

## Propaganda for War & International Human Rights Standards

Evelyn Aswad

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# Propaganda for War & International Human Rights Standards

Evelyn Aswad\*

## Abstract

Shortly after Russia's illegal invasion of Ukraine in February 2022, the European Union (EU) began suspending Russian state-sponsored media outlets from broadcasting within the EU because they were spreading propaganda for war. The EU also required social media companies to remove user speech containing the banned broadcasts and prohibited search engines from displaying content from those outlets in search results. The EU's General Court upheld the outlets' suspension as consistent with both European human rights norms and the United Nations International Covenant on Civil and Political Rights (ICCPR), which contains a mandatory prohibition on propaganda for war in Article 20(1). The EU's outright ban and the General Court's decision have generated questions among governments, companies, and civil society about the meaning of ICCPR Article 20(1), a provision the international community has generally overlooked. This Essay unpacks the scope of Article 20(1)'s prohibition on war propaganda, providing an overview of existing interpretations and then proposing a way to reconcile the ICCPR's ban on propaganda for war with the treaty's otherwise broad protections for freedom of expression.

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## I. INTRODUCTION

Shortly after Russia’s illegal invasion of Ukraine in February 2022,<sup>1</sup> the European Union (EU) suspended Russia Today (RT) and Sputnik, two Russian state-sponsored media outlets, from broadcasting within the EU,<sup>2</sup> after determining that the outlets’ propaganda in favor of aggression against Ukraine risked destabilizing Europe.<sup>3</sup> The EU imposed the suspension “until the aggression against Ukraine is put to an end, and until the Russian Federation, and its associated media outlets, cease to conduct propaganda actions against the Union and its Member States.”<sup>4</sup> In a private letter to companies that Google made public, EU officials explained that the regulation meant that, within the EU, social media companies must suspend the media outlets’ accounts and remove individual user speech containing the banned broadcasts, and search engines must not display content from those outlets in search results.<sup>5</sup>

RT France sued the EU for violating its right to freedom of expression.<sup>6</sup> On July 27, 2022, the EU’s General Court held that the ban did not constitute a freedom of expression violation under the region’s Charter of Fundamental Rights.<sup>7</sup> The Court assessed the freedom of expression issue under a four-part analysis, holding that the ban successfully met all four prongs.<sup>8</sup> First, the Court found that the ban was “provided for by law,” because it was foreseeable that

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<sup>1</sup> See G.A. Res. ES-11/1, Aggression Against Ukraine (Mar. 2, 2022).

<sup>2</sup> See European Council Press Release 207/22, EU Imposes Sanctions on State-Owned Outlets RT/Russia Today and Sputnik’s Broadcasting in the EU (Mar. 2, 2022), <https://perma.cc/BA22-JQUX>; see also European Council Regulation 2022/350, 2022 O.J. (L 65) [hereinafter EU Council Regulation 2022/350] (amending the EU’s 2014 Regulation on Russian destabilization of Ukraine to suspend certain media outlets). The EU suspended additional Russian media outlets in the ensuing months. See, e.g., European Council Press Release 1122/22, Russia’s War of Aggression against Ukraine: EU Adopts 9th Package of Economic and Individual Sanctions (Dec. 16, 2022), <https://perma.cc/3WGD-ZC9B> (noting that four additional media outlets were suspended).

<sup>3</sup> See EU Council Regulation 2022/350, *supra* note 2, ¶¶ 6–9.

<sup>4</sup> *Id.* ¶ 10; see also European Council Press Release 52/23, Russia: EU Prolongs Economic Sanctions over Russia’s Military Aggression Against Ukraine (Jan. 27, 2023), <https://perma.cc/C23T-NJSG>.

<sup>5</sup> Gerrit De Vynck, *EU Sanctions Demand Google Block Russian State Media from Search Results*, WASH. POST (Mar. 9, 2022), <https://perma.cc/W576-82NT>. The EU explanation of the sanctions did exempt some speech from the ban. See E-mail from European Commission to Signatories (Mar. 4, 2022), <https://perma.cc/G6VR-AUBA> (“Where a media outlet . . . reports about the current Regulation and it[s] consequences, it may *inter alia* provide the content and in that regard it may refer to pieces of news by RT and Sputnik, in order to illustrate the type of information given by the two Russian media outlets concerned with a view to informing their readers/viewers objectively and completely.”).

