

PROPAGANDA FOR WAR AND HATRED AND FREEDOM OF THE MEDIA

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Session 1 - Legal definitions and challenges to propaganda

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1. I focus on the relationship between laws on propaganda for war, incitement to genocide, hate speech and incitement to terrorism; and their relationship with human rights/freedom of expression (which includes the question of definition of key terms and legal certainty, and the important role of context in the assessment of such expressions).

Is criminal law always the solution for hate speech and propaganda? Even within European states, there are many different and shifting ideas.

2. When we talk about freedom of expression and propaganda for *war*, it is important to note that such propaganda is mainly issued by states themselves. However, freedom of expression is a human right that seeks to protect individuals *against* the state. So when expressions are issued by powerful parties such as states, freedom of speech arguably becomes a less important consideration. So it seems logical to conclude that such propaganda laws are really not so problematic in terms of freedom of expression. Yet there is a dilemma here: as the OSCE Representative on Freedom of the Media's non-paper states: '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.' But it is also in those environments when it is most difficult to counter by law. Especially by repressive/coercive forms of law. These forms of law are executed by state organs, and there is a risk that they will misuse it to suit their own interests.

3. So we have to be very careful with repressive laws on propaganda for war and hatred. First of all, they have a potential for misuse. They typically do not only target speech by state organs; journalists, activists and demonstrators can easily become targets. This is particularly apparent with the 'indirect incitement/glorifying terrorism' laws which are often used nowadays. Second, we have to keep in mind that speech is always context and that laws can and should never automatically exclude certain categories of speech from the protection of the right to freedom of expression, without providing for a contextual / proportionality test (see art. 17 ECHR). Even where the worst types of speech imaginable are concerned, such as incitement to genocide, assessing speech before a court is always a matter of context.

The prohibition of propaganda for war is very much a preventative law, which we can also see eg in the prohibition of incitement to genocide: we obviously want to prevent war, let alone genocide, at all costs. But the question is how effective such *coercive* prevention is, and what the side effects are.

4. Different types of speech restrictions are important here. They bring up some similar questions.

- Incitement to genocide (*international crime* ICC/ICTR/ICTY; Genocide Convention)
 - o Also: hate speech as form of persecution/crimes against humanity
- Propaganda for war (positive obligation 20(1) ICCPR)
- Incitement to terrorism incl. indirect incitement (positive obligation EU Framework Decision amending Framework Decision 2002/475/JHA on Combating Terrorism (2008/919/JHA) / Council of Europe Convention on the Prevention of Terrorism)
- Incitement/advocacy of hatred and/or discrimination (grounds: race/national descent; religion; sometimes also gender, political ideology, nationality, handicap, ...) (positive obligations 20(2) ICCPR, 4 CERD, EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (2008/913/JHA), Cybercrime Convention)
 - o Denying, glorifying, justifying genocide and other gross human rights violations: form of hate speech?
- Group defamation
 - o Blasphemy/defamation of religion: very controversial

Common problem: of definition. ‘Lex certa’ key principle of criminal law & human right. Offences on “propaganda,” “hatred,” “incitement” and “war” must give clarity, also in terms of breadth: always look carefully at what purpose the prohibition serves, and how the law should be formulated to achieve that goal. So a careful look is needed at how the law deals with intention /mens rea criteria, directness of the speech, and causation/potential harm requirements.

5. Rationale: incitement/advocacy of hatred laws are designed to protect against ‘negative imaging’: prevent other people from getting negative ideas about the groups concerned, which may eventually lead to violence or acts of discrimination. But, these can be distinguished from other types of hate speech laws (sometimes also called ‘group defamation laws’) that have as their ratio to protect the human dignity, protect victims themselves against threatening words or defamation or their sense of honour.

Incitement to genocide, propaganda for war and incitement to terrorism laws are generally meant to prevent future violence of different kinds. But it matters a lot how they are formulated: is the law formulated so as to punish expressions at a very early stage (expressions of a more indirect nature that may perhaps eventually lead to hatred and then violence, with many causal steps in between), or only expressions posing an imminent threat?

