

Legal Response to Propaganda Broadcasts Related to Crisis in and Around Ukraine, 2014–2015

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Keywords: freedom of expression, freedom of the media, propaganda for war, incitement to hatred, international standards, rule of law, national regulators, Russia, Ukraine, UK, Latvia, Lithuania, Moldova

The conflict in and around Ukraine in 2014–2015 has brought about the spread of propaganda for war and hatred, especially on television and on the Internet. Research on the national laws and resolutions made by courts and independent media regulators that adjudicated complaints on Russian TV propaganda in Latvia, Lithuania, Moldova, the UK, and Ukraine shows that the national courts and regulators made few references to international norms, resting, rather, on domestically developed standards. As a result, there was a lack of solid grounds for stopping, blocking, and banning programs emanating from Russian media. In particular, there was no clear line between propaganda for war and hatred, proscribed under international norms, and legally protected Kremlin interpretation of the events in Ukraine. The comparative analysis of case law attempts to provide a modern rationale for regulation of propaganda for war and hatred and through it to offer relevant recommendations.

Introduction

The year 2014 marked the 100th anniversary of the beginning of World War I. It is worthwhile to recall that the Austro-Hungarian ultimatum to Serbia, which precipitated the start of the hostilities, included a major demand to stop nationalistic propaganda, as it flared the existing controversies. The ultimatum also called for punishment for those in the Serbian civil and military service responsible for domestic as well as transnational (in Bosnia and Herzegovina) propaganda against the Austro-Hungarian monarchy (Kearney, 2007).

The conflict in and around Ukraine in 2014–2015, already viewed by some as a prologue to World War III, has invoked heated accusations and counteraccusations of a spread of propaganda for war and hatred. While there was significant criticism of bias in the Ukrainian and separatist media, the majority of observers pointed to the extremely troubling nature of the conflict coverage in the Russian media, especially on television. Of particular concern was a barrage of messages against what was labeled on Moscow TV as the “Kiev junta,” “fascist nationalists,” “extremists,” and “militants,” who, it was claimed,

¹ The analysis and opinions expressed are the author’s own and do not necessarily reflect those of the OSCE.

came to power as a result of a "coup d'état." These ugly characters were opposed by brave "people's governors and mayors," "supporters of federalization," and, finally, "local militia."² With time, the issue of Russian propaganda has entered the world of political and scholarly debate.³

This article reviews the legal environment in which this debate takes place. It organizes broader regional approaches by summarizing the legal details of the national statutes and case law in Latvia, Lithuania, Moldova, the UK, and Ukraine related to threats of propaganda as a useful doctrinal background to the conflict in and around Ukraine. I apply a comparative legal method for the analysis of the sources of law. This methodological approach provokes relevant sources that are often not observable if the focus is on individual legal systems. Comparative studies of legal systems in different post-Soviet societies allow examination of related legal norms and institutions. It can reveal the continuity and discrepancies of legal responses in various countries that, in a post-Soviet fashion, all claim to share common European values.

In comparing these norms and practices with international standards, the research builds on the work of scholars such as Callamard (2008), Colliver (1992), Kearney (2007), Lumley (1933), Nowak (2005), and Mendel (2012) in order to highlight the different perspectives on the issues and to emphasize the need for a more pragmatic approach to counteracting propaganda for war and hatred. This discussion is relevant to the communications discipline because the profession of journalism will increasingly be confronted with the threat that propaganda presents. Narratives about propaganda and its restrictions, already intense in the context of events around Ukraine, spike well in the current debate about ISIL's extensive and effective social media campaigns.

The importance of legal efforts to prevent wars and discrimination in relation to the values of human rights is widely known and clear enough: Modern history is abundant with examples of the fueling of aggression and the incitement of racism and intolerance giving rise to military hostilities, genocide, and crimes against humanity.

International law is a repository of the reflections on the interrelation of freedom of expression and obligations to stop war propaganda and hate speech. In the post-World War II world, the conundrum this represents is best exemplified in Articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR). Propaganda for war as well as calls for discrimination and violence based on nationality, race, or beliefs implicate abuses of core human rights stipulated in the ICCPR (1966, Article 20). These acts, which we put under an umbrella term *propaganda for war and hatred*, present assaults on 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" (ICCPR, 1966, Preamble). They destroy the rights and freedoms of the weaker parts of the population and humanity itself (Richter, 2015a). Propaganda for

² The most detailed analysis of the content in question was found in the deliberations of UK's Ofcom. See Ofcom (2014).

