 5 November 1997. Establishment of the Office of the OSCE Representative on Freedom of the Media, Mandate of the OSCE Representative on Freedom of the Media. Paragraph 6. URL: <http://www.osce.org/fom/99565?download=true> .

5. Sample national statutory law

In one of her recent reports to the OSCE Permanent Council the Representative on Freedom of the Media made the point that while the concept of freedom of the media and freedom of expression has received due attention and recognition in the international human rights law and in many national jurisdictions, their practical application is not fully respected around the world. At the same time, international human rights standards on the prohibition of propaganda for war and hatred still need to be clearly and effectively integrated in domestic legislation, case law and policies in too many instances. This explains the difficulty and political sensitivity of defining a ban on such propaganda in a manner that respects freedom of expression.

There are different national styles in restricting propaganda for war and hatred, ranging from a liberal approach in the US, the United Kingdom and Hungary, to a more strict approach in France and Germany. It is worth noting a set of historic legal acts, national laws on protection of peace adopted in 1950-51 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.” There are no known cases of applying these declarative laws.

A review of the national legislation of several OSCE participating States, who that claim that they are currently being affected by hateful propaganda, demonstrates that there are sufficient legal instruments to set a barrier to the illegal propaganda as recognized in international standard-setting acts.

The national Constitution of **Lithuania** establishes that “in the Republic of Lithuania, war propaganda shall be prohibited” (Article 135). “Freedom to express convictions and to impart information shall be incompatible with criminal actions—incitement of national, racial, religious, or social hatred, violence and discrimination, with slander and disinformation” (Article 25).⁹³

The Criminal Code of Lithuania does not include a crime of propaganda for war, though it punishes for public incitement of violence or support of such actions on the grounds of “sex, sexual orientation, race, nationality, language, descent,

⁹³ Constitution of the Republic of Lithuania. Adopted by citizens of the Republic of Lithuania in the Referendum of 25 October 1992. URL: <http://www3.lrs.lt/home/Konstitucija/Constitution.htm> ,

social status, religion, convictions or views or finances” by imprisonment for a term of up to three years. The Code provides that a legal entity can also be held liable for these acts.⁹⁴

Article 19(1) (3) of the Law on Provision of Information to the Public (as amended in 2015) echoes the Constitution by banning the media to disseminate

“propaganda for war or incitement of hatred, ridicule, humiliation, instigates discrimination, violence, physical violent treatment of a group of people or a person belonging thereto on grounds of age, gender, sexual orientation, ethnic origin, race, nationality, language, origin, social status, faith, belief, convictions or religion.”

Its article 19(2) prohibits dissemination of “disinformation and information which is slanderous and offensive to a person or which degrades one’s honour and dignity.”⁹⁵

Finally, paragraph 11 of Article 34¹ (“Freedom to Provide Audiovisual Media Services and Restrictions Thereon”) of the Law on Provision of Information to the Public stipulates the right to suspend “reception” of foreign broadcasts:

“Free reception in the Republic of Lithuania of television programmes and/or parts of programmes and/or catalogues from countries other than the EU Member States, states of the European Economic Area and other European states which have ratified the Council of Europe Convention on Transfrontier Television may be suspended upon a decision of the Commission if such television programmes and/or parts of the programmes and/or the catalogues of those countries violate the requirements of Articles 17 or 19 of this Law. ... The measures to be applied must be proportionate to the violations committed.”⁹⁶

⁹⁴ Republic of Lithuania. Criminal Code of Lithuania. 26 September 2000. No VIII-1968. Article 170. URL (in English): www.legislationline.org/documents/id/17832 .

⁹⁵ Republic of Lithuania. Law on Provision of Information to the Public. 2 July 1996. No. I-1418. (As last amended on 6 November 2012 – No XI-2353). Official translation. URL: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=458157 . The translation provided here takes into account amendments made in 2015.

⁹⁶ Ibid.

Decisions of the national regulator, the Radio and Television Commission of Lithuania (RTCL), on suspension or annulment of reception of particular programmes need approval by an administrative court.

The Criminal Law of **Latvia** provides that a person who commits public incitement of a war of aggression or of triggering of military conflict shall receive a punishment of up to eight years imprisonment.⁹⁷

Article 26 (parts 3 and 4) of the Latvian law on Electronic Mass Media (or, EPPL) stipulates:

“The programmes and broadcasts of the electronic mass media may not contain:

- incitement to hatred or discrimination against a person or group of persons on the grounds of sex, race or ethnic origin, nationality, religious affiliation or faith, disability, age or other circumstances;
- incitement to war or the initiation of a military conflict.”⁹⁸

Article 24 provides in paragraph 4:

“The electronic mass media shall ensure that facts and events are fairly, objectively reflected in broadcasts, promoting exchange of opinions, and comply with the generally accepted principles of journalism and ethics. Commentary and opinions shall be separated from news and the name of the author of the opinion or commentary shall be indicated.”

Finally, Article 19 (5), paragraph 1 stipulates that the national regulator shall ensure the freedom of reception and shall not restrict the retransmission of programmes within the territory of Latvia from other states, unless broadcasts coming from another state “manifestly, seriously and gravely” infringe the provisions of Article 26 of the law.⁹⁹

⁹⁷ Criminal Law of Latvia. 8 July 1998. Article 77. URL (in English): <http://www.legislationline.org/documents/section/criminal-codes>

⁹⁸ Electronic Mass Media Law, 28 July 2010. Official translation.

⁹⁹ Ibid.

The Constitution of the Republic of **Moldova** proclaims in Article 32 (“Freedom of Opinion and Expression”):

“(3) The law shall forbid and prosecute all actions aimed at denying and slandering the State or the people. Likewise shall be forbidden and prosecuted the instigations to sedition, war, aggression, ethnic, racial or religious hatred, the incitement to discrimination, territorial separatism, public violence, or other actions threatening constitutional order.”¹⁰⁰

The Criminal Code stipulates that “war propaganda, spreading of pretentious or invented information inciting to war, or any other actions aimed at unleashing war committed verbally; in writing; on radio, television, cinema; or by any other means” is punishable by imprisonment for up to 6 years.¹⁰¹

The Audiovisual Code of Moldova stipulates as follows:¹⁰²

“Article 7. Political and social balance and pluralism

(1) The transmission and retransmission of programme services carry out and ensure political and social pluralism; cultural, linguistic and religious diversity; information, education and entertainment of the public respecting the legal guarantee of fundamental freedoms and human rights.

(2) Granting airtime to a political party or movement with a view to promoting their positions, the broadcaster shall also grant airtime to other political parties and movements within the same type of programs and hours, without any ungrounded delays or favouring a certain party, regardless of the percentage of its representation in the Parliament.

<...>

¹⁰⁰ Constitution of the Republic of Moldova. Adopted on 29 July 1994. URL: <http://www.presedinte.md/eng/constitution> .

