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Richard B. Collins

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## Propaganda for War and Transparency

# PROPAGANDA FOR WAR AND TRANSPARENCY

RICHARD B. COLLINS<sup>†</sup>

*Any propaganda for war shall be prohibited by law.*<sup>1</sup>

## INTRODUCTION

Other papers in this Symposium Issue on Government Speech are based on the Supreme Court's categorical position that government speech is not restricted by the Free Speech or Free Press Clauses. Some papers have raised difficulties with that position, but the Court seems quite set.<sup>2</sup> This Essay turns to another source of regulation: international law. The section of the International Covenant on Civil and Political Rights (ICCPR) quoted above is meant to forbid both private and government advocacy of aggressive war.<sup>3</sup> I shall first outline the history of this provision, then analyze the difficulties it poses. Finally, I shall consider the standard American reply to speech restrictions, that the best answer to harmful speech is more speech. In the context of war propaganda, this requires consideration of government secrecy and efforts to counter it—that is, to promote government transparency.

## I. HISTORY OF COVENANT ON CIVIL AND POLITICAL RIGHTS ARTICLE 20(1)

Promotion of aggressive war is surely the most destructive form of government speech. Its use in pre-modern recorded history was documented by Hawaii's East-West Center in 1979.<sup>4</sup> Then World War I raised the stakes. War technology expanded the slaughter manifold.<sup>5</sup> At the same time communications technology spread war propaganda far more effectively.<sup>6</sup> The U.S. Government in particular entered the war when our largest immigrant population was from Germany and the Austrian Empire, and German was the foreign language most widely spoken and studied.<sup>7</sup> The Government decided that it needed to demonize the

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<sup>†</sup> Professor of Law, University of Colorado. LaKischa Cook, class of 2009, and Benjamin Schler, class of 2010, provided valuable research assistance.

1. International Covenant on Civil and Political Rights art. 20(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at <http://www2.ohchr.org/english/law/ccpr.htm>.

2. See, e.g., *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009).

3. See *infra* notes 46, 71, 106, 110 and accompanying text.

4. See 1 EAST-WEST CENTER, PROPAGANDA AND COMMUNICATION IN WORLD HISTORY (Harold D. Lasswell, Daniel Lerner & Hans Speier eds., 1979); see also JOHN B. WHITTON & ARTHUR LARSON, PROPAGANDA: TOWARDS DISARMAMENT IN THE WAR OF WORDS 12–30 (1964).

5. See Sheldon Hochheiser, *World War I Technology*, IEEE GLOBAL HISTORY NETWORK, [http://www.ieceghn.org/wiki/index.php/World\\_War\\_I\\_Technology](http://www.ieceghn.org/wiki/index.php/World_War_I_Technology) (last visited Apr. 21, 2010).

6. See WHITTON & LARSON, *supra* note 4, at 30–34; Arthur Larson, *The Present Status of Propaganda in International Law*, 31 LAW & CONTEMP. PROBS. 439, 440 (1966).

7. See John Simkin, *German Immigration*, SPARTACUS EDUCATIONAL, <http://www.spartacus>

enemy nations, particularly Germany, and it did so with stunning success. War posters featuring fearsome and bloody portrayals of “The Hun” became staples of poster art.<sup>8</sup> Cities and towns removed German place names.<sup>9</sup> Citizens anglicized German family names.<sup>10</sup> Local laws outlawed use of German words such as sauerkraut and forbade performances of music by Beethoven and Mozart.<sup>11</sup> Several states curtailed study of foreign languages or in one instance of German alone.<sup>12</sup> Of course all belligerents engaged in war propaganda, and some say greater skill in using it was important to the war’s outcome.<sup>13</sup>

American involvement in the war lasted such a short time that this propaganda blitz quickly faded. Soviet propaganda then replaced the war’s as a subject of concern.<sup>14</sup> During the 1920s, systematic study of propaganda for war began, led by Walter Lippmann and Harold Lasswell.<sup>15</sup> In 1927, Lasswell published his University of Chicago doctoral thesis titled *Propaganda Technique in the World War*.<sup>16</sup> In the 1930s, the Nazi regime and the Japanese Empire supplied fresh inspiration for study and analysis. International law theorists and the League of Nations began to discuss outlawing propaganda for war.<sup>17</sup> In 1931 the League commissioned a study of the use of radio broadcasts in the cause of peace. Two years later the League authorized preparation of a draft convention on propaganda and broadcasting. These initiatives generated the Convention on the Use of Broadcasting in the Cause of Peace, completed in 1936.<sup>18</sup> It required States Parties to forbid transmissions within their territories of incitements to wars of aggression. Many states ratified or acceded to the Convention, but they did not include Germany, Italy, Japan, the USSR, or Spain.<sup>19</sup> The United States was not a League member and did not participate in drawing up the Convention or ratify it.<sup>20</sup>

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.schoolnet.co.uk/USAGermany.htm (last visited Apr. 21, 2010).