<sup>6</sup> See Laura Kayali, *RT France Challenges EU Ban Before Court*, POLITICO (Mar. 8, 2022), <https://perma.cc/XY9C-8MRB>; Case T-125/22, *RT France v. Council*, ECLI:EU:T:2022:483, ¶ 45 (July 27, 2022).

<sup>7</sup> *RT France v. Council*, ¶ 215.

<sup>8</sup> *Id.* ¶ 145–215.

such a suspension could be imposed under existing EU legal authorities.<sup>9</sup> Second, the Court determined that the ban did not undermine the “essence of freedom of expression,” because it was temporary in nature, the outlet’s journalists could continue to engage in activities other than broadcasting within the EU, like conducting interviews, and the outlets could still broadcast outside the EU.<sup>10</sup> Third, the Court found that the ban “effectively [met] an objective of general interest,” accepting the EU Council’s stated objectives of protecting public order and security.<sup>11</sup> And fourth, the Court determined that the ban was “proportionate,” because no other measure would have been as effective<sup>12</sup> and the burden on expression was not disproportionate to the benefits.<sup>13</sup>

After analyzing the ban under regional norms, the Court turned briefly to global standards of freedom of expression contained in the United Nations (U.N.) International Covenant on Civil and Political Rights (ICCPR).<sup>14</sup> In particular, it focused on ICCPR Article 20, which prohibits “propaganda for war,” but it did not examine Article 19, which provides broad protections for expression and specific conditions for restricting speech.<sup>15</sup> The Court stated that Article 20’s prohibition “refers to ‘any’ propaganda for war, [and therefore] includes not only incitement to a future war, but also continuous, repeated, and concerted statements in support of an ongoing war, contrary to international law, especially where those statements come from a media outlet under the direct or indirect control of the aggressor State.”<sup>16</sup> The Court used this cursory reference to the ICCPR to buttress its conclusion that the EU’s ban did not violate freedom of expression.<sup>17</sup>

Unsurprisingly, the EU’s ban triggered a variety of legal and policy critiques within Europe. Critics decried the fact that the ban was imposed by a political

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<sup>9</sup> *Id.* ¶ 149.

<sup>10</sup> *Id.* ¶¶ 154–57. While many aspects of the Court’s decision were not compelling and were criticized, *see, e.g., infra* notes 23–24 and accompanying text, the Court’s finding that the essence of freedom of expression for journalists is not undermined because they can conduct interviews within the EU but only broadcast outside of the EU is particularly troubling.

<sup>11</sup> *Id.* ¶¶ 160–67; *see supra* note 3 and accompanying text (describing the EU’s rationale relating to the stability and security of Europe).

<sup>12</sup> *Id.* ¶ 201.

<sup>13</sup> *See id.* ¶ 202.

<sup>14</sup> *See id.* ¶ 208.

<sup>15</sup> *See id.* ¶¶ 209–10. ICCPR Article 20(1) provides that “[a]ny propaganda for war shall be prohibited by law.” International Covenant on Civil and Political Rights art. 20(1), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. ICCPR Article 19 protects free speech, including the right of listeners to receive information across borders. *Id.* art. 19(2)–(3); *see also* Part II *infra* (discussing ICCPR Articles 19 and 20).

<sup>16</sup> *RT France v. Council*, ¶ 210.

<sup>17</sup> *See id.* ¶¶ 211–12.

body rather than an independent regulatory agency,<sup>18</sup> and argued that it would be counterproductive,<sup>19</sup> was improperly applied to information and communications technology (ICT) companies,<sup>20</sup> and was not the least intrusive means of countering Russian propaganda.<sup>21</sup> Scholars within the EU also criticized the General Court's decision as "an extremely dangerous precedent for free expression in Europe."<sup>22</sup> They argued that the Court had neglected important European Court of Human Rights (ECtHR) jurisprudence,<sup>23</sup> improperly deferred to the Council in assessing proportionality issues, rather than engaging in a rigorous review of less intrusive measures; and focused solely on ICCPR Article 20, while ignoring Article 19.<sup>24</sup>

Outside Europe, criticism also emerged. The U.N. and regional freedom of expression experts issued a joint statement arguing that the ban did not respect internationally recognized protections for freedom of expression, that Russia would invoke the ban to justify further censorship in the future, and that access

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<sup>18</sup> For example, the European Federation of Journalists called the ban's imposition by the EU's political body rather than an independent regulatory body "a complete break with . . . democratic guarantees." *Fighting Disinformation with Censorship Is a Mistake*, EUR. FED'N OF JOURNALISTS (Mar. 1, 2022), <https://perma.cc/QE7Y-24SB>.