¹⁰¹ Article 140. The Criminal Code of the Republic of Moldova. No. 985-XV. Promulgated on 18 April 2002. Official Monitor no. 128-129/1012 of 13 September 2002. URL (in English): www.legislationline.org/documents/id/8906 .

¹⁰² Audiovisual Code of the Republic of Moldova. LPC260/2006. Promulgated on 4 August 2006. Official Monitor no. 131 of 18 August 2006, art. 679. URL (in English): http://www.apel.md/public/upload/en_audiovisual_code.pdf .

- (4) In order to ensure the observance of the principles of social and political balance, equidistance and objectivity within broadcasters' news and current affairs programmes, they shall ensure that:

each news story shall be accurate;

The sense of reality shall not be distorted by means of editing tricks, comments, wording or headlines;

The principle of multi-source information shall be observed in cases of news stories covering conflict situations. <...>

“Article 10. Rights of Program Consumer

- (1) Moldova's legislation guarantees the right to comprehensive, objective and fair information, the right to freedom of expression and the right to free communication of information by broadcasting means.
- (2) The Council for Coordination on Audiovisual, having the task to coordinate on the audiovisual activities, as well as the judicial authorities shall ensure the protection of rights of program consumers.
- (3) The judicial authorities shall take action to protect the rights of program consumers if the latter notify about any violations.

<...>

- (5) Broadcasters shall ensure objective information of the public and favour a free formation of opinions.”

Finally, “in [the] case of violation of the legal regulations by broadcasters,” the Code provides for a suspension of the broadcasting licence “for a certain period of time” (Article 38 paragraph 1, d).

The Constitution of **Ukraine** stipulates freedom of expression in Article 34:

Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.

The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.¹⁰³

The Constitution also mentions informational security in the following context of Article 17:

“To protect the sovereignty and territorial indivisibility of Ukraine, and to ensure its economic and informational security are the most important functions of the State and a matter of concern for all the Ukrainian people.”¹⁰⁴

In addition, the Criminal Code of Ukraine provides that any person who commits public incitement to an aggressive war or an armed conflict shall be imprisoned for a term of up to three years.¹⁰⁵

The Law on Information in Article 46 (“Inadmissibility to abuse right to information”) stipulates that:

[I]nformation shall not be used to call for overthrow of

¹⁰³ Constitution of Ukraine. Adopted at the fifth session of the Verkhovna Rada of Ukraine on 28 July 1996. URL: www.ccu.gov.ua/doccatalog/document?id=12084 .

¹⁰⁴ Ibid.

¹⁰⁵ Criminal Code of Ukraine. 5 April 2001 N 2341-III. Article 436. URL (in English): <http://www.legislationline.org/documents/action/popup/id/16257/preview> .

constitutional system, territorial disintegration of Ukraine, propaganda for war, violence, brutality, working up race, national, religious hostility, terrorist attacks, encroach on rights and freedoms of an individual.¹⁰⁶

Article 6 (paragraph 2) of the Broadcasting Law of Ukraine forbids propaganda and incitement to war, acts of aggression, as well as propaganda of supremacy or discrimination of persons based on their religion, ideology, nationality, race, state of health or wealth, or social origin as abuses of broadcasters' freedoms. Its Article 72 (paragraph 6) lists among sanctions imposed by the national regulator for violations of the broadcasting law "submission to a court of a case on annulment of the broadcasting licence", suspension of broadcasting for such reasons is not envisaged by the law.¹⁰⁷

¹⁰⁶ The Law of Ukraine On Information. Bulletin of the Verkhovna Rada, 1992, N 48. Article 650. URL: http://www.wipo.int/wipolex/en/text.jsp?file_id=182882 .

¹⁰⁷ The Law of Ukraine On Television and Radio Broadcasting. Bulletin of the Verkhovna Rada, 1994, N 10. Article 43. URL: <http://zakon3.rada.gov.ua/laws/show/3759-12> ,

6. Draft legislation

It seems that the lack of solid grounds and arguments in the national courts to stop, block and ban propaganda led governments to apply a more familiar instrument – drafting restrictive legislation targeting, under different pretexts, Russian media and journalists as a class.¹⁰⁸ It was supplemented by the efforts to implement counter-propaganda measures. Establishing the Ministry of Information Policy of Ukraine¹⁰⁹ in late 2014 is just the most vivid example of it.

A lack of solid grounds and arguments in the national courts to stop, block and ban propaganda led governments to draft restrictive legislation.

This happened in Ukraine, Moldova,¹¹⁰ Latvia¹¹¹ and Lithuania.¹¹²

In Lithuania, the parliament adopted amendments proposed by the government to the Law on Provision of Information to the Public. The explanatory notes to the bill said it was a necessary step to enhance the protection of Lithuanian information space and national security in an ongoing information war. The proposal amended Article 48 so as to give the RTCL the authority to impose fines on broadcasters and re-broadcasters for dissemination of illegal content, including war propaganda, as an alternative and lesser administrative sanction to suspension of service.

The Ukrainian parliament was, naturally, most active in this regard. Among its recent initiatives were:

1. The statute “On amendments to certain statutes of Ukraine to protect information television and radio sphere of Ukraine” which was adopted by the

108 Richter, Andrei. (2015b). Legal Response to Propaganda Broadcasts Related to Crisis in and around Ukraine, 2014-2015. International Journal of Communication. 9. Pp. 3138–3139.

109 URL: <http://mip.gov.ua/en/>

110 Andrian Kandu: Bill on Propaganda Ban will be Discussed with Participation of the Civil Society (Андриан Канду: законопроект о запрете пропаганды будут обсуждать с гражданским обществом). 2 April 2015. URL: http://ru.publika.md/link_1588411.html .

111 National Electronic Mass Media Council of Latvia, “Country Report – Latvia September 2014.” URL: <http://www.neplpadome.lv/en/home/news/country-report---latvia-july-2014.html>. “Country report – Latvia May 2014”. URL: <http://www.neplpadome.lv/en/home/news/country-report---latvia-may-2014.html>.

112 Lithuanian president proposes another anti-propaganda bill. Delfi, 12 December 2014. URL: <http://en.delfi.lt/lithuania/politics/lithuanian-president-proposes-another-anti-propaganda-bill.d?id=66654462#dreload1418385259828>.

Supreme Rada (Parliament) on 5 February 2015 and promulgated by President Petro Poroshenko on 2 April 2015. According to the amendments to the statute “On Cinematography,” the “central body of the executive that enforces national policy in the field of cinematography” (currently, the Ukrainian State Film Agency) is to refuse the issue of new state permits for the exhibition and other forms of distribution, including via TV, of films in a number of new cases.