8. See Anti-German Hysteria, *Birth of the Hun: The Propagandists*, <http://www.exulanten.com/hysteriaintro.html> (last visited Apr. 21, 2010).

9. Simkin, *supra* note 7.

10. *Id.*

11. Anti-German Hysteria, *Our Destroyed Heritage Continued: Goodbye Sauerkraut*, <http://www.exulanten.com/cr7b.html> (last visited Apr. 21, 2010); see also Simkin, *supra* note 7.

12. See *Meyer v. Nebraska*, 262 U.S. 390, 397 (1923) (holding one such law invalid); *Bartels v. Iowa*, 262 U.S. 404, 409 (1923) (holding two other laws invalid). Ohio had specifically targeted German. *Bartels*, 262 U.S. at 410 n.2. Two justices thought that made a constitutional difference. *Id.* at 412 (Holmes, J., dissenting and concurring).

13. See, e.g., WHITTON & LARSON, *supra* note 4, at 30–34.

14. See MICHAEL G. KEARNEY, *THE PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW 21* (2007), available at <http://0-www.oxfordscholarship.com.pacman.law.du.edu/oso/public/content/law/9780199232451/toc.html>.

15. See WALTER LIPPMANN, *PUBLIC OPINION* 24–29, 43–45 (1922).

16. HAROLD D. LASSWELL, *PROPAGANDA TECHNIQUE IN THE WORLD WAR* (1927).

17. See KEARNEY, *supra* note 14, at 24–28.

18. *Id.* at 28.

19. *Id.* at 30–31.

20. *Id.* at 31.

World War II of course increased awareness of the question of war propaganda. During the war, Professor Lasswell was Chief of the Experimental Division for the Study of War Time Communications at the Library of Congress. His office studied Nazi propaganda to understand the methods used to gain support of the German people for Hitler.<sup>21</sup>

After the war, issues about war propaganda arose in the war crimes trials in Tokyo and Nuremberg. As is well known, the trials were the first efforts to punish war crimes internationally. They also included the first efforts to punish war propaganda in particular.<sup>22</sup> The Nuremberg Charter was drawn up by the four convening nations, Britain, France, the U.S.S.R., and the U.S., so its legal pedigree was a blend.<sup>23</sup> Indictments of twenty-four Nazi leaders were drawn up and served. They stressed the central role of propaganda in war preparation, but the Charter did not state that propaganda or incitement alone constituted a crime.<sup>24</sup> Count One of the indictments alleged a common plan or conspiracy to commit crimes against peace. Count Two charged substantive crimes.<sup>25</sup>

A year later, the International Military Tribunal issued its judgments. They emphasized the importance of Nazi propaganda in the lead-up to war. The Tribunal considered the conspiracy to have begun with formation of the Nazi party in 1919.<sup>26</sup> Findings of guilt on the conspiracy count included references to war propaganda in several cases. These included prominent defendants Rudolf Hess, Wilhelm Keitel, and Alfred Rosenberg. Rosenberg in particular was found to have been chief ideologist of the Nazi Party. However, for these and others, guilt was also predicated on substantive crimes; references to propaganda were contributing factors.<sup>27</sup>

Charges in two other cases were based on pure speech. Julius Streicher was charged both with war propaganda and with being the chief propagandist promoting hatred and violence against Jews. He was acquitted of the former and convicted of the latter, based on his role as publisher and editor of a virulently anti-Semitic newspaper.<sup>28</sup> Hans Fritzsche was charged with war propaganda and anti-Jewish activities for his work in the Nazi propaganda ministry. The Tribunal acquitted him of all charges, finding that he had not been involved in direct incitement to war

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21. Harold Lasswell, <http://www.answers.com/topic/harold-lasswell> (last visited Apr. 21, 2010).

22. See KEARNEY, *supra* note 14, at 34.

23. *See id.*

24. *Id.* at 34, 37.

25. *See id.* at 34.

26. *Id.* at 36.

27. *See id.* at 38–39.