<sup>19</sup> See Jacob Mchangama, *In a War of Ideas, Banning Russian Propaganda Does More Harm than Good*, TIME (Aug. 12, 2022), <https://perma.cc/5Q3L-VUSY> (explaining that the ban risked hindering efforts to debunk Russian propaganda, would be counterproductive by giving "legitimacy to censorship by authoritarian regimes," and was unnecessary, as Russian propaganda was generally not effective in Europe); Natalie Helberger & Wolfgang Shultz, *Understandable, but Still Wrong: How Freedom of Communication Suffers in the Zeal for Sanctions*, MEDIA@LSE (June 10, 2022), <https://perma.cc/TN7W-ZRQ6> (voicing concerns that the ban "prevent[s] EU citizens and the media [from recognizing] and formulat[ing] a resilient response to wrongful propaganda, and affecting their right to receive information").

<sup>20</sup> See T.J. McIntyre (@tjmcintyre), TWITTER (Mar. 9, 2022, 10:21 AM), <https://perma.cc/Q3N8-K4ZQ> (criticizing the EU's application of the regulation to ICT companies as overly broad and posing transparency problems).

<sup>21</sup> See Igor Popović, *The EU Ban of RT and Sputnik: Concerns Regarding Freedom of Expression*, EUR. J. INT'L L.: TALK! (Mar. 30, 2022), <https://perma.cc/F8UT-WNNE> (noting that the EU could have countered Russian propaganda by simply labeling the broadcasts as propaganda and/or banning only broadcasts that constituted war propaganda, and also questioning whether RT's misleading broadcasts rose to the level of ICCPR Article 20's prohibition on war propaganda).

<sup>22</sup> Ronan Ó. Fathaigh & Dirk Voorhoof, *Case Law, EU: RT France v. Council: General Court Finds Ban on Russia Today Not a Violation of Right to Freedom of Expression*, INFORRM (Aug. 19, 2022), <https://perma.cc/EWW3-RTY7>.

<sup>23</sup> *Id.* These scholars emphasized that the Court did not consider that a political body (the EU Council) had instituted the ban rather than an independent body, contrary to what the ECtHR maintains is a key factor for such measures. The scholars also highlighted that the Court failed to analyze the ban under the ECtHR's jurisprudence on prior restraints, which requires a high level of judicial scrutiny.

<sup>24</sup> *Id.* With respect to ICCPR Article 19, the scholars highlighted that the Court failed to note that the restriction was improperly vague. See, e.g., *id.* ("The Court utterly fails to admonish the Council for basically making up a standard on propaganda and then applying it to RT France's broadcasts and publications.").

to information is more effective than censorship in countering propaganda.<sup>25</sup> American scholar David Kaye, a former U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, criticized the EU for failing to demonstrate how its ban met the ICCPR's freedom of expression standards.<sup>26</sup> He also observed that “most—if not all—[ICT companies] seem to have rolled over in compliance [with the EU ban]” despite their stated commitments to respecting human rights, which should have “le[d] them to challenge the ban.”<sup>27</sup>

These developments have triggered questions about the scope of ICCPR Article 20(1)'s ban on propaganda for war<sup>28</sup> and have spurred a call from the U.N.'s current Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression for the U.N. to issue interpretative guidelines on this topic,<sup>29</sup> which has been generally overlooked by the

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<sup>25</sup> See *Ukraine: Joint Statement on Russia's Invasion and Importance of Freedom of Expression and Information*, U.N. OFF. HIGH COMM'R FOR HUM. RTS. (May 4, 2022), <https://perma.cc/NV2Y-4DEG>. In addition, the Global Network Initiative, an international multistakeholder initiative that promotes respect for freedom of expression and privacy online, wrote an open letter to the EU criticizing the ban as inconsistent with the ICCPR. See *GNI Statement: EU Sanctions on Russian Broadcasters*, GLOB. NETWORK INITIATIVE (Aug. 2022), <https://perma.cc/W8ER-NTEY>. The Global Network Initiative is composed of companies, NGOs, investors, and academics. See GLOB. NETWORK INITIATIVE, <https://perma.cc/L8N2-YL3D>.

<sup>26</sup> See David Kaye, *Online Propaganda, Censorship, and Human Rights in Russia's War Against Reality*, 116 AM. J. INT'L L. UNBOUND 140, 142 (2022) (stating that “Russian state media has been banned and binned, deposited into a contemporary memory hole”). Professor Kaye served as the U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression from 2014 to 2020. See *Special Rapporteur on Freedom of Opinion and Expression*, U.N. OFF. HIGH COMM'N FOR HUM. RTS. (2023), <https://perma.cc/CTH8-TJP2>.