Among prohibited films are films with the participation of persons included in the “List of persons who pose a threat to national security.” This list is to be published and renewed on its official website by the Ministry of Culture, which shall be guided by requests of the national security agencies, as well as the National Council on Television and Radio Broadcasting, the independent regulator; films that popularize or create a positive image of the law enforcement agencies or any other agencies of the “aggressor state,” Soviet state security and their agents. The aggressor state, according to the statute, as well as earlier resolutions of the Parliament, is the Russian Federation. This new norm (Article 15-1) bans distribution of such films if they were produced in any country after 1 August 1991; any films of any thematic character produced with the participation of physical and legal entities of the aggressor state since 1 January 2014. The Agency is also obliged to annul the already issued permits to such films retroactively. Violators of the above provisions will face administrative fines.

Amendments to the Broadcasting Statute of Ukraine introduced by the new statute envisage a ban on the broadcasting of audiovisual programmes that fall under the following categories: programmes produced after 1 August 1991 that popularize bodies of the aggressor state, as well as its actions that justify or legitimise the illegal occupation of Ukrainian territories, as specified in the statute “On Cinematography”; films and TV programmes (with the exception of news and current affairs) with the participation of a person included in the “List of persons who pose a threat to national security.” The statute defines as “participation” the functions of an actor, artist, script author, music composer, narrator, director and/or producer of a film or TV programme. Licence holders that violate the above provisions face sanctions by the National Council on Television and Radio Broadcasting. The statute went into effect on 4 June 2015.¹¹³

¹¹³ Про внесення змін до деяких законів України щодо захисту інформаційного телерадіопростору України. The statute of Ukraine “On amendments to certain statutes of Ukraine to protect information television and radio sphere of Ukraine”, N 159-VIII, 5 February 2015.

2. The amendments to the 1996 Law on Advertising and 2006 Law on Broadcasting adopted by the Supreme Rada on 14 May 2015 and signed into force by the President on 4 June 2015. They introduce a total ban on commercials in TV programmes of foreign TV and radio entities that broadcast (rebroadcast) in Ukraine unless those entities are under jurisdiction of the states that are members of the EU or parties to the European Convention on Transfrontier Television (ECTT).

They also introduce a requirement that a Ukrainian entity that intends to rebroadcast programmes of foreign entities that are not under the jurisdiction of the states that are members of the EU or parties to the ECTT may start rebroadcasting only if it has a license from the rights-holder and only under condition that such programmes (channels) correspond to the laws of Ukraine or to the ECTT and are included in the list of programmes (channels) that are permitted to be retransmitted by a decision of the National Council on Television and Radio Broadcasting. The amendments went into effect on 5 August 2015.¹¹⁴

3. In the same context should be viewed the law “On condemnation of the Communist and Nazi totalitarian regimes in Ukraine and banning of propaganda of their symbols” adopted by the Supreme Rada on 9 April 2015 and promulgated by President Poroshenko on 15 May 2015.

The law criminalizes public denial of the activities of these regimes and bans all related symbols, except for restricted educational or scientific purposes. Violation of the law carries a penalty of potential termination of activities of media outlets and prison sentences for up to 10 years.

In particular, the law amends the law of Ukraine “On Television and Radio Broadcasting”, by adding a norm that bans broadcasters from disseminating audiovisual works that “deny or justify the criminal nature of the Communist totalitarian regime of 1917-1991 in Ukraine, the criminal nature of the National-Socialist (Nazi) totalitarian regime, create positive images of persons who held administrative positions in the Communist Party (secretaries of the district committees and up) or top positions in the governing and executive bodies of the

¹¹⁴ Про внесення змін до деяких законів України щодо особливостей трансляції (ретрансляції) реклами, яка міститься у програмах та передачах іноземних телерадіоорганізацій. Law of Ukraine of 14 May 2015, N 422-VIII on amending some laws of Ukraine as to particularities of transmission (retransmission) of advertising in programmes of foreign TV broadcasters, published on the official website of the Supreme Rada on 5 June 2015.

USSR, the Ukrainian SSR, other Union and autonomous Soviet republics (with an exception of instances related to development of Ukrainian science and culture) and those who worked at Soviet state security agencies.” The ban also prohibits justifying of the activity of such agencies, as well as justifying “the establishment of Soviet power on the territory of Ukraine or its parts and purges of Ukraine’s independence fighters in the 20th century.”¹¹⁵

4. The amendments into the Statute of Ukraine “On TV and Radio Broadcasting” adopted by the Supreme Rada on 3 September 2015 that introduce a blanket ban on ownership or participation in television and radio entities and multiplex and cable operators for natural persons and legal entities that are residents in a country recognized by the Supreme Rada as an aggressor-state or an occupying state. The amendments went into effect on 1 October 2015 and within six months the subjects of this statute shall provide first reports on their property ownership and control.¹¹⁶

5. The Ministry of Information Policy of Ukraine recently drafted an Information Security Concept for the country. In July 2015 the OSCE Representative on Freedom of the Media presented a legal analysis of the document, commissioned by her Office. The Representative pointed to some issues regarding the draft.

“Despite the authorities’ legitimate concerns regarding information security, certain provisions of the draft Concept could have a chilling effect on media and hinder its important watchdog role,” Mijatović said. The analysis, carried out by Dr. Katrin Nyman Metcalf, indicated several main recommendations based on international standards and OSCE commitments. They include a recommendation that the State will not be involved in creating media content or through regulation excessively influencing it. The draft Concept also shall not indicate that, in balancing freedom of expression against possible reasons for restricting this

115 Про засудження комуністичного та націонал-соціалістичного (нацистського) тоталітарних режимів в Україні та заборону пропаганди їхньої символіки (Statute of Ukraine “On condemnation of the Communist and Nazi totalitarian regimes in Ukraine and banning of propaganda of their symbols”). 9 April 2015. No. 317-VIII. Officially published in Holos Ukrainy daily on 20 May 2015, N 87.

116 Про внесення змін до деяких законів України щодо забезпечення прозорості власності засобів масової інформації та реалізації принципів державної політики у сфері телебачення і радіомовлення (Statute of Ukraine “On amendments to certain laws of Ukraine as to provision of transparency of property of the mass media and implementation of the national policy in the field of television and radio broadcasting”) of 3 September 2015, N 674-VIII. Published in Holos Ukrainy on 12.09.2015 — N 169. URL (in Ukrainian): <http://zakon4.rada.gov.ua/laws/show/674-viii>.

freedom, there should be a presumption of allowing restrictions.¹¹⁷

The Representative appealed to the authorities and made several public statements criticizing some of these and other initiatives and asking for careful consideration of the draft laws.¹¹⁸

117 Legal analysis of the draft Information Security Concept of Ukraine. Commissioned by the Office of the OSCE Representative on Freedom of the Media and prepared by Professor Dr. Katrin Nyman Metcalf, Professor at Tallinn Law School, Tallinn University of Technology, Independent Communications Law Expert. . July 2015. URL: <http://www.osce.org/fom/173776?download=true>; Press release of the OSCE Representative on Freedom of the Media, OSCE Representative welcomes transparent process to create policy document for information security in Ukraine, presents legal analysis. 22 July 2015. URL: <http://www.osce.org/fom/173971>

118 Press release of the OSCE Representative on Freedom of the Media, "New laws in Ukraine potential threat to free expression and free media, OSCE Representative says", 18 May 2015. Report by the OSCE Representative on Freedom of the Media "Media Freedom under siege in Ukraine" . 2014. URL: <http://www.osce.org/fom/118990?download=true>; Legal Analysis of Proposed Amendments to the Audiovisual Code of the Republic of Moldova. Commissioned by the Office of the OSCE Representative on Freedom of the Media and prepared by Professor Dr. Katrin Nyman Metcalf, Tallinn Law School at Tallinn University of Technology, independent Communications Law expert. July 2015. URL: <http://www.osce.org/fom/175681?download=true>. Press release of the OSCE Representative on Freedom of the Media, "OSCE media freedom representative calls amendments to Latvian criminal law potentially harmful to free expression, free media". 14 February 2014, URL: <http://www.osce.org/fom/111322> .