28. *See id.* at 40–42.

and that he had not been proved to know of extermination of Jews, but it assumed validity of the charges if proved.<sup>29</sup>

A later indictment of twenty-one more Nazis was tried as what is called the *Ministries* case. Charges against two of these defendants, Otto Dietrich and Ernst von Weizsaeker, were based directly on speech activities as war propaganda. The Tribunal decided that conviction required proof beyond a reasonable doubt that each defendant knew of Hitler's war plans. Both were acquitted for lack of sufficient proof of this element. But the judgments again assumed validity of the charges.<sup>30</sup>

The Tokyo Tribunal was almost a solo American effort, so its legal forms are more familiar to Anglo-American lawyers. The conspiracy count in the indictments looks like the common-law offense; it charged conspiracy to wage aggressive war.<sup>31</sup> Defendants were again accused of propaganda for war as part of the conspiracy count. Five of the accused were found guilty of conspiracy based largely on propaganda activities. Sadao Araki was found to be chief propagandist in preparing the Japanese people for war as early as 1928. Koichi Kido's guilt was based on his work as education minister.<sup>32</sup> A clearer instance of punishment for speech alone was the case of the twelve women who made propaganda broadcasts under the name of Tokyo Rose.<sup>33</sup>

Propaganda for war was also discussed in the newly established United Nations. Its 1948 Universal Declaration of Human Rights enshrined the right to freedom of expression with no specific exceptions.<sup>34</sup> But several General Assembly resolutions condemned war propaganda, and the draft Convention on Freedom of Information and the Press, first published in 1948, added a 1960 provision that condemned "incitement to violence and crime."<sup>35</sup> Other international treaties adopted in the post-war period made some reference to the question.<sup>36</sup>

Advocates for an international ban on war propaganda achieved success with adoption of the International Covenant on Civil and Politi-

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29. See *id.* at 42–45.

30. See *id.* at 48–49.

31. See *id.* at 50.

32. See *id.* at 50–52.

33. See Ann Elizabeth Pfau, *Miss Yourlovin: GIs, Gender, and Domesticity During World War II* ch. 5, (2008), <http://www.gutenberg-e.org/pfau/chapter5.html>; see also JUDITH KEENE, *TREASON ON THE AIRWAVES: THREE ALLIED BROADCASTERS ON AXIS RADIO DURING WORLD WAR II* pt. II (2009); *D'Aquino v. United States*, 192 F.2d 338, 347–48 (9th Cir. 1951).

34. Universal Declaration of Human Rights, G.A. Res. 217A(111), art. 19, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>. However, Article 2(4) of the U.N. Charter provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, para. 4, available at <http://www.un.org/en/documents/charter/chapter1.shtml>.

35. See KEARNEY, *supra* note 14, at 56–65.

36. See *id.* at 70–78.

cal Rights in 1966.<sup>37</sup> Its Article 19 is a typical modern guarantee of freedom of expression, subject only to restrictions necessary for “respect of the rights or reputations of others” or “for protection of national security or of public order . . . or of public health or morals.”<sup>38</sup> Article 20 adds two specific exceptions, the war propaganda provision quoted at the head of this article, and Article 20(2), which forbids “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>39</sup> In other words, Article 20 forbids warmongering and hate speech.

Article 20(1)’s supporters must be disappointed by the failure of some nations to agree to the provision and the failure of others to implement it. The article requires that “propaganda for war” be forbidden by law, so it requires action by acceding states. But it does not say what form a prohibition should take. Moreover, most of the debate during adoption of the Covenant related to warmongering by the press.<sup>40</sup> There was very little attention given to war propaganda by governments except where governments control the press.

The majority of nations that passed legislation directly responsive to the text of Article 20(1) were the U.S.S.R. and others in its former bloc.<sup>41</sup> This reflected national positions during the Covenant’s drafting and in prior General Assembly resolutions and other forums. These nations saw a rule against propaganda for war as a device to suppress internal dissent and to counter western media.<sup>42</sup> When the U.S. objected to the concept of a ban on propaganda for war, the Russians chided America as soft on aggressive war.<sup>43</sup> In agreeing to the Covenant, nations can make reservations and declarations, and the U.S. refused to agree to either part of Article 20.<sup>44</sup> The U.S. also forbade domestic enforcement and did not agree

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37. ICCPR, *supra* note 1; see also Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 32, 64–66 (Louis Henkin ed., 1981); DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 10 (1996). National agreements to the Covenant followed according to laws and politics of each state party. For example, the U.S. signed the covenant in 1977, and the Senate ratified it with extensive qualifications in 1992. HUMAN RIGHTS COMMITTEE, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT: INITIAL REPORTS OF STATES PARTIES DUE IN 1993, Annex III (1993), <http://www.state.gov/documents/organization/133836.pdf>.

38. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 437 (2d ed. 2005).

39. *Id.* at 468.

40. See KEARNEY, *supra* note 14, at 92, 101, 134, 142, 159, 167, 169.

41. See *id.* at 135–38.

42. See *id.* at 87, 95, 122.

43. See *id.* at 96, 100.

44. See NOWAK, *supra* note 38, at 479; HUMAN RIGHTS COMMITTEE, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT: INITIAL REPORTS OF STATES PARTIES DUE IN 1993, Annex III (1993), <http://www.state.gov/documents/organization/133836.pdf>.

to review of complaints by the U.N. Human Rights Committee.<sup>45</sup> A number of other western democracies balked at Article 20(1).<sup>46</sup> Still others made half-baked attempts at compliance. Forms of compliance dealt only with private sector warmongering.<sup>47</sup> No nation seriously addressed the concept of adopting a restraint on the government itself. A further disappointment is the paucity of scholarship on the provision.