<sup>27</sup> Kaye, *supra* note 26, at 144.

<sup>28</sup> See Irene Khan (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. on Disinformation and Freedom of Opinion and Expression During Armed Conflicts*, ¶ 39, U.N. Doc. A/77/288 (Aug. 12, 2022) [hereinafter *Special Rapporteur 2022 Report*] (“There is, however, confusion among some States and companies about [ICCPR Article 20(1)'s] scope, which underlines the need for further clarification.”).

<sup>29</sup> *Id.* ¶ 105 (calling on “the Office of the United Nations High Commissioner for Human Rights [to develop guidelines] for the use of States and companies” with respect to ICCPR Article 20(1)).

international community.<sup>30</sup> One scholar has highlighted the potential for states to misuse Article 20(1) if it remains undefined.<sup>31</sup>

This Essay unpacks the meaning and scope of ICCPR Article 20(1)'s prohibition on war propaganda, to help international human rights law better meet the moment. Part II engages in a mapping exercise of existing proposed interpretations of Article 20(1) and that Article's intersection with Article 19's protections for freedom of expression. Building on that overview, Part III proposes a framework for interpreting Article 20(1).

## II. ANALYSIS OF KEY U.N. STANDARDS

The ICCPR, a foundational treaty in the U.N. human rights system, features the “centerpiece” of the global framework on freedom of expression: Article 19, which broadly protects freedom of expression.<sup>32</sup> The treaty also contains Article 20, which uniquely requires States Parties to prohibit certain forms of expression. Of the treaty's 173 States Parties,<sup>33</sup> seventeen—primarily European countries—issued a reservation, understanding, or declaration (RUD)<sup>34</sup> with respect to Article 20(1),<sup>35</sup> a fact that indicates the controversiality of the Article.

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<sup>30</sup> See, e.g., MICHAEL G. KEARNEY, THE PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW 133, 171 (2007) (observing that “the paucity of academic analysis [of Article 20(1)] is remarkable” and highlighting that “Article 20(1) has drifted out of the collective consciousness in the decades since adoption of the Covenant”); Richard Collins, *Propaganda for War and Transparency*, 87 DENVER U. L. REV. 819, 824 (2010) (noting “the paucity of scholarship on” ICCPR Article 20(1)); Susan Benesch, Columbia Global Freedom of Expression Conference, *Day 2 | Regulating the Online Public Sphere: From Decentralized Networks to Public Regulation*, YOUTUBE, at 4:29:47–4:30:34 (Oct. 4, 2022), <https://youtu.be/DHJzcRlqZkY> (stating that ICCPR Article 20(1) has “very, very little explication of what [war propaganda] means and where its boundaries are” and “urgently” needs more scholarly engagement).

<sup>31</sup> See KEARNEY, *supra* note 30, at 246 (expressing concern about a “threat to freedom of expression” because of states improperly invoking Article 20(1)).

<sup>32</sup> Kaye, *supra* note 26, at 141.

<sup>33</sup> See International Covenant on Civil and Political Rights, U.N. TREATY COLLECTION (2023) [hereinafter ICCPR Treaty Collection], <https://perma.cc/DH9F-WWPW>.

<sup>34</sup> A reservation is a statement made by a nation when joining a treaty to exclude or modify its obligations, regardless of how such a statement is phrased or labeled. See SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW 87 (3d ed. 2018). An understanding “is an interpretative statement that clarifies or elaborates on a treaty provision without altering it.” *Id.* at 94. A “statement expressing the state's position or opinion on matters relating [to] the treaty” is a declaration. *Id.*

<sup>35</sup> ICCPR Treaty Collection, *supra* note 33. For example, Australia, Belgium, Luxemburg, Malta, and the U.K. emphasized that Article 20 needed to be read harmoniously with free speech protections. See *id.* France and Thailand clarified that “war” in Article 20(1) meant “war in contravention of international law.” See *id.* Finland, Denmark, Belgium, Iceland, Luxemburg, the Netherlands, Norway, Sweden, and the U.S. lodged explicit reservations to Article 20(1). See *id.* Australia, France, Malta, New Zealand, Switzerland, and the U.K. stated that they reserved the



This Part assesses the meaning of ICCPR Article 20(1). It first conducts a textual analysis. Finding ambiguity in the Article’s language, it then turns to the Article’s negotiating history, which illuminates the geopolitical tensions that animated inclusion of this provision in the treaty, though it acknowledges that definitional ambiguities remain. It then considers the views of scholars and the recommendations of U.N. independent experts charged with monitoring implementation of these international standards. Finally, it concludes with an overview of established understandings of ICCPR Article 19’s protection for freedom of expression and its intersection with Article 20.