7. Self-regulation mechanisms

Of all self-regulation mechanisms in the OSCE area it is the Public Collegium on Media Complaints (PCMC), a national media council in Russia, which recently adjudicated two complaints on television programmes that are relevant to this non-paper.

The first case, regarding the weekly newscast of *Rossiya-1 TV*, the media council ruled on the complaint of its Ukrainian counterpart. In its decision, the PCMC refused to judge the programme in accordance with the standards of professional journalism, saying it was beyond this notion. The PCMC found it a sheer piece of propaganda that falls into all criteria of this genre. It stopped short of calling it “hate speech,” as claimed by the complainant, as it found no calls to violence.

This decision is quite remarkable as the media council on 13 February 2014 practically issued an early warning and formulated a set of “systemic features of propaganda.” They include:

- An “object” attitude of the “propagandist” to a subject, a specific person, social group, society at large;
- An intentional reduction of multidimensional phenomena to two-dimensional ones, coloured ones to black-and-white; narrowing of the field of a personal moral choice and responsibility for the choice;
- The existence of a clear aim, to be implemented as an outcome of the expected impact on the “object,” to follow a certain variation (or maintenance) of the “picture of the world” in his mind; ideally with translation of the “induced” beliefs into action and course of action;
- Consistent implementation of a set of tasks, each of which has no relation to the objectives and the basic functions of journalism (to inform, educate, and entertain);
- A targeted selection of facts that work for the tight “script,” an active use of misinformation, where useful and possible, a manipulation with facts, statistics, opinions, including expert ones, or a shift in emphasis where direct misinformation seems a “no-go”;

- An action in the logic of “the end justifies the means”; the use of means and methods that are mostly incompatible with values such as honesty, truthfulness, etc.
- A presence (detection, creation, modification) of an “enemy image”; introduction to the mass consciousness and keeping it in the division into “us” (the right ones with the true values, with real truth) and “them” (that possess a negative set of the same features);
- A formation of the belief in the moral justification of any act in relation to the “enemy,” including “internal enemies,” including potential enemies of such kind, including persons who are not loyal enough to the state institutions, to specific embodiments of the public authorities, to ideas or values, that are proclaimed as corresponding with the public interests and national traditions;
- A non-stop persuasion, a repeated sequence of the narration, examples, images; typically, an appeal to traditional values as the only constant in an unbalanced world, and therefore the “chief” in the hierarchy of values;
- An appeal mainly to the emotions and feelings, not reasoning;
- Playing on the fears, prejudices, phantom pains; an active use of stories about the atrocities and brutalities; a widespread employment of the method to report on cruelty and violence;
- Work under cover of journalism, a desire to play the role of a leading source of news;
- The formation of models for the media, including models of behavior, by designing situations to be discussed, shifting the focus of attention from zones to be in the shadow to the propaganda paradigms and virtual reality;
- The fabrication of the characteristics that provide reliability of information, including its sources;

- A construction of loyalty of the addressees of propaganda to the system of institutions and ideas that are served by the propagandist.¹¹⁹

It is important to note that the PCMC found then, in relation to a TV programme aired in December 2013, a situation when propaganda spreads and strengthens in the Russian media as an abnormal one. It called the professional community of journalists and media outlets to view it as a threat of reputation to bona fide journalism.

In the second case on propaganda, this time on NTV broadcasts, the PCMC reviewed a complaint regarding a public affairs programme, which reported from Perm's museum of the Gulag. The programme claimed, in particular, that the guides of the museum, sponsored with the US Agency for International Development money, promoted Ukrainian fascist nationalists, "while in Donetsk People's Republic followers of Stepan Bandera [embodiment of Ukrainian nationalism and the main historical target of Russian propaganda] bomb hospitals and shoot peaceful civilians."¹²⁰

The media council found in the NTV reports elements of a "synthetic" genre: a mix of straightforward propaganda with the so-called mockumentary whereby "pseudodocumentality" served as its basic element. Although the decision clearly stated a complete departure of the national broadcaster from the Russian standards of professional journalism, it also touched upon a legal aspect of the programme. PCMC said: "National airing of materials that openly contradict the fundamentals of civil society that are specified in the Constitution of the Russian Federation as national values shall not be considered an 'interior matter' of a federal TV channel."¹²¹

119 On the complaint of the Commission on Journalists' Ethics, Ukraine, regarding the programme Vesti nedeli of the TV channel Rossiya-1 and its anchor-man, Dmitry Kiselyov, triggered by the airing of a story on the "Ukrainian Assembly": Decision of the Public Collegium on Media Complaints N 98. 13 February 2014. URL: <http://presscouncil.ru/index.php/praktika/rassmotrennye-zhaloby/3007-zhaloba-na-vesti-nedeli-s-dmitriem-kisilevym-iz-za-osveshcheniya-evromajdana?showall=&start=9>.

120 On the complaint of the staff workers of NGO "Perm-36" triggered by broadcasting by the NTV TV channel of stories on "US sponsors Perm museum of 'nationalist martyrs' of Ukraine" and "Paid by US money the 'fifth column' praises Banderivtsi: investigation by NTV". Decision of the Public Collegium on Media Complaints, N 116. 22 January 2015. URL: <http://presscouncil.ru/index.php/praktika/rassmotrennye-zhaloby/4458-zhaloba-muzeya-perm-36-na-syuzhety-iz-chp-i-professiya-reporter-ntv?showall=&start=8>. In March 2015 the NGO which ran the museum filed for its closure as a result of mounting political pressure to change museum's profile or quit its work. URL: <http://www.perm36.ru/ru/novosti/novosti/724-ano-zakryvaetsya-rabota-prodolzhaetsya.html>.

121 Decision of the Public Collegium on Media Complaints No 116. 22 January 2015. URL: <http://presscouncil.ru/index.php/praktika/rassmotrennye-zhaloby/4458-zhaloba-muzeya-perm-36-na-syuzhety-iz-chp-i-professiya-reporter-ntv?showall=&start=8>.