Article 20(2), forbidding hate speech, has had a more robust life. It has generated substantial scholarship.<sup>48</sup> Many nations have passed legislation to curb hate speech.<sup>49</sup> But again these actions have outlawed private sector hate speech. No nation that engages in verbal persecution of minorities has curtailed these actions because of Article 20(2). Of course the two parts of Article 20 to some extent overlap because nations have used hate speech in campaigns to promote aggressive war.<sup>50</sup> Serbian propaganda against Bosnia is a grim example.<sup>51</sup> The problem also arises internally, as in Rwanda.<sup>52</sup>

## II. RELATED HUMAN RIGHTS TREATIES<sup>53</sup>

A commission established by the Organization of American States drafted the American Convention on Human Rights.<sup>54</sup> The Convention's Article 13 is its guarantee of freedom of expression.<sup>55</sup> Article 13(5) derives from its U.N. ancestor but with important changes:

45. On domestic enforcement, see Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 311, 321 (Louis Henkin ed., 1981); 138 CONG. REC. S4781-01, S4783 (daily ed. Apr. 2, 1992) (statement of Sen. Moynihan). On interpretation by the Human Rights Committee, see *infra* notes 97-106 and accompanying text.

46. See NOWAK, *supra* note 38, at 479.

47. See KEARNEY, *supra* note 14, at 139-41.

48. See, e.g., Stephanie Farrior, *Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1 (1996). Art. 20(2) substantially overlaps Art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. International Covenant on the Elimination of All Forms of Racial Discrimination art. 4, 660 U.N.T.S. 195 (Dec. 21, 1965), available at <http://www2.ohchr.org/english/law/icerd.htm>. The latter is more demanding by requiring criminal penalties for hate speech.

49. See Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1541-57 (2003).

50. Nazi Germany used its campaigns against Jews and others both internally and in its war aims. See *supra* text accompanying notes 21-30.

51. See KEARNEY, *supra* note 14, at 213-19.

52. See *id.* at 219-34.

53. In addition to the treaties reviewed in this section, propaganda for war is forbidden by the preamble to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, G.A. Res. 2222 (XXI), Annex (Dec. 19, 1966), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/2222\(XXI\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2222(XXI)), and by the Declaration on Principles of International Law Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Preamble, U.N. Doc. A/8028 (Oct. 24, 1970), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement>.

54. See KEARNEY, *supra* note 14, at 175-76.

55. *Id.* at 176.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.<sup>56</sup>

The U.S. opposed, on free speech grounds, an initial draft that tracked ICCPR Article 20 and persuaded the commission to adopt this “incitements to lawless violence” version that was deemed compatible with the First Amendment.<sup>57</sup> The Convention was approved and entered into force in 1978, but the U.S. has yet to agree to it.<sup>58</sup> The Convention established an Inter-American Commission on Human Rights and Court of Human Rights.<sup>59</sup> Both have opined extensively on Article 13 but have said almost nothing about part 13(5).<sup>60</sup>

The international human rights treaty in most active use is the European Convention on Human Rights. From its original ten signers, it has expanded to serve forty-seven States Parties including Turkey, Russia, and other former Soviet bloc nations.<sup>61</sup> The Convention’s Article 10 protects freedom of expression with the general exceptions typical in modern provisions, but it has none for war propaganda.<sup>62</sup> Like the American treaty, the European Convention establishes a Commission on Human Rights and the European Court of Human Rights that sits in Strasbourg. The Court’s active docket is shown by its 35,460 decisions in 2009.<sup>63</sup>

Although European Convention Article 10 lacks express exceptions from its free expression guarantee for war propaganda, a series of decisions from Turkey have sustained applications of a statute that forbids

56. Organization of American States, American Convention on Human Rights, Nov.22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>.

57. See KEARNEY, *supra* note 14, at 178–79.

58. *Id.* at 176, 183.

59. See Inter-American Court of Human Rights, Information History, <http://www.corteidh.or.cr/historia.cfm> (last visited Apr. 21, 2010); Inter-American Commission on Human Rights, What is IACHR?, <http://www.cidh.oas.org/what.htm> (last visited Apr. 21, 2010).

60. See KEARNEY, *supra* note 14, at 180–83.

61. Council of Europe in Brief, Who We Are, <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en> (last visited Apr. 21, 2010).

62. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 (2003), <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>. The text of Article 10.2 states:

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

*Id.*

63. See European Court of Human Rights Annual Report 2009, available at [http://www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/Annual\\_Report\\_2009\\_versionProv.pdf](http://www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/Annual_Report_2009_versionProv.pdf), at 137.