## A. The ICCPR’s Ban on Propaganda for War

### 1. Textual analysis

ICCPR Article 20(1) states: “Any propaganda for war shall be prohibited by law.”<sup>36</sup> This provision contains two principal but undefined terms: “propaganda” and “war.”<sup>37</sup> Neither of these terms appears elsewhere in the treaty, and therefore other provisions do not shed light on their meaning.

Questions surrounding the meaning of “propaganda” abound. Does “propaganda” cover speech that directly calls for war, rises to the level of incitement to war, actually leads to war, or might make listeners more amenable to war?<sup>38</sup> Must speech contain falsehoods or at least be misleading to be “propaganda”? English dictionaries, for example, tend to define “propaganda” broadly to cover the (1) intentional (2) spreading of ideas (3) to promote a cause, and they note that such speech often contains elements of bias.<sup>39</sup> But such

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right not to enact further legislation to implement Article 20(1). *See id.* Ireland stated that it accepted in principle Article 20(1) but reserved the right not to enact implementing laws immediately. *See id.* Other ICCPR States Parties did not object to the RUDs lodged with respect to Article 20(1). *See id.*

<sup>36</sup> ICCPR art. 20(1).

<sup>37</sup> Under the Vienna Convention on the Law of Treaties (VCLT), treaty interpretation begins with analyzing the agreement’s phrasing “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties art. 31, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT].

<sup>38</sup> It should be noted that, unlike Article 20(1), a separate clause in Article 20 explicitly prohibits certain forms of “incitement.” *See* ICCPR art. 20(2) (“Any advocacy of national, racial, or religious hatred that constitutes *incitement* to discrimination, hostility, or violence shall be prohibited.”) (emphasis added).

<sup>39</sup> *See, e.g., Propaganda Definition & Legal Meaning*, LAW DICTIONARY, <https://perma.cc/HC97-3ZZ7> (based on most common use of BLACK’S LAW DICTIONARY (2d ed. 1995), “[a] message that is aimed at a specific audience that will try to change their thinking to that of the person releasing such propaganda. It will often contain disinformation to promote a certain view point in politics.”); *Propaganda*, MERRIAM-WEBSTER, <https://perma.cc/9JHF-XZQG> (defining “propaganda,” in part, as “the spreading of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause, or a person” or “ideas, facts, or allegations spread deliberately to further one’s cause or to damage an opposing cause”); *Propaganda*, CAMBRIDGE

dictionary definitions do little to address questions of the term's scope in Article 20.

Just as many questions exist with respect to “war.” The U.N. Charter never uses the term “war,” instead utilizing the term “use of force.”<sup>40</sup> So is the concept of “war” in ICCPR Article 20(1) synonymous with the unauthorized use of force under the U.N. Charter? Does “war” cover transnational and/or domestic uses of force by non-state actors such as terror groups? What about situations of civil war or wars in pursuit of self-determination? Dictionary definitions add little specificity: some define “war” as a state of armed conflict among nations; others define the term to include non-state actors.<sup>41</sup>

Beyond these ambiguities and the potentially unmanageable breadth of these key terms, a few additional questions arise. For example, does Article 20(1) require States Parties to criminalize war propaganda, or would a civil sanction fulfill this obligation?<sup>42</sup> Does it matter who the speaker is—in other words, does Article 20(1) only require the state to ban war propaganda of private actors, or must it also ban governmental propaganda? In addition, does this provision apply solely to propaganda *before* a war commences, or does it include propaganda *during* a war? Because a textual analysis of the Article produces more questions than answers, the next section turns to Article 20(1)'s negotiating history to further elucidate its meaning.<sup>43</sup>

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DICTIONARY, <https://perma.cc/SLU4-V6XE> (defining propaganda as “information, ideas, opinions, or images, often only giving one part of an argument, that are broadcast, published, or in some other way spread with the intention of influencing people’s opinions”).

<sup>40</sup> Charter of the United Nations arts. 2(4), 51, June 26, 1945, 1 U.N.T.S. XVI [hereinafter U.N. Charter].