³ See, e.g., conference "The Menace of Unreality: Combatting Russian Disinformation in the 21st Century," October 2014, Legatum Institute, London. Retrieved from <http://toinformistoinfluence.com/2014/11/07/aar-the-menace-of-unreality-combatting-russian-disinformation-in-the-21st-century/>; Pomerantsev & Weiss (2014); Stratcom (2014); Borajan (2015).

war is usually framed as incitement to violence based on advocacy of national, racial, or religious hatred. Put in reverse order, an incitement to violence often leads to propaganda for war and war itself (Kearney, 2007). At the same time, propaganda for war and hatred should be distinguished from genocide, "the ultimate crime against humanity" (Cotler, 2012, p. 430) that includes public incitement to genocide.

Those who address the question tend to agree that responsibility for the prohibition of propaganda for war and hatred also falls on governments, not just the media and other private players involved.

There is no question that a resilient free media system is a necessary 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 coregulation bodies in the media field provide for an early warning in this respect. In contrast, in a media system where governmental broadcasters dominate the field and attempt to control the minds of the population through the typical set of "suppression, distortion, diversion and fabrication" (Lumley, 1933, pp. 116–117), its menace is real. And while powerful media corporations are able to use their own initiative and means to disseminate propaganda for war and hatred, 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" (Kearney, 2007, p. 9).

A key aspect of the debate on prohibition of propaganda for war remains the issue of whether the term should be limited to direct *incitement to war* or additionally encompass propaganda that serves as a means of preparation for a future war or to preclude peaceful settlement of disputes (Kearney, 2007).

The article examines modern approaches in the case law in the aforementioned five countries as it relates to Russian-made political TV coverage of the crisis in and around Ukraine. In most instances, the Russian channels are rebroadcast from pay-tv satellite platforms by local cable operators operating under their respective jurisdictions. By Russian channels, I am referring to programs provided by Moscow-based national broadcasters and, in the case of RT, international broadcasters.

Case Law: Lithuania

The constitution of the Republic of Lithuania (1992) 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).

While the criminal code of Lithuania (2000) does not include a crime of propaganda for war, it punishes public incitement of violence on grounds of "gender, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views or finances" by imprisonment for a term of up to three years (Article 170).

The Law on Information (1996) echoes the constitution (Constitution of the Republic of Lithuania, 1992) by prohibiting the media from disseminating information that

instigates war or 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, citizenship, language, origin, social status, belief, convictions, views or religion. (Article 19(1) (3))

In addition, the Law on Information (1996) prohibits dissemination of "disinformation and information which is slanderous and offensive to a person or which degrades his honor and dignity" (article 19(2)) and stipulates the right to suspend reception of foreign broadcasts in the following words:

Free reception in the Republic of Lithuania of television programs and/or parts of programs . . . 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 [Radio and Television Commission of Lithuania, or RTCL] if such television programs and/or parts of the programs . . . 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. (para. 11 of Article 34-1)

Such decisions of the national regulator, the RTCL, on suspension or annulment of broadcasts of particular programs need approval by an administrative court. On April 7, 2014, the RTCL obtained such an approval in relation to rebroadcasting of the program *Weekly News* by the *RTR Planeta* channel (an offspring of the Russian state broadcaster VGTRK) for three months (Vilnius District Court, 2014). In its decision (No. KS-59 of April 2, 2014), the RTCL found that this weekly review included nonobjective and tendentious information that justified violence against residents, military intervention in a sovereign state (Ukraine), and the annexation of a part of it, thus encouraging military activities and fomenting hatred between Russians and Ukrainians (as cited in NEPLP, 2014a).

In yet another decision, on January 7, 2015, the RTCL suspended for three months rebroadcasts of the program *The Territory of Misinterpretation* by *REN TV Baltic*, another Russian channel but licensed and regulated in the UK. This ruling (as cited in Vilnius Regional Court, 2015) was based on a finding that a broadcast, on November 19, 2014, disseminated biased and tendentious information about events in Ukraine and war-mongering and hate propaganda against Ukrainians and the legitimate Ukrainian government, as well as against EU and NATO countries that support the sovereignty and territorial integrity of Ukraine.

The Vilnius Regional Administrative Court reasoned that the program at issue

deliberately disseminated misinformation about the history of Ukraine and its relations with other countries, instigated hatred towards Ukraine and the Ukrainian nation, the United States of America, Poland, the Baltic States . . . The disseminated information was usually not based on any evidence, but the topics of reports, program participants, interviewees, experts and witnesses were chosen so that to illustrate and attest to the statements of the host as if they were incontestable facts, without giving the right to

reply or providing any alternative opinions for commenting on the events at issue.
(Vilnius Regional Court, 2015, p. 3)

The court found that the sanction was applied proportionally to the committed violation of Article 19(1) (3) of the Law on Information (Vilnius Regional Court, 2015).