“propaganda . . . aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation.”<sup>64</sup> Thus the European Convention’s jurisprudence seems to allow prohibitions adopted to comply with ICCPR Article 20.<sup>65</sup>

Another discussion about banning propaganda for war arose in connection with drafting the Rome Statute for the International Criminal Court. The U.N. established its International Law Commission in 1947, and the Commission began to draft an international criminal code in 1950.<sup>66</sup> The process included detailed discussions aimed at forbidding incitement to war or war propaganda.<sup>67</sup> But no agreement was reached for adoption of the Rome Statute in 1998.<sup>68</sup> The statute asserts jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression. However, it defines and claims present jurisdiction over the first three but postpones jurisdiction over aggression until the crime is defined, and this has not yet occurred.<sup>69</sup> Debate leading to this stalemate was vigorous and complex.<sup>70</sup>

### III. ANALYSIS

Trying to forbid war propaganda encounters substantial obstacles. As is often the case, the problems begin with basic definitions. When should advocacy of war be defined as forbidden war propaganda? The history of Article 20(1) and its antecedents make it clear that the intent is to forbid advocacy of wars of aggression. Therefore defensive wars are not within the provision.<sup>71</sup> Modern conditions have generated claims of preemptive war as a justification and thus not a war of aggression. That distinction is difficult to define, but international law at least provides a procedure to try. To oversimplify somewhat, actions sanctioned by the U.N. Security Council are lawful, others are not.<sup>72</sup> By this metric, the

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64. See KEARNEY, *supra* note 14, at 185–88.

65. The African Charter on Human and Peoples’ Rights is another regional human rights treaty. African Commission on Human and Peoples’ Rights, African Charter on Human and Peoples’ Rights, [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html) (last visited Apr. 21, 2010). However, it lacks any reference to war incitement or propaganda, and its guarantees of free expression have not been interpreted in relevant ways.

66. See Statute of the International Law Commission, G.A. Res. 174 (II), U.N. Doc. A/519 (Nov. 21, 1947), available at [http://untreaty.un.org/ilc/texts/instruments/english/statute/statute\\_e.pdf](http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf); KEARNEY, *supra* note 14, at 193.

67. See KEARNEY, *supra* note 14, at 193–212.

68. See William A. Schabas, *The Unfinished Work of Defining Aggression: How Many Times Must the Cannonballs Fly, Before They Are Forever Banned?*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 123, 131–35 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004).

69. See KEARNEY, *supra* note 14, at 234–35.

70. See Schabas, *supra* note 68, at 123–41.

71. See U.N. Charter art. 51, available at <http://www.un.org/en/documents/charter/chapter7.shtml>; Nowak, *supra* note 38, at 473.

72. See U.N. Charter preamble (“to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest”), available at <http://www.un.org/en/documents/charter/preamble.shtml>; U.N. Charter ch. VII (“Action with Respect

2001 American invasion of Afghanistan was lawful, while the 2003 invasion of Iraq was not.<sup>73</sup>

Another basic issue is the intended scope of the word propaganda. The word itself originated in modern Latin to describe an office of the Catholic Church.<sup>74</sup> At times it has been used in a positive sense, for example, to describe William Wilberforce's campaign to outlaw the slave trade in the British Empire.<sup>75</sup> But its modern uses are almost entirely negative, implying deceptive advocacy of bad actions or policies.<sup>76</sup> Yet many uses involve issues of honest debate, and free expression is a fundamental value. Political rhetoric often calls legitimate opposing arguments propaganda.<sup>77</sup> So when does war propaganda depart from useful debate and become a reasonable target for legal restrictions?

Common-law legal systems have always held that conspiracy or incitement to commit a substantive crime can be punished.<sup>78</sup> But the right of free speech has required strict definitions of both conspiracy and incitement to avoid excessive suppression of expression.<sup>79</sup> Famously, American constitutional law restricts punishment of incitement to instances of clear and present danger of substantive harm.<sup>80</sup> This issue arose in the Tokyo and Nuremberg prosecutions. The counts based on speech and writings were couched as accusations of conspiracy to commit substantive crimes.<sup>81</sup> As related above, charges against some defendants were substantially based on their speech activities well beyond conspiratorial agreement.<sup>82</sup> But the judgments also relied on the success

to Threats to the Peace, Breaches of the Peace, and Acts of Aggression"), available at <http://www.un.org/en/documents/charter/chapter7.shtml>.

73. See Onder Bakircioglu, *The Right to Self-Defence in National and International Law: The Role of the Imminence Requirement*, 19 IND. INT'L & COMP. L. REV. 1, 40 (2009); Global Policy Forum, *UN Involvement in Afghanistan*, <http://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/afghanistan.html> (last visited Apr. 23, 2010); Global Policy Forum, *UN Role in Iraq*, <http://www.globalpolicy.org/iraq/political-issues-in-iraq/un-role-in-iraq.html> (last visited Apr. 23, 2010). For a thorough review of the legality of the Iraq war under international law, see DOMINIC MCGOLDRICK, FROM '9-11' TO THE 'IRAQ WAR 2003' 52-86 (2004).