<sup>41</sup> See, e.g., *War*, MERRIAM-WEBSTER, <https://perma.cc/G8JH-BKKR> (defining “war” as “a state of usually open and declared armed hostile conflict between states or nations”); *War*, BRITANNICA, <https://perma.cc/62VW-MDSL> (defining “war” “in the popular sense, [as] a conflict between political groups involving hostilities of considerable duration and magnitude”). Legal dictionaries often focus on nation-states as the relevant parties to a war. See, e.g., *War*, LAW DICTIONARY, <https://perma.cc/6ETR-SBV3> (citing HUGO GROTIUS, DE JUR BELLI AC PACIS (1625)) (describing war as “[a] state of forcible contention; an armed contest between nations; a state of hostility between two or more nations or states”); *War*, INTERNATIONAL LAW: A DICTIONARY (defining war as “a status or condition of armed hostility between two or more ‘belligerent’ states”); *War*, DICTIONARY OF INTERNATIONAL & COMPARATIVE LAW (citing to a treaty that defines war as a “formal state of hostilities between nations governed by the rules of war and neutrality”).

<sup>42</sup> Under most dictionary definitions, “prohibit” means to forbid without specifying whether legal sanctions must be civil or criminal in nature. See, e.g., *Prohibit*, CAMBRIDGE DICTIONARY, <https://perma.cc/SWB7-HMUH> (“to officially refuse to allow something”); *Prohibit*, LAW DICTIONARY, <https://perma.cc/QPD7-G6TG> (“[r]estraining a certain action(s) by a certain party, normally by the order of a legitimate legal authority”).

<sup>43</sup> Under the VCLT, resort to the “preparatory work of the treaty” is permissible if the textual analysis leaves the agreement’s meaning “ambiguous or obscure.” VCLT art. 32(a).

## 2. Negotiating history

The over fifteen years of highly politicized negotiations surrounding Article 20(1) make it challenging to discern the meaning of its terms.<sup>44</sup> But the debates in which negotiators engaged are nonetheless useful for revealing the geopolitical backdrop that animated the provision's inclusion in the ICCPR.

During the negotiations, the Soviet Union and its allies were the main proponents of Article 20(1).<sup>45</sup> Often, their proposals included condemnation of Western “propaganda” against communist states during the Cold War,<sup>46</sup> though they noted at times that this ban on war propaganda was also needed to prevent future Nazi-like horrors.<sup>47</sup> Many Western liberal democracies, as well as non-Western countries, were alarmed by the proposals and intentions of the Soviet bloc.<sup>48</sup>

Those concerned about the Soviet proposals initially succeeded in preventing inclusion of the war propaganda ban in the treaty.<sup>49</sup> However, wider support for such a provision progressively grew.<sup>50</sup> Several proposals during the negotiations encompassed a ban on “incitement” to war, but they were not

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<sup>44</sup> See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS 471 (2d ed. 2005) (observing that the treaty's negotiating history is of “only limited assistance in interpreting [Article 20(1)]” because the negotiations were “political in nature”); KEARNEY, *supra* note 30, at 82 (Article 20(1) negotiations occurred from 1947 to 1961). Part IIA.2 is based on Michael Kearney's extensive summary of the negotiations. See *id.* at 81–132.

<sup>45</sup> See KEARNEY, *supra* note 30, at 86, 92–93, 95, 97 (describing Soviet bloc advocacy to insert a ban on war propaganda).

<sup>46</sup> See *id.* at 87 (noting that “the stated purpose of the [Soviet] proposal was to check the activities of the Western media and specifically ‘the warmongering propaganda and calumnies which were being made by a press serving the interests of the armaments industry’”); *id.* at 96 (observing that Poland's delegate highlighted an example of “‘dangerous propaganda’ disseminated in the US press” to argue for a ban on war propaganda); *id.* at 100 (noting that “the Soviets adopted a confrontational approach, lambasting the press and government of the USA as the nerve center of dangerous international propaganda”).

<sup>47</sup> See *id.* at 85, 95 (noting the Soviet Union's statement that unlimited freedom of opinion and expression could be used to justify “all fascist and Nazi doctrines”). Kearney observes the “exclusion from almost all debates of the necessity of restricting speech of the state itself in order to protect human rights is a significant characteristic of the . . . *travaux préparatoires*.” *Id.* at 101.

