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Limits of the Freedom of Speech: Propaganda Advocating Racism and Hatred Clear Obligations of European States

Abstract. The prohibition of “advocacy of national, racial or religious hatred” by modern international law demonstrates more than any other provision concerning mass media a response effected by the horrors of National Socialism. It is primarily conceived of a special duty by States to take preventive measures to enforce the principle of non-discrimination and the right to life. This provision seems nowadays of special importance all over Europe. After the revolutions in former communist countries in the 1990s the democratic governments and movements are searching for new approaches to guarantee individual freedom, peace and social justice. Freedom of expression plays a decisive role in these conditions. People have eagerly embraced this freedom, so long withheld from them, and are using it to express their democratic aspirations. At the same time, this newly won freedom of expression has being misused to disseminate fascism and racial hatred. In the Balkans terrible crimes against humanity were committed. “Ethnic cleansing” was one of the results of this misuse of the freedom of expression. But also in post WW II democracies—like in Germany—one can find books and papers with racist und neo-fascist propaganda, sometime distributed by international networks. The attempt of the German government to prohibit the right-wing “National Party of Germany” (NPD) shows that the politics try to undertake some action against neo-fascist activities and propaganda. This paper examines the legal basis for international prohibitions against media content advocating war, racism and fascism and shows the ways in which democratic countries have handled (or failed to handle) this thorny issue.

Keywords: civil law notary, notary public, civil law codification, Civil Code, civil procedure law, register, payment order, non-litigious proceeding, deed

The international legal standard

The United Nations Charter prohibits the threat or use of force and establishes universal respect for and observance of human rights. These principles have their application in the field of communication in three binding instruments of international law that prohibit warmongering, racist and genocidal media content. The 1948 Convention of the Prevention and Punishment of the Crime of Genocide makes punishable direct and public incitement to commit genocide. The 1966 International Covenant on Civil and Political Rights prohibits propaganda and advocacy of national, racial or religious hatred. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination makes punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race. At the European level also the European Convention on Human Rights is of relevance if media as used to infringe human rights. If mass media incite racial discrimination then they violate Article 17 of the convention which prohibits any activity aimed at the destruction of any of the rights set forth in the convention. Even if an international agreement does not contain an express obligation of member States to enact legislation, it is implicit in all human rights

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conventions that the States internal legal order must secure the rights expressed in those international law agreements.

Who is included under these prohibitions? *States themselves, including state-controlled or state-financed mass media* (for example, government broadcasting stations) are forbidden from disseminating war or racial propaganda. *Private media* are also included in this ban. The argument heard often is that international law does not apply to private media firms. However, Article 26 of the 1969 Vienna Convention on the Law of Treaties emphasizes that states have general obligations in the sphere of international law which they cannot evade by pointing to domestic laws. The manner in which international law is enforced on private media is a matter of a state's sovereign decision-making; the point is that these measures must be promulgated. Private media must comply with the laws of the state in which they operate. If international law prohibits propaganda for racism, the state has an obligation to regulate the private media in this regard.

It is a well-accepted rule of international law that the only barriers to private dissemination of information across borders which States are responsible for ensuring under international law is the prohibition on incitement of violence against foreign States, genocide, and racist propaganda.

Prohibition of hatred propaganda versus freedom of opinion?

In the 1940s, these prohibitions were objects of considerable international debate. States party to the 1948 Genocide Convention had no reservations about making direct and public incitement to commit genocide punishable by law. But during the drafting of the 1948 Universal Declaration of Human Rights (UDHR), most delegates supported the US "free flow" position, that all ideas, regardless of their content, should be freely disseminated. The majority voted against including a clause prohibiting propaganda for racial hatred in Article 19 of the Universal Declaration of Human Rights. This famous article states:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interferences and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Despite this formulation, we must keep in mind that Article 19 does not guarantee absolute freedom of opinion and expression. All freedoms guaranteed by the UDHR are qualified by Article 29, which declares that freedoms necessarily carry with them a duty toward the community. Article 29 para. 3 asserts explicitly: "These rights and freedoms may in no case be exercised contrary to the purpose and principles of the United Nations."

In the 1960s, during the drafting of the 1966 International Covenant on Civil and Political Rights (ICCPR), the West once again insisted that the "free flow" doctrine meant that freedom of expression should also guarantee propaganda for racism. Article 19 of the ICCPR restates the UDHR formulation:

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."

But the majority of states agreed that there were certain kinds of information content that should be absolutely forbidden. Article 20 of the ICCPR declares:

- “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.”