74. See KEARNEY, *supra* note 14, at 3.

75. See William Wilberforce, *William Wilberforce: Encyclopedia of World Biography*, <http://www.encyclopedia.com/doc/1G2-3404706863.html> (last visited Apr. 23, 2010).

76. See WHITTON & LARSON, *supra* note 4, at 9.

77. See *id.*; Nowak, *supra* note 38, at 471-73; Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 209, 227-30 (Louis Henkin ed., 1981).

78. See Aaron Fichtelberg, *Conspiracy and International Criminal Justice*, 17 CRIM. L.F. 149, 149 (2006); Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 655-57. Incitement as a crime is essentially synonymous with solicitation. The latter term is generally used in American statutes, the former in international and British sources. Compare Model Penal Code § 5.02 (1985), with KEARNEY, *supra* note 14, at 195-200.

79. See Greenawalt, *supra* note 78, at 687-728 (discussing U.S. case law on solicitation); David B. Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189, 198-200 (1972).

80. *Brandenburg v. Ohio*, 395 U.S. 444, 450 (1969) (Douglas, J., concurring).

81. See *supra* notes 26-27 and accompanying text.

82. See *supra* notes 28-29 and accompanying text.

of the conspiracies. No one was punished for advocacy that did not achieve its aim.<sup>83</sup>

In the discussions and debates leading to adoption of Article 20 of the Covenant, representatives of the U.S. and other western democracies advocated limiting forbidden propaganda to incitement to wars of aggression, but these efforts lost out to the broader term propaganda.<sup>84</sup> Nevertheless, the history is murky enough to justify wording a compliance using the word incitement rather than propaganda. That would still leave a gap between the very strict American definition of incitement and broader usages elsewhere. Note that section 2 of Article 20 forbids only hate speech that constitutes incitement to discrimination, although that was nevertheless too much restriction on free speech for American agreement to it.<sup>85</sup>

American law has at times employed the word propaganda, and the experience illustrates difficulties in defining the word. In 1938 Congress passed the Foreign Agents Registration Act, which required agents of foreign governments who wished to disseminate "political propaganda" in the U.S. to register with the Attorney General and to identify the material with that label and to disclose the agency.<sup>86</sup> In 1987, a divided Supreme Court sustained the act against a First Amendment challenge.<sup>87</sup> But in 1995 Congress replaced the quoted phrase with the term "informational materials."<sup>88</sup> A 1948 statute forbids use of defense appropriations for "propaganda purposes within the United States not otherwise specifically authorized by law."<sup>89</sup>

If these difficulties are mastered, one reaches the daunting problem of trying to deter government propaganda for war. Private actors have promoted aggressive war at various times in world history. Religious authorities have done it, as have some modern press and broadcast voices.<sup>90</sup> But in modern times propaganda for war is largely about government speech.<sup>91</sup> It thus poses two of the most basic problems of interna-

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83. See *supra* notes 30–36 and accompanying text.

84. See KEARNEY, *supra* note 14, at 116, 120, 123, 126, 128.

85. See HUMAN RIGHTS COMMITTEE, *supra* note 44.

86. Foreign Agents Registration Act, ch. 327, 53 Stat. 631 (1938) (codified as amended at 22 U.S.C. §§ 611–621 (2006)).

87. *Meese v. Keene*, 481 U.S. 465, 467–69 (1987).

88. Act of Dec. 19, 1995, Pub. L. No. 104-95, 109 Stat. 700 (codified at 22 U.S.C. §§ 611, 614, 616, 618, 621 (2006)).

89. Smith-Mundt Act, Pub. L. No. 80-402, 62 Stat. 6 (1948) (codified as reenacted at 10 U.S.C. § 2241a (2006)). However, there is no record of attempts to enforce it. See Allen W. Palmer & Edward L. Carter, *The Smith-Mundt Act's Ban on Domestic Propaganda: An Analysis of the Cold War Statute Limiting Access to Public Diplomacy*, 11 COMM. L. & POL'Y. 1, 29–30 (2006).

90. See Robert Brentano, *Western Civilization: The Middle Ages*, in 1 PROPAGANDA AND COMMUNICATION IN WORLD HISTORY, *supra* note 4, at 552–90; WHITTON & LARSON, *supra* note 4, at 133–80.

91. For an extended discussion of the forms of government propaganda for war, see WHITTON & LARSON, *supra* note 4, at 62–132.

tional law. First, how can a government wishing to comply with Article 20(1) do so effectively? Second, what can be done about violators?