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It is important to take note of the recent decisions of the Network of Organizations of Media Self-Regulation (SOMS) adopted in Tbilisi and Vienna. Currently SOMS is supported by the Council of Europe and comprises of the national press councils of Armenia, Azerbaijan, Belarus, Georgia, Moldova, Russia, Tajikistan and Ukraine.¹²² In Tbilisi, in July 2015, the representatives of SOMS decided that disputes related to propaganda in international affairs shall be taken by a special supranational commission of SOMS.¹²³ In Vienna, in October 2015, they adopted recommendations in relation to propaganda in the media and a format for the work of such a commission. They agreed to lay in the foundation of its work the set of “systemic features of propaganda,” developed in the above decision of the Public Collegium on Media Complaints in Russia.

¹²² Council on Information Disputes of Armenia; Press Council of Azerbaijan; Commission on Ethics of the Belarusian Association of Journalists; Charter of Journalistic Ethics of Georgia; Press Council of Moldova; Public Collegium on Media Complaints; Media Council of Tajikistan and Ukrainian Commission on Journalistic Ethics.

¹²³ URL: <http://president-sovet.ru/presscenter/news/read/2548/>

8. Position of the OSCE Representative on Freedom of the Media

Almost 40 years after the adoption of the Helsinki Final Act, Dunja Mijatović, the OSCE Representative on Freedom of the Media, has repeatedly had to call 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.

The Representative 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 journalists or their eviction from governmental press centres. She made it very clear to all OSCE participating States that censoring is not the way out. 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.

The Representative 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.

As an effective response, participating States should support and promote the existence and effective implementation of ethical standards by different media actors and invest in media literacy to empower citizens to make informed and sober choices. An understanding and respect for those standards by media actors, as well as transparency of the media, are essential to prevent and minimize the dangers of propaganda.

Today, as it was a century ago, state media is again the main vehicle of propaganda.

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.¹²⁴

Somewhat separately, the Representative has summarized her position on the issue of **blocking TV channels**. She has 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 has reminded the participating States of Article 19 of the International Covenant on Civil and Political Rights 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. She has pointed to the procedures in this regard that should make restrictions respected all across the region:

- 1) restrictions are adopted by lawful institutions, such as legislatures, in accordance with the rule of law;
- 2) an independent court system is in place.

She noted that in her opinion, at all times, and especially in difficult times, blocking is not the answer 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."

¹²⁴ Communiqué by OSCE Representative on Freedom of the Media on propaganda in times of conflict. 15 April 2014. URL: <http://www.osce.org/fom/117701>.

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 threat in societies with the dominant state-owned and state-controlled media which can be easily used to promulgate state propaganda. Participating States have been called to stop the information war and manipulation with the media. 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.¹²⁵

The Representative believes that the free transmission of television broadcasts, as stipulated in the Helsinki Accords, can be fully ensured only if the meaning and scope of the minimum restrictions imposed by the international law are clearly established. Television broadcasters must be able to know precisely the effects of the control carried out by the competent authorities of the state where they are established or the receiving state.¹²⁶

The Representative has made it very clear to the participating States that creating an environment for free expression is not easy when governments make it more difficult for journalists to report. The denial of entry to journalists based on a perceived bias by government officials is wrong – and runs counter to the express language of the Helsinki Final Act of 1975 which recognized the need for the authorities to facilitate international travel by media.¹²⁷

She explained her objections to imposing other restrictions, such as a ban on entry for Russian journalists or their eviction from governmental press centres. In the Helsinki Final Act, participating States agreed to improve the conditions under which journalists from one participating State practice their profession in other participating States. They, inter alia, committed to “ease, on a basis of reciprocity, procedures for arranging travel by journalists of the participating States in the country where they are exercising their profession, and to provide progressively greater opportunities for such travel, subject to the observance of regulations

¹²⁵ Communiqué by OSCE Representative on Freedom of the Media on blocking television channels. 27 March 2014. URL: <http://www.osce.org/fom/116888> .

¹²⁶ The OSCE Representative on Freedom of the Media Regular Report to the Permanent Council for the period from 28 November 2013 through 18 June 2014. URL: <http://www.osce.org/fom/119957?download=true> .

¹²⁷ Ibid.

relating to the existence of areas closed for security reasons.” The participating States also affirmed that “the legitimate pursuit of their professional activity will neither render journalists liable to expulsion nor otherwise penalize them.”¹²⁸

While respecting the sovereign right of participating States to control their borders, the Representative has serious concerns about undue limitations on such travel which affects the free flow of information and free media.

The media plays a vital role during the times of crisis and it can also play a positive role by obtaining information, improving the understanding of the situation between nations and preventing further escalation of tensions.

By arbitrary denying entry to journalists, governments are obstructing free media and the exchange of information.

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In a special communiqué the Representative encouraged participating States to fulfil their OSCE commitments and refrain from any steps to restrict the free flow of information. In addition, journalists negatively affected by denials of entry should be given the opportunity to appeal.¹²⁹

Propaganda, blocking television channels and denying access to foreign journalists to information in conflict zones were also subjects of the **round-table discussions** between Ukrainian and Russian journalists that have been held seven times since May 2014. Senior representatives from the *Independent Media Trade Union of Ukraine*, *National Union of the Journalists of Ukraine*, and the *Russian Union of Journalists* met in Vienna to discuss ways to improve professional standards and safety of journalists in the context of the crisis in and around Ukraine. These roundtables became the backbone of the “Two Countries - One Profession” process, a platform for the exchange of information, experience and opinions.

The Representative convened in June 2015 a major OSCE-wide **conference “Journalists’ Safety, Media Freedom and Pluralism in Times of Conflict”** in

¹²⁸ URL: <http://www.osce.org/mc/39501> .

¹²⁹ Communiqué by the OSCE Representative on Freedom of the Media on denial of entry of journalists from one OSCE participating State to another. 3 April 2014. URL: <http://www.osce.org/fom/117092> .

Vienna. This milestone event brought together some 400 journalists, diplomats and other officials, academics and focused in particular on measures to deal with propaganda for war and hatred and the information war. The Representative derived **recommendations** from the discussions that were endorsed by the representatives of Ukrainian and Russian media organisations that are part of the “Two Countries - One Profession” process. These recommendations included a set of tasks **to the OSCE participating States** aimed to eliminate hostile propaganda, in particular the responsibility to:

- Condemn propaganda for war and hatred that leads to violence and discrimination and take practical steps to eliminate it in the OSCE region in line with the Helsinki Final Act.
- Be cognisant that propaganda for war and hatred imposed on the media by governments or proxies contributes to the escalation of violence and discredits journalism as a profession that serves the public interest.
- Promote media plurality and free, factual and investigative journalism as the best antidote for propaganda.
- Be reminded that the dissemination of propaganda for war and hatred does not justify introducing new restrictions on freedom of expression and freedom of the media.
- Guarantee independence of media regulators, in particular when dealing with issues of hate speech, as well as licensing.
- Respect and support journalists and their self-regulatory bodies for prominently speaking out for integrity of their profession and against propaganda.
- Support media self-regulation instruments – including an efficient code of ethics and an independent media body – as the best option to promote responsibility and fair content.
- Promote ethical behaviour of the media professionals through an enabling environment beneficial to the high standards of the profession and its self-regulation.