Even Article 19(3) of the ICCPR goes on to qualify the rights to freedom of expression and opinion:

“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 provided by law and are necessary: (a) for respect of the right or reputations of others: (b) for the protection of national security or of public order, or of public health or morals.”

Thus, both the UDHR and the ICCPR demonstrate the incontrovertible link between freedom and responsibility. Freedom of expression goes hand in hand with a ban on certain communication contents. While the UDHR is implicit, the ICCPR is explicit—with one complication. Article 20(2) of the ICCPR implies that a *casual relationship must be established between media advocacy of racial hatred and actual carrying out of violent acts*. This leaves the clause open to varying interpretations since it is not always easy to provide evidence of this causal connection.

Sometimes the connection is unmistakable. Under present international law, German media of the time between 1933 and 1945 could have been punished for incitement to racial hatred. After World War II, the Nuremberg Tribunal tried, convicted and executed Journalist Julius Streicher, editor of the anti-semitic *Der Stürmer* newspaper. He was accused of “crimes against humanity” under the 1945 Charter of the International Military Tribunal. The Nuremberg judges interpreted “crimes against humanity” to include Propaganda and incitement to genocide. Based on a content analysis of articles from *Der Stürmer*, the judges found that causal connection and determined that Streicher had aroused the German people to active persecution of the Jewish people.

Another binding international legal instrument does not have the complicating factor of the ICCPR. The 1965 International Convention of the Elimination of All Forms of Racial Discrimination (Anti-Racism Convention) contains a sweeping ban on dissemination of any racist ideas, with no causal connection demanded. It also categorically outlaws all racist and neo-fascist organisations. In Article 4 of the Anti-Racism Convention, states party

“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 arts of, such discrimination and, to this end, *with due regard to the principles embodied in the Universal Declaration of Human Rights and Article 5 of this Convention* [Emphasis added] ... 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 all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

During the drafting of the Anti-Racism Convention, the question arose among the Western delegations: does not freedom of expression guarantee freedom even for the most abhorrent statements of racial hatred? In the end, Article 4 was included only on the condition that the additional “due regard clause” proposed by the US be accepted as well. Scholars summarize the prevailing thinking on this:

“The format of Article 4, which focuses primarily on protecting persons from racial discrimination, implies that in cases of conflict the balance between competing freedoms should be struck in favour of persons’ rights to freedom from racial discrimination.”¹

To conclude, then, these conventions enshrine in binding treaties basic indisputable principles of international law. The ICCPR and the Anti-Racism Convention, binding for more than 160 States, ban any form of racist propaganda. The Genocide Convention forbids direct and public incitement to commit genocide.

The implementation of the obligations differs

These principles enjoy near-universal respect. In today’s political environment, no politician or governmental leader would dare to oppose these principles. Yet the actual implementation and the enforcement of these enshrined principles has been irregular at best.

How do the various states parties to these conventions implement the bans in domestic law?

As previously mentioned, most western states opposed these prohibitions in the first place. Even after the conventions were adopted by the UN General Assembly, a variety of adherence patterns has become evident, particularly in regard to “reservations” and “statements of interpretation”. In general, international law allows a state to make reservations to a treaty that is to exclude or modify the legal effect of certain provisions of the treaty in their national application in that state. Reservations to treaties must receive the consent of other signatories. In contrast, statements of interpretation—deriving from the principles that contracting states should themselves interpret the convention which they conclude with one another—do not require such consent.

Let us now examine how different countries have enforced, or failed to enforce, the prohibitions against war, racial and genocide Propaganda.

The United States hesitated a very long time to ratify and implement international UN-human rights conventions. For years, the US Senate rejected human rights treaties on the grounds that they diminish basic rights guaranteed under the US Constitution: violate states’ rights; promote world government; subject citizens to trial abroad; threaten their form of

¹ Mahalic, D.–Mahalic, J. G.: The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. *Human Rights Quarterly*, 9 (1987) 1, 89.

government, infringe on domestic **jurisdiction-, and** increase international involvement. In 1988 the United States ratified and enacted into national law the Genocide Convention Implementation Act. After that it became illegal under US law for any group or individual to “directly and publicly incite another” to violate the 1948 Genocide Convention.

This is the only international human rights norm with media consequences to be incorporated into US law. There has been endless discussion in the United States about legal limits on the mass media. We sometimes hear views that “there can be no ‘free speech’ or ‘balanced news’ unless those who advocate racism and apartheid and, yes, war are also free to speak”.²

At the centre of the discussion is the question of how to reconcile the law with freedom of opinion and expression. The argument goes that the First Amendment supersedes any international legal restriction, even for such worthy goals as prohibiting racism and war. As a consequence, the American Civil Liberties Union even defends the First Amendment rights of such groups as the Ku Klux Klan, whose views are prohibited from media discourse in scores of countries. Consequently, President Carter signed ICCPR and the Anti-Racism Convention in 1978 and submitted them to the Senate for ratification with many reservations, among them one concerning rights to free speech. During the ratification procedure the Senate declared the following reservation:

“That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.”