<sup>48</sup> See *id.* at 87 (noting the concerns of Western countries that the Soviet-proposed ban on war propaganda would be used “to manipulate human rights for repressive purposes”); *id.* at 95–98 (noting the concerns of the U.S., U.K., and other Western countries with respect to the breadth of the Soviet proposals); *id.* at 93–94 (highlighting the Lebanese representative's statement that limiting free speech, “even in the guise of a prohibition of propaganda for war, would not help the human rights situation, since only the maximum freedom of expression would be effective in combating the propaganda of the state”); *id.* at 92 (observing that the Philippines expressed concerns about empowering governments to censor speech to counter propaganda).

<sup>49</sup> See *id.* at 86–87, 91, 99.

<sup>50</sup> See *id.* at 123–30 (noting greater involvement in the negotiations by countries beyond the Western and communist blocs).

accepted.<sup>51</sup> U.N. delegates adopted the final version of Article 20(1) in a splintered vote, without elucidating the meaning of the text.<sup>52</sup>

### 3. Views of scholars

Because the text and negotiating history of Article 20(1) still leave much unclear, it is appropriate to look to scholarly analysis of Article 20(1).<sup>53</sup> The few scholars who have opined on the scope of the Article tend to coalesce around certain interpretations of “propaganda” and “war.” Several, for example, take the position that “propaganda” for war refers to “incitement” to war or at least “advocacy” for war,<sup>54</sup> though one scholar interprets the term as being even broader than “incitement.”<sup>55</sup> Most tend to agree that “war” refers to nations engaging in transborder wars of aggression contrary to the U.N. Charter.<sup>56</sup>

<sup>51</sup> See *id.* at 128–29.

<sup>52</sup> The vote was 53 in favor, 21 against (Argentina, Australia, Belgium, Canada, Denmark, Ecuador, Federation of Malaya, Finland, France, Iceland, Ireland, Italy, Japan, the Netherlands, New Zealand, Norway, Sweden, Turkey, the U.K., the U.S., and Uruguay), and 9 abstentions (Austria, China, Colombia, Cyprus, Greece, Iran, Panama, Portugal, and South Africa). See *id.* at 130.

<sup>53</sup> Scholarly analysis may be used to help discern the meaning of international law obligations. See Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (explaining that the International Court of Justice may look to “the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination” of international law obligations).

<sup>54</sup> Nowak notes that Article 20(1) must be “understood as a response to the *incitement* to war . . . spurred by the propaganda machinery of the Third Reich [which animated inclusion of Article 20(1)].” NOWAK, *supra* note 44, at 472 (emphasis added). He again emphasizes that Article 20(1)’s purpose is “to forbid *propagandistic incitement* roughly comparable to that practiced in the Third Reich.” *Id.* (emphasis added). Nowak continues his analysis of propaganda, however, by stating that it means the “intentional, well-aimed influencing of individuals . . . to disseminate, above all incorrect or exaggerated allegations of fact. Also included . . . are negative or simplistic judgments whose intensity is at least comparable to that of provocation, instigation, or incitement.” *Id.* Collins notes that proposals to limit Article 20(1) to incitement to war failed during the negotiations, but “the history is murky enough to justify . . . using the word incitement rather than propaganda.” Collins, *supra* note 30, at 828. Karl Josef Partsch finds that propaganda means advocating or inciting war. 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 (Louis Henkin ed., 1981) (“[A] prohibition of materials that do not advocate or incite war would not be within Article 20.”).

<sup>55</sup> KEARNEY, *supra* note 30, at 116, 130–32, 248 (identifying various reasons why the provision may extend beyond incitement to war, including the negotiating history displays that proposals that commemorated an incitement standard were not included in the final text).

<sup>56</sup> See NOWAK, *supra* note 44, at 473 (noting that “[s]ince it cannot be the object and purpose of [Article 20(1)] to prohibit propaganda for internationally permissible acts of war,” it is appropriate to interpret “war” to mean wars of aggression, not acts of self-defense, civil wars, or wars in pursuit of liberation or self-determination); PAUL TAYLOR, A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 581 (2020) (generally agreeing with Nowak’s analysis); Partsch, *supra* note 54, at 227 (citing favorably to interpretations of “war” that are limited to wars of aggression); Collins, *supra* note 30, at 826 (noting that it is “clear that the intent is to forbid advocacy of wars of aggression. Therefore defensive wars are not within the