Consider the first issue under the U.S. Constitution. If Congress passed a statute that purported to limit war propaganda by the Executive Department, the statute's constitutional validity could be challenged on separation of powers grounds.<sup>92</sup> The issue would be related to the tortured history of the 1973 War Powers Resolution.<sup>93</sup> There is a chance that the courts would decline the issue under the political question doctrine.<sup>94</sup> Even if the merits were reached, the Executive could well win.<sup>95</sup> If instead the President issued an executive order forbidding incitement to aggressive war, it could be repealed or modified at the stroke of a pen. If the issue arose under a British-style constitution based on parliamentary sovereignty, a change of government would allow incoming authorities to disregard actions of prior parliaments.<sup>96</sup> Like problems are probable under other legal systems, although Finland has made a careful attempt to comply.<sup>97</sup>

Second, of course international law lacks any general system of direct enforcement. Interpretation of the Covenant is made primarily by the U.N. Human Rights Committee (HRC), which the Covenant established for that purpose.<sup>98</sup> On request of the Committee, the Covenant requires reports by States Parties detailing their compliance with it.<sup>99</sup> The Committee examines these reports, makes its reports and comments to the submitting States Parties, and makes an annual report of its activities to the General Assembly that in practice includes extensive commentary on reports by States Parties.<sup>100</sup> This process generates the most extensive interpretive commentary on the Covenant.<sup>101</sup> The Covenant also has procedures for a State Party to submit a communication to the HRC accusing another State Party of failing to fulfill its obligations under the Covenant and for conciliation of the dispute.<sup>102</sup> However, the HRC can receive

92. On judicial review of executive authority generally, see HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 79–92 (2006). There is in fact a statute that forbids use of defense appropriations for “propaganda purposes within the United States not otherwise specifically authorized by law.” See *supra* note 89 and accompanying text.

93. 50 U.S.C. §§ 1541–1548 (2006). See Michael J. Glennon, *The War Powers Resolution, Once Again*, 103 AM. J. INT’L L. 75, 78–79, 81 (2009).

94. See John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 306–08 (1993).

95. See Michael D. Ramsey, *Presidential Originalism?*, 88 B.U. L. REV. 353, 372 (2008).

96. See UK Parliament, *Parliamentary Sovereignty*, <http://www.parliament.uk/about/how/laws/sovereignty.cfm> (last visited Apr. 27, 2010).

97. See KEARNEY, *supra* note 14, at 166–71.

98. ICCPR art. 28, *supra* note 1, quoted in MCGOLDRICK, *supra* note 37, at 517.

99. ICCPR art. 40, *supra* note 1, quoted in MCGOLDRICK, *supra* note 37, at 519. For links to U.S. reports, see U.S. Department of State, U.S. Treaty Reports, <http://www.state.gov/g/drl/hr/treaties/index.htm> (last visited Apr. 27, 2010).

100. See MCGOLDRICK, *supra* note 37, at 79–88, 97–98.

101. See *id.* at 62.

102. NOWAK, *supra* note 38, at 753–86.

and act on a communication only if both complaining and accused states have consented to the procedure on the date of submission, and the procedure has had little use.<sup>103</sup> There has been much more activity under the Covenant's first Optional Protocol, which allows individuals to submit communications to the HRC for its review.<sup>104</sup>

The HRC has interpreted ICCPR Article 20 in decisions on communications under the first Optional Protocol, but these are few in number and have concerned only issues arising under Article 20(2).<sup>105</sup> Thus its only interpretations of Article 20(1) have been in reviews of reports by States Parties, which have often been empty generalities or evasions.<sup>106</sup> The HRC has objected vigorously, but its complaints have had few concrete achievements.<sup>107</sup>

The Covenant can also be asserted before the International Court of Justice and other forums.<sup>108</sup> But jurisdiction of these tribunals requires a defendant nation's consent.<sup>109</sup> Nuremberg-Tokyo style punishments are inflicted after military defeat. Thus coercive enforcement of Article 20(1) is extremely unlikely beyond special situations like the former Yugoslavia and Rwanda.<sup>110</sup>

However, in both domestic and international forums, the fact that international law condemns warmongering could be a powerful influence in argument. It gives opponents of aggressive war legal as well as moral high ground. Thus in an odd way, the value of Article 20(1) is mostly based on its use in international debate and discourse—an instance of more speech. One can argue that this is no value at all because condemning propaganda for war would be equally effective were there no international covenant forbidding it. In the shadowy world of events leading to war, this claim cannot be proved or disproved. Yet at the least the Article

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103. *Id.* at 753, 757–58.