In addition, observed the court, a host of the program, a deputy to the Russian State Duma, alleged that the Holodomor (or Ukrainian Famine of 1932–1933) was a fabricated story. In 1933, the Holodomor was recognized by the Lithuanian Parliament as a Soviet-inflicted mass murder of Ukrainians, therefore such denial, the court opined, presented dissemination of misinformation, which is banned by Article 19(2) of the Law on Information (1996) (Vilnius Regional Court, 2015).

The decisions on suspension related to particular broadcasts and not to full TV channels' programming. Nonetheless, the national regulator, aware of considerations put forward by cable operators on practical difficulties to monitor the exact timing of banned broadcasts in order to block them, agreed to suspend the TV channels completely.

Following a three-month suspension, these channels were duly reintroduced into the cable TV packages.

The RTCL continued following Russian broadcasts and found new violations, this time in the programs *Today* (November 23, 2014) by NTV-Mir, licensed and regulated in the UK, and *Sunday Evening with Vladimir Solovyov* broadcast on January 18, 2015, again by *RTR Planeta* (Delfi, 2015a).

In the latter case, the RTCL solicited the expert opinion from the Strategic Communication Department of the Lithuanian Armed Forces and not, as was the past practice, from a university or similar academic institution (Delfi, 2015b). This time, the RTCL did not go to the courts to affirm its decision but opted for the procedures stipulated by Article 3(2) of the Audiovisual Media Services Directive (AVMSD), part of European Union law. The procedures allow a member state to provisionally derogate from its commitment to observe freedom of reception if certain conditions are fulfilled. These conditions are met when a television broadcast comes from another member state; it should manifestly, seriously, and gravely infringe prohibition of incitement to hatred or rights of minors; the infringement is repeated within 12 months and persists; the broadcaster and the EU Commission were notified, and consultations with the transmitting member state and the EU Commission have not produced an amicable settlement.

So the RTCL attempted to start negotiating with *RTR Planeta* with the aim of avoiding further suspension of broadcasting. It informed the legal department of Sovtelexport, the distribution arm of the Russian state broadcaster VGTRK, which it wrongly took for the proper representatives of *RTR Planeta*, on its concerns about the content of the particular program (Vaitekūnas, 2015). The RTCL also communicated its concerns to the Swedish Broadcasting Authority, as it wrongly believed that the broadcaster was licensed and regulated in Sweden.

The RTCL decided, on April 8, 2015, to suspend rebroadcasting of the *RTR Planeta* channel for another three months, citing incitement to hatred “of the Russians against the Ukrainians and the new Government of the Ukraine, as well as EU and NATO states who support the choice made by the Ukraine” (Vaitekūnas, 2015, para. 2). The decision also affected rebroadcasts on the satellite platform (Delfi, 2015a). The EU Commission was duly notified of the suspension and confirmed that the measures were compatible with EU law.

Earlier, the RTCL’s position, affirmed by the court, was that though the broadcaster was formally licensed in an EU country (REN TV Baltic in the UK), its programs were produced in the Russian Federation and the EU company had no editorial control or influence over their content. Thus restrictions were supposedly directed against broadcasters that do not fall under the protection of the procedures provided in Article 3(2) of the AVMSD.

National Regulator: Latvia

The criminal law provides that a person, who commits public incitement of a war of aggression or of triggering military conflict, shall receive a punishment of up to eight years imprisonment (Criminal Law of the Republic of Latvia, 1998, Article 77).

The Electronic Mass Media Law of Latvia (EPPL) stipulates that the programs and broadcasts of the electronic media may not contain:

incitement to hatred or discrimination against a person or group of persons on the grounds of gender, race or ethnic origin, nationality, religious affiliation or faith, disability, age or other circumstances; incitement to war or the initiation of a military conflict. (EPPL, 2010, Article 26, paras. 3–4)

This law also provides that the broadcasters “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” (EPPL, 2010, Article 24, para. 4).

As to the national regulator—the National Electronic Mass Media Council of Latvia (NEPLP)—it shall ensure the freedom of reception and retransmission of programs from other states, unless they “manifestly, seriously and gravely” infringe the above provisions of Article 26 of the law (EPPL, 2010, Article 19(5), para. 1).

Unlike in neighboring Lithuania, decisions of the national regulator on suspension of broadcasts do not require approval by the courts. In 2014, the NEPLP received complaints that several Russian-language television channels contained broadcasts that promoted war and military conflict, included incitement to hatred and intentionally misleading information undermining the territorial integrity of Latvia. This was later confirmed in the report of the Public Consultative Council, a consulting body to the NEPLP (Andersone, 2014).