- Stimulate and promote dialogue between journalists from the conflicting sides related to the safety of journalists and the standards of the profession.
- Promote media literacy across the OSCE region to help citizens make more informed choices about their sources of information.

Journalists and media organizations were, in particular, advised to:

- Adhere to a common understanding of the mission of their profession through a continuous dialogue among journalists reporting from all sides of the conflict and their self-assessment.
- Refrain from any engagement in propaganda and information wars.
- Promote self-regulation mechanisms that will properly and effectively address any use of hate speech in conflict reporting.
- Not take arms or sides in a conflict but fairly serve the public, duly respect human dignity and equal rights of all, as well as advance peaceful settlement of disputes.

Conclusions and recommendations

Today's world is more interconnected – culturally and economically – than ever. Real transborder dissemination of information is made possible due to modern technologies; international travel is affordable for many. Under these conditions, propaganda for war and hatred is effective only in environments where governments control media and tacitly support hate speech.

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-regulatory bodies in the media field may provide for an early warning in this respect. On the contrary, in a media system where the governmental broadcasters dominate the field and attempt to control the minds of the population through the typical set of “suppression, distortion, diversion and fabrication”¹³⁰ the menace is real.

War propaganda can be sustained 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 civil society critical of such policy, political attempts to isolate oppositional voices can lead to its success, at least in the short term.

If enforced in a judicial manner that is compliant with the rule of law, prohibiting propaganda for war and hatred assists and does not restrict free expression. Clear-cut definitions of the crimes and a solid basis in normative acts are needed. In practice, this is not the case.¹³¹ Courts struggle in their analysis of propaganda, hatred, incitement and war.

There is no logic in submitting a ban on propaganda of war and hatred to international norms on freedom of expression and freedom of the media. First, such propaganda is not a human right while its ban serves the human right to life and non-discrimination. International standards on freedom of speech take into account the damage that may be involved in using this freedom inasmuch as the ban on propaganda of war and hatred is called to prevent death and discrimination against humans. Second, an effective introduction of this ban is

130 Lumley, Frederick E. (1933) *The Propaganda Menace*. New York: D.Appleton – Century Company. Pp. 116-117.

131 Richter, Andrei. (2015b). *Legal Response to Propaganda Broadcasts Related to Crisis in and around Ukraine, 2014-2015*. *International Journal of Communication*. 9. Pp. 3139-3140.

a *duty* of governments, while some other limitations of free expression are just *permissible* under national law. Finally, the right to free speech is not designed to call for aggression, to spread hateful rhetoric that serves discrimination, enmity or violence.

“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.”¹³²

While the legal mechanisms to comply with Article 20 of the ICCPR remain important, legislation is only part of a larger **toolbox to respond to the challenges of propaganda**. This toolbox contains the following additional instruments:

1) As propaganda is especially dangerous when it dominates the public sphere and limits access to information, thereby preventing individuals from expressing and forming opinions and ideas, it is crucial to enforce media pluralism as an effective response that creates and strengthens a culture of peace, tolerance and mutual respect. Unhindered development of new technologies—including digital broadcasting, mobile communications, online media and social networks—should enable vast enhancement in the dissemination of diverse information.

2) Governments and political leaders should refrain from funding and using propaganda, especially when propaganda may lead to intolerance, discriminatory stereotyping or may incite war, violence or hostility. This includes steps to abolish the media run by the government or its proxies, abstain from sponsoring online trolls or engage in other covert media operations.

3) Public service media with strong professional standards should be strongly supported in their independent, sustainable, and accessible activity. An opposite line of action means corrupting the profession of journalism.

132 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>

- 4) Propaganda should be generally uncovered and condemned by governments, civil society and international organizations as inappropriate speech in a democratic world and in the profession of journalism. Governments and political leaders have a crucial role to play in speaking out decisively and promptly against instances of propaganda for war, of intolerant expression and instances of hate speech in the media.
- 5) The independence of the judiciary and media regulators should be guaranteed in law and in policy so that they do not serve political interests or be used to exploit restrictions on propaganda of hatred for curtailing dissenting voices and freedom of expression.
- 6) The root causes of propaganda for war and hatred should be dealt with a broad set of policy measures, for example in the areas of international and intercultural dialogue, such as the dialogue among journalists, intellectuals, and promoting media education and democracy based on peace, freedom of expression, pluralism and diversity. Citizens should be encouraged to express a range of views and information that embrace a healthy dialogue and debate. In addition, positive traditional values, compatible with internationally recognized human rights norms and standards, can also contribute to countering incitement to hatred and war.
- 7) National and international human rights and media freedom mechanisms, specialized self- and co-regulatory bodies, professional organizations and independent monitoring institutions should be enabled to foster social dialogue in a vibrant civil society and also address complaints about incidents of hateful propaganda. There is a need to boost the important work of regional human rights and media freedom watchdogs, such as the OSCE Representative on Freedom of the Media, as they advise and support national policies in this regard. They should be enabled to facilitate dialogue to foster peace and intercultural understanding and learning.
- 8) As only an informed, media-literate population can make rational and not emotional choices, strengthening educational programmes on media literacy and Internet literacy may dampen the flames that fire propagandists.

Governments should invest in such programmes, as well as facilitate media studies from the high school level.

- 9) Media self-regulation, where it is effective, remains the most appropriate way to address professional issues. Through self-regulation the media exercise their

moral and social responsibility, including counter-action to propaganda of hatred and discrimination. Ethical codes and self- and co-regulatory instruments should ensure that cases of propaganda are brought to the attention of the public. They must become a barrier to the negative stereotypes of individuals and groups being furthered by the media, raising awareness of the harm caused by discrimination. Journalist organizations, self-regulatory bodies and the owners and publishers of media outlets have the duty to take a serious look at the content they are producing. Propaganda does a disservice to all credible, ethical journalists who have fought for, and, in some cases, given their lives to produce real, honest journalism.