Other countries have not been so hesitant. The Federal Republic of Germany (FRG) ratified both conventions without reservation. In contrast, Belgium has ratified and implemented both but has presented statements of interpretation concerning both articles. The United Kingdom is an illustrative example of these tensions between freedom and responsibility. The UK made a reservation to Article 20 of the ICCPR. Nothing in the UK law forbids propaganda for war as such. To this extent, the law falls short of the requirements, as many members of the Human Rights Committee have pointed out during dialogues on the UK’s periodic reports. The standard response was always that this propaganda is not a problem in the UK and that any problems which arise might be expected to be dealt with under the law of sedition or the Public Order Act 1986.

Britain made not a reservation but a “statement of interpretation” on Article 4 of the Anti-Racism Convention, namely, that further legislation would only be passed in Great Britain if compatible with other rights – especially the right to freedom of opinion and expression. Why the UK did this is difficult to discern since the statement is in principle merely a repetition of the “due regard clause” of that Article 4 itself. Therefore several members of the Committee on the Elimination of Racial Discrimination (CERD), the organ of the parties to the Anti-Racism Convention, rejected the claim.

The British case in the CERD revealed two things. First, British ratification and implementation of the Anti-Racism Convention did not necessarily mean the United Kingdom had overcome its original opposition to the prohibition of racist propaganda.

² *New York Times*, 27 Nov. 1978, A35.

Second, the case made the CERD adopt a clear position concerning the obligations of Article 4.

In 1972, the CERD adopted General Recommendation 1, which determined that a number of states parties had not passed any Legislation in accordance with the provisions of Article 4 of the Anti-Racism Convention. States were called upon to bring their domestic laws in line with the Convention. Already in 1980, after analyzing over 100 states' reports over 16 years, CERD reported that there were still some states parties who had failed to introduce the legislation called for in the Convention. The CERD once again endorsed its General Recommendation 1, pointed to the preventive effect of law in acts of racial discrimination and called on states parties to implement Article 4 in their domestic law.

An analogous experience occurred in the Human Rights Committee, composed of states parties to the ICCPR. When France ratified the Convention, it at first presented a statement of interpretation to Article 20(1), namely that French Legislation was already in accordance with the Covenant in this respect. France later wanted this to be considered a reservation. Non-compliance is as much a problem in the ICCPR as it is in the Anti-Racism Convention, for in 1983, the Human Rights Committee called on states parties to the ICCPR to

“adopt the necessary legislative measures prohibiting the actions referred to therein ... In the opinion of the Committee, these required prohibitions fully compatible with the right to freedom of expression ... the exercise of which carries with it special duties and responsibilities.”

Most states parties have complied with the Anti-Racism Convention, though the route implementation oftentimes has been circuitous. The Latin American states have been particular pace-setters. Ecuador incorporated Article 4 in its penal code almost verbatim and Brazil went so far as to make any incitement to racial prejudice punishable by law. Both Italy and Greece enacted laws in accordance with the prohibition on racist propaganda.

But many western states are lagging behind. Although Canada banned the public dissemination of racist ideas, no legislation was passed to ban private fascist and racist groups. British Legislation made a similar distinction. In Britain, dissemination of racist ideas is permitted as long as it does not incite racial hatred. Though this still contravenes Article 4 of the Anti-Racism Convention, it nevertheless represents some progress. Britain no longer claims that it has submitted a reservation, and has also reported that laws in accord with Article 4 were in the process of revision.

In 1985, the CERD renewed its appeal to the United Kingdom to bring its legislation in line with the Convention's obligations. The CERD criticised the British position in two ways: it said that Article 4 and freedom of opinion do not contradict one another. It also disputed that a state only has a duty to enact Legislation if there are specific problems in race relations. In the end, though, the CERD reported that progress had been made toward implementing Article 4 around the world.