The NEPLP imposed several sanctions against Russian programs rebroadcast in Latvia. First came a decision taken on April 3, 2014, to prohibit rebroadcasting of *Rossiia RTR* in Latvia for three months. As a source of its ruling, the NEPLP referred to a public statement of the Latvian Security Police

that the way in which the Russian mass media are reflecting events in Ukraine must be seen as tendentious and in line with the opinion of the Russian political elite vis-à-vis these events. The one-sided description of the situation in Ukraine in these media reports creates the impression that fascist forces have seized power in Ukraine in an illegal way, and those who oppose them are fighting against fascism. Such reports are in violation of Latvia's security interests in that they split society both in terms of attitudes toward the situation in Ukraine, and on issues concerning Latvia's foreign and domestic policy situation. (NEPLP, 2014a, para. 4)

In its own assessment the NEPLP found the following:

While Russia was engaging in military aggression against Ukraine . . . officially claiming that this was being done to protect its compatriots, news and other broadcasts on *Rossiia RTR*, which fully belongs to and is controlled by the Russian state, contained war propaganda, also noting that the arguments used therein are often applied to Latvia, as well.

The broadcasts not only presented one-sided information, but also offered manipulated scenes as supportive resources for military aggression, thus positioning themselves as instruments of war. (NEPLP, 2014a, paras. 11.1–11.2)

After evaluating the stories "in context," the NEPLP established that news and other broadcasts from the channel carried incitement to war or military conflict, as well as to hatred for reasons of ethnicity and nationality; consequently, such broadcasts violated Articles 26.3 and 26.4 of the EPPL. For that reason, the NEPLP decided to limit illegal propaganda in Latvia by temporarily suspending the rebroadcasting of the news and current affairs programs by *Rossiia RTR* for three months beginning April 8, 2014.

When deliberating the sanction, the NEPLP looked at the experience in neighboring Lithuania. It took into account that the content of *RTR Planeta* in Lithuania and *Rossiia RTR* in Latvia was one and the same (NEPLP, 2014a). The suspension of exactly three months was explained by earlier precedents taken by the Lithuanian RTCL (see above) and a notion that this timespan would be sufficient for the distributors of *Rossiia RTR* to find a solution that would ensure that the content-related rules in the EPPL were not violated again (NEPLP, 2014a).

Although the sanction referred only to the news and public affairs broadcasts, the NEPLP took into account the fact that they were provided by *Rossiia RTR* at different times, which meant that their monitoring was all but impossible. The NEPLP also noted the opinion of telecom operators' associations that there is no practical solution to block just such types of programs. For these reasons, the NEPLP, like

its Lithuanian counterpart, concluded that the suspension on rebroadcasting must apply to the entire channel (NEPLP, 2014a).

The national regulator devoted a significant amount of argumentation to prove that this decision was appropriate and proportional, made in accordance with the law and necessary in a democratic society, and followed the constitution of Latvia as well as Articles 10 and 17 of the European Convention on Human Rights (ECHR).

In particular, the NEPLP acknowledged that by suspending the rebroadcasts it violated the right to freedom of expression of *Rossiya RTR*, although being a mere distributor of the VGTRK program the company did not enjoy special protection in this regard. The NEPLP opined, though, that in this case the public benefit of "not being subject to propaganda" outweighed the infringement of the broadcaster's rights. The public interest involved protecting audience from nonobjective and tendentious news and other broadcasts that called for war or a military conflict and incited hatred for reasons of ethnicity or nationality (NEPLP, 2014a, paras. 17.2–17.3). Freedom of expression includes duties and responsibilities, as stipulated in Article 10 of the ECHR, as well as Article 24(4) of the EPPL (2010).

Much later, on October 23, 2014, the NEPLP ruled against Latvian-based SIA First Baltic Channel (PBK) because of an administrative violation of EPPL that was committed during the broadcast of Moscow's First Channel main newscast *Time*. After evaluating broadcasts from February and early March 2014, the NEPLP opined that nonobjective information and a unilateral viewpoint were being expressed about events in Ukraine and applied a maximum fine of €3,600 to PBK (NEPLP, 2014b and 2014c).

According to publicly available information, following a three-month suspension, *Rossiya RTR* resumed regular daily operations.

Case Law: Moldova

The constitution of Moldova (1994) forbids "instigations to sedition, war, aggression, ethnic, racial or religious hatred, the incitement to discrimination, territorial separatism, public violence, or other actions threatening constitutional order" (Article 32 "Freedom of Opinion and Expression," para. 3). The criminal code of the Republic of Moldova (2002, Article 140) 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.