Selected Bibliography

- Bernays, E. (1928). *Propaganda*. New York, NY: Liveright. URL: <https://archive.org/details/Propaganda1928ByEdwardL.Bernays> .
- Bonello, G. (2012). Freedom of expression and incitement to violence. In: *Freedom of Expression: Essays in honour of Nicolas Bratza*. Casadevall, J. et.al. (Eds.). Strasbourg, France: Council of Europe. Pp. 349-359.
- Borajan, D. (2015). *Occasional papers: Facing up to Russia's information war in the Baltic States*. London, UK: Albany Associates. URL: <http://www.albanyassociates.com/notebook/2015/03/occasional-papers-facing-up-to-russias-information-war-in-the-baltic-states/> .
- Callamard, A. (2008). *Expert meeting of the links between articles 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. London, UK: ARTICLE 19. URL: <http://www.article19.org/data/files/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf>.
- Colliver, S. (1992). Hate speech laws: Do they work? In: *Striking a balance: Hate speech, freedom of expression and non-discrimination*. S. Colliver (Ed.). London, UK: University of Essex. Pp. 363–374. URL: <http://www.article19.org/data/files/pdfs/publications/striking-a-balance.pdf> ,
- Cortés, C. E. (2013). *Multicultural America: A Multimedia Encyclopedia*. Thousand Oaks, USA: Sage.
- Cotler, I. (2012). State-sanctioned incitement to genocide. In: *The content and context of hate speech: Rethinking regulation and responses*. M. Herz & P. Molnár (Eds.). Pp. 430–455. Cambridge, UK: Cambridge University Press. URL: <http://dx.doi.org/10.1017/CBO9781139042871.030> .
- Ghanea, N. (2008). *Articles 19 and 20 of the ICCPR*. Conference paper prepared for the UN HRC Expert Meeting of the Links between Articles 19 and 20 of the ICCPR, 2-3 October 2008, Geneva. URL: <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Seminar2008/CompilationConferenceRoomPapers.pdf> .
- Hampson, F. J. (2012). Freedom of expression in situations of emergency and armed conflict. In: *Freedom of Expression: Essays in honour of Nicolas Bratza*. Casadevall, J. et.al. (Eds.). Strasbourg, France: Council of Europe.
- Herpen, M.H. van. (2016). *Putin's Propaganda Machine: Soft Power and Russian Foreign Policy*. Lanham, US.: Rowman & Littlefield.
- Kearney, M. G. (2007). *The prohibition of propaganda for war in international law*. Oxford, UK: Oxford University Press. doi:10.1093/acprof:oso/9780199232451.001.0001.
- Lumley, F. (1933). *The propaganda menace*. New York, NY: D. Appleton—Century Company.

- McGoldrick, D. (1991). *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights*. Oxford, U.K.: Clarendon Press.
- McGonagle, T. (2011). *Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas*. School of Human Rights Research Series Volume 44. Cambridge – Antwerp – Portland: Intersentia.
- Mendel, T. (2012). Does international law provide for consistent rules on hate speech? In: *The content and context of hate speech: Rethinking regulation and responses*. M. Herz & P. Molnár (Eds.). Pp. 417–429. Cambridge, UK: Cambridge University Press. URL: <http://dx.doi.org/10.1017/CBO9781139042871.029> .
- Murty B. S. (1989). *The International Law of Propaganda: The Ideological Instrument and World Public Order* (New Haven Studies in International Law and World Public Order). New Haven, U.S.: Kluwer.
- Partsch, K. J. (1981). Freedom of Conscience and Expression, and Political Freedoms. In: *The International Bill of Rights. The Covenant of Civil and Political Rights*. Henkin, L. (Ed.). New York, US. Pp. 209-245.
- Nowak, M. (2005). *U.N. Covenant on Civil and Political Rights – CCPR commentary*. Kehl am Rhein (2nd rev. ed.). Germany: Engel.
- Pech, L. (2004). Balancing Freedom of the Press with Competing Rights and Interests: A Comparative Perspective. In: *Freedom of Expression*. Eoin O'Dell (Ed). Aldershot, UK.: Ashgate. URL: <http://ssrn.com/abstract=909507> . P.3.
- Pomerantsev, P., & Weiss, M. (2014). *The menace of unreality: How the Kremlin weaponizes information, culture and money*. New York, NY: Institute of Modern Russia. URL: http://www.interpretermag.com/wp-content/uploads/2014/11/The_Menace_of_Unreality_Final.pdf .
- Richter, A. (2015a). The relationship between freedom of expression and the ban on propaganda for war. In: *European yearbook on human rights 2015*. W. Benedek, F. Benoît-Rohmer, M. Kettemann, B. Kneihs, & M. Nowak, M. (Eds.). Pp. 489–503. Graz, Austria: Intersentia.
- Richter, A. (2015b). Legal Response to Propaganda Broadcasts Related to Crisis in and around Ukraine, 2014-2015. *International Journal of Communication*. 9, 2015. Pp. 3125–3145.
- Stratcom. (2014). *Analysis of Russia's information campaign against Ukraine*. Riga, Latvia: NATO Strategic Communications Centre of Excellence. URL: http://www.stratcomcoe.org/~media/SCCE/NATO_PETIJUMS_PUBLISKS_29_10.ashx .
- Timmerman, W. K. (2015). *Incitement in International Law*. Abingdon, UK-New York, US: Routledge.
- Whitton, J. B., Larson, A. (1964). *Propaganda: Towards Disarmament in the War of Words*. New York, US: Oceana Publications.

Верховский А. М. (2014). Уголовное право стран ОБСЕ против преступлений ненависти, возбуждения ненависти и языка вражды. Москва: Центр «Сова».

Пазюк А. В. (2015). Міжнародне інформаційне право: теорія і практика. Монографія / Київський національний університет імені Тараса Шевченка, Інститут міжнародних відносин. – Дніпропетровськ : «Середняк Т. К.».

Documents

Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. (2003). CETS No.: 189. 28.01.2003. URL: <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm>.

ARTICLE 19 Global Campaign for Free Expression. (2009). The Camden Principles on Freedom of Expression and Equality. URL: <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>.

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

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

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

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. URL: [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).

EU (European Union). (2015). Council decision (CFSP) 2015/432 of March 13, 2015 amending decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. *Official Journal of the European Union*. L 70/47, 03.14.2015. URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015D0432&rid=4>.

United Nations 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).” URL: <http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf>.

United Nations 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. URL: <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>.

ICCPR (International Covenant on Civil and Political Rights). (1966). United Nations General Assembly Resolution 2200A (XXI). UN Document A/6316, also UN Treaty Series 999, 171. Entered into force in 1976. URL: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> .

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

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

OSCE human dimension commitments. Volume 1, Thematic compilation. Warsaw: ODIHR, 2011. URL: <http://www.osce.org/odihr/76894> .

Rabat Plan (Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence). (2012). Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012. URL: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf .

United Nations Human Rights Committee (19th session). Geneva (July 29, 1983). General comment no. 11. *Prohibition of propaganda for war and inciting national, racial or religious hatred (Article 20)*. URL: <http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf> .

United Nations Human Rights Committee. (102nd session). Geneva (July 11–29, 2011). General comment no. 34. *Article 19: Freedoms of opinion and expression*. CCPR/C/GC/34. URL: <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf> .

ANNEXES

Communiqué by OSCE Representative on Freedom of the Media on propaganda in times of conflict

As the current crisis in and around Ukraine demonstrates, propaganda and deterioration of media freedom often go together to fuel a conflict, and once it starts they contribute to its escalation.