104. See MCGOLDRICK, *supra* note 37, at 120–246. Neither the U.S. nor Britain has agreed to the Protocol, and many other nations have qualified their consent to review by the HRC. See UNITED NATIONS, TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&Mtdsg\\_no=IV-5&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&Mtdsg_no=IV-5&chapter=4&lang=en) (last visited 8 June 8, 2010). The Covenant's second Optional Protocol concerns the death penalty. See THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY 375–77 (Anne F. Bayefsky ed., 2000).

105. NOWAK, *supra* note 38, at 476–79.

106. See KEARNEY, *supra* note 14, at 142–73 (including reports that rely on reservations and declarations and HRC's response to them).

107. See *id. passim*.

108. See United Nations Treaty Collection, Ch. IV Human Rights: Optional Protocol to the International Covenant on Civil and Political Rights, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en) (last visited Apr. 27, 2010).

109. See, e.g., Cesare P. R. Romano, *Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts*, in PROGRESS IN INTERNATIONAL LAW 433, 440 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

110. On the latter, see Dominic McGoldrick, *Criminal Trials Before International Tribunals: Legality and Legitimacy*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 9, 22–24, 36–40 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004).

provides a clear and formal warning to defendants in a future Nuremberg or Tokyo trial.

#### IV. MORE SPEECH

Turning to the last subject, the U.S. and some other western democracies maintain that the proper response to propaganda promoting aggressive war is opposing speech and press, or for short, more speech.<sup>111</sup> How effective is this response in the context of a government's war propaganda? To what extent does the answer depend on effective government secrecy?

America's recent past gives us a fresh basis to evaluate these questions. The Bush Administration attacked Iraq after a sales job that can reasonably be called propaganda. The invasion's theory was preemptive war, but the supporting facts turned out to be false.<sup>112</sup> There is a debate over whether the Administration made innocent mistakes, but the "more speech" question is the same either way. All administrations keep secrets, but the Bush Administration kept more than most and strongly defended the right to do so.<sup>113</sup>

How successful were the press and other voices in countering the Administration's war propaganda? Many opponents of the Iraq war argue not very effective, accusing the press of timid and subservient behavior during the run-up to the invasion.<sup>114</sup> War supporters, on the other side, argue that the Administration's errors were innocent mistakes, and the invasion was supported honestly.<sup>115</sup>

A detailed study of the question makes a strong case to say that both views are wrong.<sup>116</sup> The Administration did engage in distortions that deserve to be called war propaganda. But the press did a good job in countering the Administration. Within a short time after the invasion, its false pretenses were unearthed and broadcast. Many Administration secrets were exposed, by leaks and otherwise.<sup>117</sup> A British observer concluded, "The arguments for and against the war in Iraq were extensively canvassed in [Security Council] debates, international fora, international

111. KEARNEY, *supra* note 14, at 104; *see also* NOWAK, *supra* note 38, at 479.

112. *See* MCGOLDRICK, *supra* note 73, at 97–98.

113. *See, e.g.*, Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491 (2007).

114. *See, e.g.*, SHELDON RAMPTON & JOHN STAUBER, *WEAPONS OF MASS DECEPTION: THE USES OF PROPAGANDA IN BUSH'S WAR ON IRAQ* 134 (2003); Chaim Kaufmann, *Threat Inflation and the Failure of the Marketplace of Ideas: The Selling of the Iraq War*, 29 INT'L SECURITY 5, 44 (2004).

115. *See, e.g.*, KARL ROVE, *COURAGE AND CONSEQUENCE: MY LIFE AS A CONSERVATIVE IN THE FIGHT* (2010).

116. Brian A. Patrick & A. Trevor Thrall, *Beyond Hegemony: Classical Propaganda Theory and Presidential Communication Strategy After the Invasion of Iraq*, 10 MASS COMM. & SOC'Y 95, 95–96 (2007).

117. *See id.* at 107–09, 115.

and national public debate and in legal challenges.”<sup>118</sup> Thus a reasonable case can be made that events in Iraq were reported more accurately and extensively than those for any other American war. More speech seems to have worked. Moreover, sunshine laws have made government more transparent in general, and technology has undermined governments’ ability to keep secrets and has made dissemination of revealed government information much more effective.<sup>119</sup>

#### CONCLUSION

Article 20(1) of the ICCPR is an odd provision indeed. It is almost completely ineffective as a coercive approach to forbidding war propaganda except to punish the minions of defeated nations after the fact. (For the latter purpose, it does provide formal legality.) However, it is a platform to criticize advocacy of aggressive war and to argue against it in the Security Council. A provision that the United States refused to adopt based on the argument that the right remedy for harmful speech is more speech has its practical utility as a voice in the pantheon of more speech.

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118. MCGOLDRICK, *supra* note 73, at 47.

119. See, e.g., the cautious optimism of Seth F. Kreimer, *Rays of Sunlight in a Shadow “War”*: FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency, 11 LEWIS & CLARK L. REV. 1141, 1143, 1164–65 (2007).