The Audiovisual Code (2006) provides objectivity rules as follows:

In order to ensure the observance of the principles of social and political balance, equidistance and objectivity within news and current affairs programs, broadcasters shall ensure that:

- a) Each news story shall be accurate;

- b) The sense of reality shall not be distorted by means of editing tricks, comments, wording or headlines;
- c) The principle of multi-source information shall be observed in cases of news stories covering conflict situations. (Article 7, para. 4)

The Audiovisual Code (2006) acknowledges for the audience “the right to comprehensive, objective and fair information” and tasks the national regulator, the Council for Coordination on Audiovisual (CCA), and the courts to safeguard the right, while “broadcasters shall ensure objective information of the public and favour a free formation of opinions (Article 10, para. 2, 5).” Finally, “in [the] case of violation of the legal regulations by broadcasters,” a suspension of the broadcasting license “for a certain period of time” is envisioned (Article 38, para. 1d).

On October 7, 2014, the CCA, following a complaint on the failure to the observance of the principles of political balance, equidistance, and objectivity in the newscasts of Russian origin, issued a decision that sanctioned several Moldovan companies that rebroadcast Russian newscasts and other programs (CCA, 2014a). In particular, Teleproiect was found to be an offender in relation to its functions as an affiliate of *REN-Moldova TV*, retransmitting in Moldova broadcasts of Moscow’s REN-TV.

The particular sanction was the result of a complaint by the nongovernmental organization APOLLO claiming that the newscast *Free Time* on September 9, 2014 was “misinforming and distorting the developments in Ukraine, presenting exclusively the viewpoint of the Donbas region separatists” (as cited in CCA, 2014a, para 4). The complaint recalled that an earlier monitoring report by the CCA of *REN-Moldova TV* found violations of the provisions of articles 7 and 10 of the Audiovisual Code.

The CCA agreed with the complaint and decided to suspend the right of Teleproiect to broadcast commercials for 72 hours, as this was a repeated violation of the law. Other offenders were fined in the amount of 5,400 Leu (or roughly US\$300) each.

Upon appeal of Teleproiect, the CCA confirmed its decision again, on November 5, 2014 (CCA, 2014b). Then Teleproiect complained directly to the court, and in December 2014, the judge—in order to secure the claim and avoid the increasing complexity of the case—ruled to grant the suspension of the CCA decision (Chisinau Court, 2014). The merits of the contested decision are still to be verified by the court.

National Regulator: UK

Under the Communications Act 2003 and the Broadcasting Act 1996, the Office of Communications (Ofcom), the communications regulator in the UK, is required to set standards for broadcast content, including on fairness of programs. Ofcom conducts investigations into alleged breaches of standards, as well as license conditions with which broadcasters regulated by Ofcom are required to comply.

In March 2014, Ofcom was alerted to two news bulletins by RT (formerly Russia Today), the channel that broadcasts in the UK on satellite and digital terrestrial platforms using a license held by TV Novosti. These complaints considered that RT's coverage of unfolding events in Ukraine as not duly impartial. In particular, the complainants objected to critical references being made about the interim Ukrainian government, including allegations of far right-wing influence on the new administration in Ukraine. In addition, Ofcom opted to monitor other news bulletins relating to events in Ukraine and identified two further bulletins, broadcast by RT in the same month, which raised issues warranting investigation (Ofcom, 2014).

The case was built on a possible breach of due impartiality prescribed by Section 5 of the Ofcom Broadcasting Code (Ofcom, 2013). In its ruling, Ofcom emphasized that there is no requirement for broadcasters to provide an alternative viewpoint on *all* news stories or issues in the news, or to do so in *all individual* news items or programs. It is also legitimate for news to be presented from the viewpoint of a particular state. In this regard, Ofcom recognized that RT, a Russian service, wanted to present the news from a Russian perspective. However, all news must be presented with due impartiality: that is, with impartiality adequate or appropriate to the subject and nature of the program. In particular, when reporting on matters of *major political controversy* and major matters relating to current public policy in news programs, broadcasters must ensure that they reflect a sufficiently wide range of significant views and give those views due weight (Ofcom, 2014).

When applying the requirement to preserve due impartiality, Ofcom took into account Article 10 of the ECHR. This article provides for the broadcaster's and audience's right to freedom of expression, which encompasses the right to hold opinions and to receive and impart information and ideas without undue interference by public authority. As the broadcaster's right to freedom of expression is not absolute, Ofcom in carrying out its duties must balance this right with the requirement in the broadcasting code to preserve due impartiality on matters relating to political controversy or current public policy. In reaching its decision in this case, Ofcom also sought an appropriate balance between ensuring the public is protected from material that may be considered harmful or offensive on the one hand, and the broadcaster's and audience's right to freedom of expression on the other. It concluded that RT failed to preserve due impartiality (Ofcom, 2014).