The Anti-Racism Convention also bans organized groups from inciting racial hatred. In this regard subsection (b) of Article 4 qualifies subsection (a) to a certain extent. Using this as an excuse, most western countries have pointed to this provision in their attempt to avoid outlawing racist and fascist organisations. For example, in Canada the fascist “Western Guard Party” still operates. Some of its members have been charged with illegal possession of arms and some racist propaganda was seized, but the organisation was never actually banned. Over a number of years this “Party” had used public telephone services to warn “of

the dangers of international finance and Jewry leading the world into wars". The only result was that they were precluded from using the telephone services, in conformity with the express authority in the Canadian Human Right Act. The Human Rights Committee supported this preclusion because the "Party" seeks to disseminate through the telephone system opinions which clearly constitute the advocacy of racial hatred which Canada has an obligation under Article 20 (2) CCPR to prohibit.³

Many signatories have openly stated their intention *not* to forbid racist and fascist organisations. The Federal Republic of Germany, for instance, allows the "National Democratic Party of Germany" (NPD), the "National Assembly", and other neo-fascist organisations to operate freely. CERD criticised this non-compliance. Contrary to its obligations under the Anti-Racism Convention, Germany believes that banning the NPD is not a judicial issue but rather a question of political opportunism. The FRG admitted that 34 neo-fascist organisations exist in the country. At the same time it claimed that the neo-Nazi groups have slipped into political oblivion. This position has been accepted by CERD. It needed as long as the year 2001 after many racist attacks all over Germany that the German government decided to apply from the Federal Constitutional Court the prohibition of the NPD. It is the Federal Constitutional Court alone that decides on the unconstitutionality of political parties. Only applications can be made by the Parliament, the Federal Council or the government.

The United Kingdom violates its obligation to the Convention by allowing neo-fascist and extreme right-wing groups to operate freely. At the CERD, the British representative did not deny these groups' existence. He argued that such organisations were tolerated because they did not have a great following and that banning them would contradict freedom of opinion and expression. He did not answer whether such organisations would be banned if they did attract a mass following. The status of British compliance has not changed. Therefore the CERD expressed in 1996 again its concern over the British interpretation of Article 4: "Such an interpretation is not only in conflict with the established view of the Committee, ... but also amounts to a negation of the State Party's obligation ... to outlaw and prohibit organizations which promote and incite racial discrimination" (UN-Doc. CERD/C/304/Add.9).

In general, Western countries find it difficult to comply with the provisions of Article 4(b). Most do not deny that they are violating international law by failing to take judicial or administrative measures to ban racist or neo-fascist organisations. Instead, they ask for understanding regarding their domestic obligations. Clearly, states parties' obligation to Article 4 of the Anti-Racism Convention will remain a central issue in CERD.

On closer scrutiny, though, this argument of the freedom of opinion is faulty. When, for example, Iceland's representative to the Human Rights Committee maintained that prohibiting of racist propaganda would violate freedom of expression, some committee members asked him to justify that country's ban on tobacco and alcohol advertisements. He was not able to give an answer. In like manner, the United Kingdom refused to withdraw its reservations to Article 20(1) of the ICCPR when called upon to do so by the Human Rights Committee. The government maintained that propaganda posed no problem for the United Kingdom and that there was no need to adopt legal measures banning it.

³ Manfred Nowak, CCPR Commentary, see supra note 1, 367. Nowak, M.: *U.N. Covenant on Civil and Political Rights. CCPR Commentary*. Kehl, 1993; UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll – CCPRKommentar, Kehl-Straßburg-Arlington, 1989.

Also the newly democratic States in Europe like Croatia have some problems with the prohibition of hatred propaganda and racist organizations, especially after civil wars. Therefore the CERD articulated in 1999 concern at incidents of hate-speech directed at the Serb minority in Croat media and the failure of the State party to take adequate measures to investigate and prosecute those responsible for promoting hatred and ethnic tension through print and audio-visual media. The CERD noted also with concern the lack of legal provisions required in order to implement to prohibition of racist organizations, because it is the absence of legislative measures declaring those organizations illegal which promote and incite racial discrimination (UN-Doc. CERD/C/304/Add.5).

Conclusion

There are still some gaps between international law standards and the practice on some States concerning hatred propaganda. But it is very important that we have nowadays a whole body of international law dealing with information and established clear prohibitions. Clearly, the concept of free expression as reflected in the human rights instruments is non-absolute and may be subjected to impairment in certain circumstances. These norms are binding to more than 150 States which belong to the Genocide Convention, the CCPR and to the Anti racism Convention. Some aspects of these conventions represent without any doubt customary international law. This is reflected by regional instruments. The American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Helsinki Accords each codify the right to free speech with specific limitations. However, it is true that one can observe some hesitation on the side of many States to implement all components especially of the UN-conventions in a correct way, because they are convinced that there are other ways to deal with racist propaganda. On the other hand there is an increasing public awareness worldwide and stronger involvement of the civil societies in the States. This gives hope that international law will be implemented in the future in more proper way.