Incitement to genocide has sometimes been interpreted so broadly as to include hate speech. Yet it is important to differentiate these offences As incitement to genocide is an international crime raising international criminal responsibility, this is logically constructed in the most strict way.

6. As to propaganda for war in art. 20(1), there is no uniform definition (neither is there in national legal systems). This has been an important factor for states to make reservations. First, there is the question of what kinds of war are included. Art. 20(1) relates to waging aggressive war against another state; no civil wars or advocacy of right to self-defence / self-determination. On the one hand this raises the question whether such a strict scope it is still justifiable – think of incitement to war crimes or crimes against humanity outside this strict context. But on the other hand: can such a prohibition stifle the debate about the justifiability of humanitarian interventions (responsibility to protect)? And what about the ‘war on terror’ – does the prohibition create a risk that states will interpret it so as to clamp down on any radical or fundamentalist speech connected to terrorist movements and their goals? Is it possible to see propaganda as propaganda when you’re sympathetic towards its goals (eg ‘Western liberal values’ in order to invade Iraq) – how do we prevent such laws from being used in a partial manner?

In the Netherlands, a reservation was made to 20(1) ICCPR: the legislature feared that such a law would lead to judges being called upon to decide about complex questions like whether there is an aggressive war as prohibited by international law, and where the difference lies between propaganda and war reporting, ‘glorification’ in war films, etc. That could compromise the relationships with other nations; moreover, cases would be of a political character – it would often depend on one’s political ideology/outlook whether an expression would be viewed as war propaganda. Also, people would then try to initiate cases purely with the idea of making the judiciary speak out about the legality of a certain war. This reasoning may raise eyebrows today, as Dutch courts are regularly called upon to judge on exactly such issues in counterterrorism cases where legislation is very broad and reaches far into the preventive stage. The same is true of many states nowadays.

7. In legal doctrine, there are double messages about the breadth and scope of art. 20(1). On the one hand, it appears to be written for incitement of an imminence comparable to the Nazi campaigns. On the other hand it could also be taken to mean the phase before direct incitement, where a climate of hate is created among groups. Such a wider scope would bring up the question when someone is promoting/encouraging violence and when merely explaining motivations (eg agreeing with terrorist group’s final goal but not promoting their methods).

Propaganda, according to Nowak must consist of ‘intentional, well-aimed influencing of individuals by employing various channels of communication to disseminate, above all, incorrect or exaggerated allegations of fact. Also included thereunder are negative or simplistic value judgements whose intensity is at least comparable to that of provocation, instigation, or incitement.’ This is potentially very broad. The OSCE non-paper mentions issues like reducing multidimensional phenomena to simple issues, creating an enemy picture, inducing certain beliefs about the world, misinformation/manipulation of facts, repetition, appeal to emotions... Much thus depends on how such a prohibition is applied, because all of this is not black-and-white but rather a question of scale: many media misrepresent facts from time to time, human rights reporting also appeals to emotions (which can be a good thing). And who is going to decide what is ‘false news’ – journalists among themselves or state organs? The thing is not that we should thus not take any action

against war propaganda at all, but rather, that it is difficult to make this workable in criminal law. As the non-paper states, propaganda becomes detrimental to the freedom of the media when 'it is pervasive, massive and systematic': in such cases, a broad, holistic action plan is needed.

8. In order to be in line with freedom of expression, incitement offences should have clear requirements of both mens rea/intention and the directness/risk/potential result of expressions (Do they really have the potential to lead to war/genocide/terrorism/hatred?). This also depends on factors like speaker (and his/her authority) and the audience (what is their level of knowledge? Do they have access to other voices?). Context is key here. In criminal procedures on propaganda for war and hatred, there must always be a balancing act which involves the context of the expression. Context includes looking at an expression as a whole and at different reasonable possible interpretations (in light of the historical context and people's knowledge), but also at the external context (the security situation in the region concerned), and whether it concerns art, humour/irony.... Prohibiting propaganda for war and hatred can lead to 'hard cases', such as the question of prohibiting the distribution of Mein Kampf in present-day Europe.