Case Law: Ukraine

The constitution of Ukraine (1996) stipulates that freedom of expression may be restricted by law for the specific purposes that include the interests of national security, territorial indivisibility or public order, and preventing disturbances or crimes (Article 34). It also specifies that among "the most important functions of the State and a matter of concern for all the Ukrainian people" is protecting the sovereignty and territorial indivisibility of Ukraine, its economic and informational security (Article 17). In addition, the criminal code of Ukraine (2001) 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 (Article 436). The Law on Information (1992) in Article 46 ("Inadmissibility to abuse right to information") stipulates that "information shall not be used to call for overthrow of 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.”

Finally, the Broadcasting Law (1993) forbids calls for war or 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 (Article 6, para. 2). It 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” (Article 73, para. 6, & Article 43); suspension of broadcasting for such reasons is not provided by the law.

Despite its popularity, Russian TV was pushed out of the Ukrainian market as early as 1992–1993. The last Russian channel, ORT, was transferred to a weaker frequency in 1995, and then, in 1996, it was replaced by its joint-venture broadcaster, Inter, which kept most popular programming of ORT (since then renamed as the First Channel) (Richter, 2002). Contrary to the expectations of the restrictions, Russian TV did not disappear in Ukraine but rather migrated to the cable and then satellite platforms, giving a boost to their development, notably in eastern and southern Ukraine.

Right after the change of government in February 2014, the National Security and Defense Council of Ukraine (RNBO), an advisory state body to the president, pleaded with the National Council for Television and Radio Broadcasting (NCTRB) to intervene to help prevent the spread of anti-Maidan propaganda in Russian rebroadcasts on cable systems. In response, on March 7, 2014, the members of the NCTRB, referring to the threat to the sovereignty of Ukraine, made a strong appeal to the cable operators to temporarily exclude from their packages particular Russian news and public affairs channels “until they bring their programming in line with the Ukrainian law” (Telekrytyka, 2014a, para. 1). Within a week, the appeal was voluntarily followed by 347 out of 703 existing cable operators (some of them “complied” by moving the Russian channels to their premium packages), with a notable exception of operators from the Crimea, Luhansk, Donetsk, and Odesa regions (Telekrytyka, 2014b). Although compliance with the decision even in the three latter regions was almost complete by early April, the situation reversed in June and July 2014 with the establishment of separatist authorities in Luhansk and Donetsk.

Against this background, there were three major cases raised by the regulator, which are still being reviewed in the Ukrainian courts. The first started on March 20, 2014, when the NCTRB filed a lawsuit in the District Administrative Court of Kyiv against “Torsat,” an affiliate company to Inter and the national distributor of several Russian channels (First Channel, RTR-Planeta, Russia-24, NTV-Mir). Although the distributor claimed that it had no authority to control programs of cable operators, the court ordered it to temporarily suspend the retransmissions until consideration of the merits of the lawsuit. The court pointed out that, unlike Ukraine, Russia has not ratified the European Convention on Transfrontier Television (ECTT), a Council of Europe’s instrument parallel to the AVMSD. Also, the defendant did not provide proof of the required (by the Broadcasting Law [1993]) “adaptation” of the programs it was distributing to the terms of the ECTT or of the law of Ukraine (District Court, 2014a).

With this decision in hand, the NCTRB began to annul one after another the licenses of the cable operators that continued to retransmit suspended Russian channels.

The court decision was appealed by each of the Russian broadcasters affected and separately by the Association of Russian Channels. The Appellate Court—in separate sessions and in two different chambers—confirmed the interim restrictive measure sanctioned by the lower court (Appellate Court, 2014a, 2014b, and 2014c) and explained the need to take the measure by

an imminent threat to violation of informational security of the state which is manifested in dissemination of malicious misinformation that incites ethnic hatred, attempts at the human rights and liberties, and may bring about irrevocable processes of violation of territorial integrity of Ukraine. (Appellate Court, 2014a, 2014b)

On May 6, 2014, the lower court at its fourth session on the merits of the case asked an expert institution to provide “a psychological and linguistic expertise” of the programs concerned and then immediately halted the proceedings until the report could be delivered. Among the five questions proposed for the expertise by the complainant, the NCTRB, and approved by the court were whether the broadcasts disseminated “incitement to war, aggression [or] their propaganda” and whether they contained “propaganda of exclusivity, superiority or inferiority of persons based on their religion, ideology, affiliation to a nation or a race, physical or economic status, social origin” (District Court, 2014b, Resolution).

This ruling was again appealed by the First Channel and the Association of Russian Channels, which demanded that the court order be reversed and the lower court consider the merits of the case without further delay. The Appellate Court concluded that such an expertise was indeed “an objective necessity” and its absence prevented the proceedings in the administrative case (Appellate Court, 2014d, para. 7). Furthermore, VGTRK and NTV appealed to the top court in the system of administrative courts, the High Administrative Court of Ukraine, which on September 1, 2014, declared that the complaints were ungrounded (High Court of Ukraine, 2014a).

