

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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On Propaganda for War and Contemporary International Law

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In reflecting on how international law, and lawyers, can contribute to a discussion on propaganda for war, hate speech, and freedom of the media, my main concern is that freedom of expression issues too often tend to be considered and analysed in isolation from the broader field of public international law. In a sense, and I am generalising somewhat but confident that this is an accurate reading, freedom of expression cases appear to be considered from the perspective of a sort of *lex specialis*, which is to say that once a case is labelled a freedom of expression issue, it is subject to a special body of law which overrides the general law. This tendency stems in part from the particular value placed on the idea of freedom of expression in liberal western culture, but also from the actual structure of the right to free expression and the permissible grounds for limitations as they are set out in human rights treaties.

There is also the fact that freedom of expression cases are intensely interesting to academics and to students of law. In their balancing of rights, and their engagement with the extreme elements of religion, culture, politics, and art, such cases are nearly always fascinating. Too often though they are isolated from the broader realm of public policy and of the overarching structure of international law. Too often the decisions in freedom of expression cases, even if objectively correct, can lead to charges of hypocrisy or double-standards – for example the European Court of Human Rights' diverging treatment of 'denial' cases involving the Holocaust and other genocides.

The OSCE's Representative on Freedom of the Media is to be commended for the quality of the non-paper on Propaganda and the Freedom of the Media, and on the broader streams of activity from which it draws. The subject of propaganda for war and its prohibition under international law has too often been overlooked or treated as an academic curiosity. Before further comment on this prohibition, the non-paper's emphasis on media literacy and education is to be welcomed and its recommendations in this regard to be amplified. As an educator of young adults I recognise the need for this while acknowledging how ambitious and difficult a project it presents. As an academic in the field of international law and conflict, I am also fully aware that exercising effective media literacy can seem like a full time job, but as a form of literacy can regularly be underestimated and too often be taken for granted.

The non-paper's emphasis on the function, role, and responsibility of journalists, particularly during armed conflict, is also something which too often is taken for granted. The experience of the war in Syria should be a grim reminder that, at least from the western perspective, the targeting of journalists from the early days of the conflict, and the difficulty which they faced in trying to do their job, likely contributed to the paucity of momentum in pushing for diplomatic and political efforts to effectively end the conflict. At a time when social media is heralded as providing so much opportunity for communication, we should recall that the skill, time, and energy required to decipher and understand Twitter or Facebook sources coming from Syria is far beyond the capacity

of most people, and that we still must rely on the professionalism and commitment of competent and free journalists.

On the prohibition of propaganda for war, and as noted in the non-paper, one must begin from the point that although states are generally enthusiastic in implementing legislation restricting speech constituting incitement to hatred and to violence, they continue to demur when it comes to the acceptance that international law requires the proscription of propaganda for war. The tendency is to cite supposedly insurmountable definitional quandaries – What is propaganda? What is war? – and to elevate a commitment to freedom of expression over any other concern.

Two factors need be highlighted in this regard. The first is when considering legislative responses to terrorism, and particularly to speech deemed supportive of terrorism, states have had little hesitation in adopting and implementing severe restrictions on freedom of expression, even absent any international, and frequently absent national definitions of terrorism. The UN's Counter-Terrorism Committee, in its monitoring role as to action taken to combat terrorism, has warned of negative consequences of such practices, not just regards enjoyment of human rights but in their potential for fuelling resentment. Cases such as *R v Mohammed Gul* (2013) and of *Miranda v Home Secretary* (2016) in the UK can be taken both as a warning about the threat posed by restrictions on speech classed as terrorism given the lack of an adequate definition of terrorism, and as a reminder of the key role courts can play in affirming the scope of journalists' freedom of expression.

In referring to contemporary state practice in prosecuting terror related speech even absent a definition of terror, the idea is not to suggest a similar approach be adopted with respect propaganda for war, but rather to argue that the notion that states cannot proscribe propaganda for war due to their commitment to free speech, does not stand up to scrutiny. The majority of western states have entered reservations declaring that they would not be bound by the prohibition of propaganda for war set out in article 20 of the International Covenant on Civil and Political Rights, a position which effectively neutered the efficiency of the provision since the adoption of the treaty. It appears that this is an example of the right to freedom of expression being perceived as a *lex specialis*, whereby efforts to make progress in tackling propaganda for war are isolated from the broader realm of public international law dealing with international peace and security, with the law on the use of force, and on matters of state responsibility. By this reckoning, the delinking of the narrow law on free expression, and the wide law and practice on war and self-defence, serves to ensure that the prohibition of propaganda for war is unjustifiably filed away as an unthinkable threat to free speech.

In drawing attention to the problem of propaganda for war, the non-paper makes a significant and welcome contribution to challenging this long-standing status quo. The timing is critical, since to reappraise the prohibition once must turn to the meaning of war in international law, and the nature of contemporary conflict and of third state interventions in civil wars, shows us that the definition of war in international law has rarely looked as uncertain. That said, international tribunals are developing an increasingly effective and useful jurisprudence on restricted and on criminal speech. The many judgments of the Rwanda Tribunal considering the role of radio and of music and print media in inciting to genocide, the Yugoslavia Tribunal's emphasis on propaganda activities (and even the suggestion in the Galic judgment that propaganda could itself be understood as constituting an act of terror), have been followed by significant accord being given to speech acts and propaganda in the, as yet limited, jurisprudence of the International Criminal Court. In the ICC Prosecutor's opening remarks at the start of the Gbagbo trial in January 2016 for example, she stressed how alleged crimes had been fuelled, and can be evidenced, by the accused's engagement in hateful rhetoric targeting

potential victims and political opponents. The Yugoslavia Tribunal is shortly expected to rule in the Seselj Case, where charges include responsibility for alleged war propaganda.

In suggesting that we take a broader approach in understanding where and how international law addresses free speech and propaganda, the hope is that the various strands of criminal law, human rights law, state responsibility, counter-terrorism, humanitarian law and so on, can each contribute to making progress in confronting the manifestations of propaganda and of hate speech and incitement, which after all, respect no disciplinary boundaries, and which appear everywhere in similar, seemingly inevitable guises.