The ICTR has also made it clear (with regard to the crime of incitement to genocide) that 'to determine whether a speech rises to the level of direct and public incitement to commit genocide, context is the principal consideration, specifically: the cultural and linguistic content; the political and community affiliation of the author; its audience; and how the message was understood by its intended audience, i.e. whether the members of the audience to whom the message was directed understood its implication.' (ICTR Trial Chamber, Prosecutor v Bikindi, 2 Dec 2008, par. 387) Indeed, expressions are not just passively consumed; receivers make different things of expressions, they reinterpret it and re-issue it in different ways. There is an element of persuasion between the words and the potential results. A challenge as regards propaganda for hatred is thus where to start prosecuting - there are many general prejudices and stereotypes that are subtly woven through our language. Because many films, books, jokes and other expressions can be said to contribute to such processes, prohibiting this whole range of expressions would severely restrict freedom of speech. In hindsight it is always much easier to see which expressions should have been prohibited and when.

Notwithstanding legal doctrinal arguments about the relationship between art. 19 and 20 ICCPR, in my opinion it would be very unwise to say that a certain category of speech is always beyond bounds and should be prohibited and not balanced against freedom of expression (as has happened with art. 17 ECHR – though nowadays the ECHR actually does seem to do some kind of proportionality test under that article as well...). It is not possible to say that such speech prohibitions are always automatically 'necessity in a democratic society', without a proportionality test.

Contextual factors can sometimes be exculpatory, but can sometimes also contribute to the conclusion that someone is responsible for incitement or hate speech. As the ICTR has noted, even direct incitement need not be in explicitly hateful language: words that seem neutral like 'go to work' had a very particular meaning in the Rwandan context of 1994.

9. A particularly important contextual element is the political and security situation in a certain region at a certain time; this we see also ECtHR case law on South-East Turkey. Whether incitement will 'succeed' depends on the tense climate already in place. In wartime, public debate does not operate as it should; countervoices are not easily available. The 'marketplace of ideas' (if we can say it exists at all) is not functioning if people do not feel safe anymore to express certain views. Moreover, when violent acts have already taken place there may be a higher risk that certain forms of speech will lead to new violence. Glorifying or justifying past or present violence is more serious during conflicts too, since its connection to future violence is closer than outside conflict.

10. All of these different challenges in interpretation already point to the potential for misuse. There are all too many examples of regimes that have charged journalists and political opponents with incitement laws, prohibiting legitimate dissent. Especially laws that have broad definitions regarding 'national security' and 'public order' are prone to misuse. Laws that are meant to prevent ethnic hatred are sometimes interpreted so broadly that any discussion of ethnicity is suspect; in countries where politics are divided among ethnic lines this can curb much political speech. Even if laws are meant to protect minorities they may be used against them, in favour of majority voices. Eg after England adopted a racial hate speech ban, one of the first cases where it was used was against black consciousness activist.

The risk of laws being applied to protect dominant groups against dissenters or minorities is now also apparent in the use of 'incitement/glorification of terrorism' laws. Past, present, future are intimately related in these laws: it is often thought that glorifying past 'heroic' actions or using symbols related to certain ideologies, or justifying past or current violence, may lead to more violence in the future. However, most of the time the conflicts underlying these debates are not so simple to put in black-and-white terms that you cannot glorify or justify anything. Eg the ECtHR's case law on South-East Turkey shows how such laws are used to silence debates about minority rights. Speakers may merely justify or sympathise with the goals behind the violence, without necessarily accepting or promoting that violence; criminalising a broad range of 'incitement' will stifle possibilities for non-violent protest and for discussion of how to act against dictators.

11. How to mitigate the risk of misuse? The practical application of such criminal laws is in the hands of states/prosecutors and eventually judges – hence the prime importance of independent judiciary and prosecution, as well as lawyers. But even then, there is a natural tendency to stifle speech coming from one's 'enemies' and not that propaganda which comes from the dominant groups in a society.

Eventually, freedom of expression is indeed our ally, as the OSCE's Representative on Freedom of the Media rightly states. Preserving a public sphere where there is room for countermessages is key. The role of state authorities in 'countermessaging' cannot be too direct, though, lest it becomes (regarded as) 'propaganda' in itself.