The need to stop propaganda is frequently being used as a reason for blocking and jamming television and radio signals or imposing other restrictions to freedom of expression and freedom of the media. Taking into consideration the broadness and vagueness of the term propaganda, and its direct link to political speech, its blank prohibition would violate international standards for the protection of free expression and free media.

To address these dangerous practices, the Representative issues this communiqué with 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.

Freedom of expression, particularly of political speech, is a vital right in a democracy and implies the existence of a plural and diverse range of voices. Shocking, disturbing and offensive content should be combated with counter arguments and debate. The best and most effective mechanism to neutralize the impact of propaganda is the existence of an open, diverse and dynamic media environment. Propaganda is dangerous when it dominates the public sphere and prevents individuals from freely forming their opinion, thus distorting pluralism and the open exchange of ideas. No matter how loud certain outrageous voices are, they will not prevail in a competitive and vibrant circulation of ideas. Rather than engaging in censorship, States should protect and promote free and equal access to the marketplace of ideas regardless of format and technology.

No one should be restricted from expressing a certain view. Instead States should ensure that different views have an equal chance to be presented. If propaganda amounts to incitement to hatred and violence, proper and proportionate measures may be applied using existing international and national human rights instruments. According to the OSCE commitments, in particular, the Copenhagen (1990) and Moscow (1991) Documents, only those restrictions that pursue a legitimate aim and are clearly defined by law are acceptable.

There are 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.

As an effective response, States should support and promote the existence and effective implementation of ethical standards by different media actors and invest in media literacy to empower citizens to make informed and sober choices. An understanding and respect for those standards by media actors, as well as transparency of the media, are essential to prevent and minimize the dangers of propaganda.

Today in the 21st century, as it was in the past, state media is the main vehicle of propaganda. As it is dangerous for peace and security, it should be transformed into true public service media or privatized.

Dunja Mijatović

OSCE Representative on Freedom of the Media

Vienna, 15 April 2014; URL: <http://www.osce.org/fom/117701>

Communiqué by OSCE Representative on Freedom of the Media on blocking television channels

Recently politicians, lawmakers and regulators in Ukraine have expressed concern about the influence of Russian television on information security or other national interests. These concerns are often followed by actions that effectively suspend or ban all or some programmes produced in Russia. In a similar development, de facto authorities in Crimea several weeks ago abruptly and brutally switched off almost all Ukrainian television channels and replaced them with channels originating from the Russian Federation.

While the OSCE Representative on Freedom of the Media has expressed her opinion on specific incidents in the recent weeks, she would like to summarize her position on the issue as a whole.

In the Helsinki Final Act, participating States agreed to be bound by and fulfil their obligations as set forth in the international declarations and agreements in the area of free expression, including international agreements on human rights.

According to Article 19 of the International Covenant on Civil and Political Rights (ICCPR), “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.”

However, the ICCPR also notes that this right carries special duties and responsibilities. It, therefore, may be subject to certain restrictions, but these shall 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.

If such restrictions are adopted by lawful institutions, such as legislatures, in accordance with the rule of law, and if the restrictions pursue a legitimate aim, and are necessary and proportional in scope, then they can indeed be recognized as appropriate.

An independent court system presents an appropriate venue to debate the restrictions to the right guaranteed by Article 19. A national court decision about the legality of such restrictions can be appealed and, in the case of many participating States, even challenged in the European Court of Human Rights as a violation of freedom of expression.

These are procedures that should be accepted and respected all across the region.

Arbitrary attempts to restrict media pluralism must be opposed. Media freedom is dependent on a healthy and vibrant and competitive media landscape which includes voices that provide a variety of news and views in different languages coming from different countries. At all times, and especially in difficult times, blocking is not the answer; more debate is.

At the same time I see a danger to media pluralism in the very existence of state-owned and state-controlled media as they can be easily used to promulgate state propaganda – the evil all international media-freedom agreements aspire against. Therefore, I use these opportunities

to call for the transformation of state media into public service broadcasters and private media across the OSCE region.

I call on all participating States to stop the information war, stop the manipulation with media and to ensure journalists' safety.

History has taught us more than once that limits on media freedom for the sake of political expediency leads to censorship and, when begun, censorship never stops.

As the OSCE Representative on Freedom of the Media I call on participating States to refrain from blocking media to avoid arbitrary and politically motivated actions which could impede the expression of alternative positions.

At the same time I recall 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 Budapest Document, Chapter VIII, paragraph 25, and in the Decisions of the Rome Council Meeting, Chapter X^[1].

Dunja Mijatović

OSCE Representative on Freedom of the Media

Vienna, 27 March 2014, URL: <http://www.osce.org/fom/116888>

[1] Decision No 193 of the Permanent Council. 5 November 1997. Establishment of the Office of the OSCE Representative on Freedom of the Media, Mandate of the OSCE Representative on Freedom of the Media.

Communiqué by the OSCE Representative on Freedom of the Media on denial of entry of journalists from one OSCE participating State to another

Over recent years the OSCE Representative on Freedom of the Media has reacted on a number of occasions when an OSCE participating States denied entry to journalists from other countries. Following recent instances where journalists from Russia were denied entry into Ukraine, as well as reports of de facto authorities in Crimea denying entry to a number of journalists crossing the border of the peninsula, the Representative would like to restate her position on this issue.

In the Helsinki Final Act, participating States agreed to improve the conditions under which journalists from one participating State practice their profession in other participating States. They, *inter alia*, committed to “ease, on a basis of reciprocity, procedures for arranging travel by journalists of the participating States in the country where they are exercising their profession, and to provide progressively greater opportunities for such travel, subject to the observance of regulations relating to the existence of areas closed for security reasons.” The participating States also affirmed that “the legitimate pursuit of their professional activity will neither render journalists liable to expulsion nor otherwise penalize them.”

Unfortunately, based on numerous examples, too many participating States are not honoring these words.

While respecting the sovereign right of participating States to control their borders, I have serious concerns about undue limitations on such travel which affects the free flow of information and free media.

Particularly worrying is the current situation related to the crisis in Ukraine. On several occasions I have addressed Ukrainian authorities and I also called on those responsible in Crimea to stop this unacceptable practice. Once again I call on all those responsible to consider their relevant policies and instructions and to stop using media and journalists for advancing their political agendas. They, instead, should facilitate the work of journalists from other countries and abstain from creating administrative obstacles to the entry.

The media plays a vital role during the times of crisis and it can also play a positive role by obtaining information, improving the understanding of the situation between nations and preventing further escalation of tensions. By arbitrary denying entry to journalists, governments are obstructing free media and the exchange of information.

I encourage participating States to fulfil their OSCE commitments and refrain from any steps to restrict the free flow of information. In addition, journalists negatively affected by denials of entry should be given the opportunity to appeal.

Dunja Mijatović

OSCE Representative on Freedom of the Media

Vienna, 3 April 2014, URL: <http://www.osce.org/fom/117092>