Some of the decisions referred to monitoring of the channels’ content conducted by RNBO, as well as pleas by RNBO to the NCTRB. The typical offence claimed in its pleas was “propaganda and incitement to change constitutional order in Ukraine and its territorial integrity” (Appellate Court, 2014b, para 18).

On November 14, 2014 the expert report, ordered on May 6, was submitted to the lower court, and followed by resumption of the proceedings (District Court, 2014f).

The second case started in July 2014, when Vertikal-TV, the Donetsk-based national distributor of another Russian channel TV-Tsentr, was ordered by the NCTRB to suspend its retransmission until consideration of the merits of the lawsuit. The same District Administrative Court of Kyiv affirmed the order to Vertikal and also those cable operators that had contracts with it. Report on the monitoring of TV-Tsentr news and current affairs programs convinced the court that their core was

incitement of interethnic hatred, propaganda of exclusiveness, supremacy or inferiority of persons on the basis of their ideology, belonging to a particular nation. The above . . . testifies an imminent threat of informational security of the state, as expressed in dissemination of malicious disinformation that may lead to civil disturbances. (District Court, 2014c, para. 5–6)

The judgment was affirmed on appeal (Appellate Court, 2014e). Although the High Administrative Court of Ukraine agreed to review the case, its decision on the merits is still to be reached (High Court of Ukraine, 2014b).

Third, the national regulator filed a lawsuit over the Russian 24-hour business news channel RBK-TV and its Ukrainian distributor, Agenstvo Klas. The court agreed to suspend retransmission of RBK-TV until consideration of the merits of the case as it found evidence of violations of the law in the rebroadcasts of RBK-TV, in particular,

the dissemination of misinformation, in particular regarding the use by the Ukrainian Armed Forces of forbidden ammunition—phosphorus bombs—against civilian population, regarding purposeful bombardments by the Ukrainian Armed Forces of residential areas of Donetsk by means of air force, Grad and Smerch missile systems, in statements that those in Ukraine wish for the continuation of the war, thus funneling interethnic enmity, which may bring about even more large-scale hostilities in the east of Ukraine, leads to propaganda of aggressive actions, encroachment of territorial integrity of Ukraine. (District Court, 2014g, para. 15)

In January and February of 2015, the court decided to consolidate consideration of the merits of all three cases into one (with number 826/3456/14) thus once again extending the administrative procedures (District Court, 2015a, 2015b, 2015c). Next, on March 3, 2015, the court assigned an expert institution within the Ministry of Interior to provide expertise on the programs in the consolidated case and suspended deliberations in the case until its results are presented to the court (District Court, 2015d). The questions posed for the experts by and large reiterated those raised in the court ruling of May 6, 2014.

The consideration of the merits of the case has not yet taken place at the time of this writing.

Conclusions

Many of the doctrines discussed in this article were developed in the long period of consolidation in Europe after World War II, but also in moments during the Cold War. Article 20 of the ICCPR in particular is a Cold War artifact. It has been a slumbering article of the ICCPR for a half century. But conditions are returning in which societies will reexamine the necessity to use propaganda and their need to resist it. They are learning that 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 law enforcement agencies of civil societies critical of such policy, and political attempts to isolate oppositional voices make it successful, at least in the short term.

Far more needs to be done to understand the interconnection between freedom of expression and bans on propaganda for war. This article contributes to the process by examining how it is unfolding in and around Ukraine.

Having analyzed the decisions of the national regulators and the courts, we detect the following trends.

All the decisions are based on national constitutions and statutory law as affected by international commitments. They do not necessarily find a comfortable base there.

Although the law of all five countries involved bans censorship and stipulates, in very strong words, freedom of expression and freedom of the media, it allows restrictions on hate speech. While some of the constitutions (Latvia, Ukraine) do not specifically mention propaganda for war, it is banned in relevant media statutes of Latvia, Lithuania, Moldova, and Ukraine.

Provisions on national security and its relatively new component, informational security, serve as a basis for decisions taken in Ukraine and Latvia. The actual threat of Russian aggression is a major factor in determining the level of danger of propaganda for war and hatred through Russian TV channels. It was particularly noted in decisions taken in Ukraine and Latvia (see Table 1).

Table 1. Arguments of Courts and Regulators in Decisions on Russian Propaganda.

Legal Arguments	Latvia	Lithuania	Moldova	UK	Ukraine
Propaganda for war	Yes	Yes	No	No	No
Hate speech	Yes	Yes	No	No	Yes
Threat to national security	Yes	No	No	No	Yes
Threat to territorial integrity	Yes	No	No	No	Yes
Misinformation/Bias	Yes	Yes	Yes	Yes	Yes

Provisions for suspension of retransmission of foreign broadcasts for a limited time are anticipated in the law of Lithuania, Latvia, and Moldova, though not in Ukraine or UK. Both in Lithuania and in Latvia, the courts subjected the Russian broadcasts to a provisional three-month suspension. In Moldova, the sanction was a suspension of advertising for three days.

In Ukraine, the courts have deliberated on the merits of complaints by the national regulator since March 2014, and such protracted deliberations in an administrative case seem to be caused by political rather than legal considerations. In particular, the courts might be expecting changes in legislation that will enable them to ban Russian channels with a firm basis in law.

Indeed, the lack of solid grounds and arguments in the courts to stop, block, and ban propaganda led governments to apply a more familiar instrument—drafting more restrictive legislation targeting, under different pretexts, Russian media and journalists. These efforts took place in Ukraine (Richter, 2015b, 2015c), Moldova (Kandu, 2015), Latvia (NEPLP, 2014b, 2014c), and Lithuania (Delfi, 2014). They were

supplemented by attempts to implement counterpropaganda, exemplified by establishing the Ministry of Information Policy of Ukraine in late 2014.

Among the international treaties the judicial and regulatory bodies most often invoked are the ECTT and its EU equivalent, the AVMSD. The latter was brought forward in Latvia and Lithuania to determine grounds for jurisdiction over Russian broadcasters who were registered and licensed in the EU countries. The logic referred to it in several judgments in Ukraine was that ECTT guaranteed its parties (in Article 4) respect of Article 10 of the ECHR, and as Russia was not such a party, this provision apparently did not apply (District Court, 2014a, 2014c, 2014d, 2014e). This is a highly dubious reason to discriminate against Russian media, as such an argument cannot be found in the ECTT. In addition, Ukrainian courts frequently used the argument of lack of "adaptation" of Russian channels to the ECTT rules and Ukrainian law.

As to the ECHR itself, it is referred to only in the carefully reasonable Latvian national regulator's ruling. The articles cited are 10 ("Freedom of expression") and 17 ("Prohibition of abuse of rights"). The NEPLP also noted six cases adjudicated by the European Court of Human Rights (ECtHR). These judgments, in the absence of hate speech provisions in the ECHR, referred to the issues of pluralism in public broadcasting, the need for journalists to observe professional ethics, and the general design of the ECHR to maintain and promote the democratic ideals and values.

None of the courts or regulators so far has made any references to the ICCPR, either Articles 19 or 20. This conclusion correlates with the results of a study of references to articles 19 and 20 in the hate speech case law of Canada, South Africa, Norway, and the United States (Ghanea, 2008). I believe this is caused by inconclusive interpretations of the meaning of Article 20 by the UN Human Rights Committee (UNHRC, 1983, 2011), as well as by a more convenient substitution of Article 19 of the ICCPR with Article 10 of the ECHR, a far more familiar instrument duly interpreted by the ECtHR.

At least several of the decisions of national regulators were instigated by state security agencies or were based on conclusions and monitoring of the content by these agencies, such as the secret police of Latvia, Ministry of Defense of Lithuania, RNBO, and Ministry of Interior of Ukraine.

The last peculiar aspect of the existing case law is what is not there: There are no known charges brought by the prosecutors against individual journalists or editors for the dissemination of hate speech banned under national criminal law. Indeed, there are travel sanctions against particular Russian journalists and media executives for their "actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine" and their role in "government propaganda supporting the deployment of Russian forces in Ukraine" but these accusations have not been validated by the courts (EU, 2015, para. (1) and Annex).

Prohibition of propaganda for war and hatred assists, rather than restricts, further enjoyment of freedom of expression, if enforced in a judicial manner that is complacent with the rule of law. Effective decisions should rely on clear-cut definitions of crimes and a solid basis in normative acts. So far the national practice in the countries studied fails to prove this is the case. The courts and national regulators

struggle in their analysis of propaganda, hatred, incitement, and war. In particular, the courts suffer distinguishing between illegal propaganda for war and hatred and propaganda of one-sided interpretation of the conflict. All these terms are somewhat raw, controversial, and infrequently parsed in the legal process. Does it depend on the context, or intent, or a combination of both to determine which category is relevant? In what circumstances can falsity or lack of due impartiality slide into propaganda for war? Do states only protect against propaganda for wars that involve their territory and statehood or is this a much broader concept? The current outbreak of propaganda raises many such questions to be decided in trials and deliberations to come.

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