Scholars have also addressed how Article 20(1) should be applied. On the issue of criminal or civil penalties for Article 20(1) violations, Manfred Nowak notes that the issue is somewhat open, but argues that because the negotiating history indicates that prior censorship is not authorized, there will be certain cases where only criminal sanctions would be effective.<sup>57</sup> Michael Kearney believes that only serious cases should be addressed through criminal sanctions.<sup>58</sup> Karl Josef Partsch finds that Article 20(1) does not require a criminal sanction.<sup>59</sup>

With respect to whether Article 20(1)'s ban applies to state actors, Nowak notes that Article 20 is primarily aimed at creating a state obligation to take measures at the "horizontal level" (in other words, to regulate the speech of private actors),<sup>60</sup> but later observes that states "should" abstain from propaganda as well.<sup>61</sup> By contrast, Kearney finds that applying Article 20(1) to states themselves is not "strictly consistent with the intentions of the drafters,"<sup>62</sup> but agrees that it does cover state actors.<sup>63</sup>

#### 4. U.N. expert interpretations

U.N. experts' interpretations also shed light on Article 20(1)'s meaning. Although the ICCPR did not create a mechanism to issue legally binding decisions that interpret its language or determine violations, it did create a body to monitor its implementation, the U.N. Human Rights Committee (HRC). The HRC, a body composed of independent experts elected by ICCPR States Parties, monitors implementation of the treaty's obligations by: (1) issuing recommended interpretations of the treaty (known as "General Comments"); (2) providing

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provision."). Kearney agrees that limiting "war" to wars of aggression is consistent with the negotiating history. KEARNEY, *supra* note 30, at 148–49, 154.

<sup>57</sup> See NOWAK, *supra* note 44, at 474. Nowak notes that "there are certain indications in the historical background that it is to be left to States themselves as to which sanctions they wish to provide as appropriate for enforcing this prohibition." *Id.* His analysis appears to draw from the negotiating history, the text, and a normative approach.

<sup>58</sup> KEARNEY, *supra* note 30, at 135. Kearney notes issues relating to overly broad restrictions on freedom of expression in coming to his conclusion. *See id.* ("Given the concerns about the impact of the prohibition on the right to freedom of expression, significant consideration should be given towards restricting the application of penal legislation to the most grievous cases of propaganda for war.").

<sup>59</sup> Partsch, *supra* note 54, at 228. Partsch appears to base his views on a textual analysis. *See id.* ("the Covenant requires that such propaganda be prohibited by law but does not prescribe what type of law it should be. It is not required that such propaganda . . . be made a crime.").

<sup>60</sup> NOWAK, *supra* note 44, at 468.

<sup>61</sup> *Id.* at 473.

<sup>62</sup> KEARNEY, *supra* note 30, at 172. Kearney observes that "throughout the drafting of Article 20(1), delegates focused almost exclusively on the role of the press in disseminating propaganda for war . . . few commented on the role played by the state in the dissemination of propaganda for war." *Id.* at 142.

<sup>63</sup> *See id.*

views on periodic State Party reports about their treaty implementation record (known as “Concluding Observations”); and (3) hearing complaints lodged by individuals, where a State Party has consented to this procedure.<sup>64</sup> In addition, the U.N. Human Rights Council, a body of forty-seven nations charged with promoting human rights globally,<sup>65</sup> has appointed a U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (“Special Rapporteur”), an independent expert who monitors implementation of the U.N.’s free expression standards by, *inter alia*, issuing thematic reports and country-specific reports.<sup>66</sup> This section provides an overview of the HRC’s and Special Rapporteur’s interpretations of ICCPR Article 20(1)—which provide the most detailed guidance on how Article 20(1) should be read.<sup>67</sup>

Forty years ago, the HRC issued a formal interpretation of ICCPR Article 20(1),<sup>68</sup> which places parameters on the provision’s potential scope in two key ways. First, it states that “propaganda” must either threaten or result in war, which means that only propaganda that creates a real risk of war or actually results in war is within Article 20(1)’s scope.<sup>69</sup> Second, the HRC defines “war” as “act[s] of aggression or breach[es] of the peace contrary to the Charter of the

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<sup>64</sup> See ICCPR arts. 28, 40; Optional Protocol to the ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171; *Introduction to the Committee: Human Rights Committee*, U.N. OFF. HIGH COMM’R FOR HUM. RTS., <https://perma.cc/6VPQ-NFD4>.

<sup>65</sup> *Promotion and Protection of Human Rights Around the Globe*, U.N. OFF. HIGH COMM’R FOR HUM. RTS., <https://perma.cc/S5DB-CX8B>.

<sup>66</sup> *Special Rapporteur on Freedom of Opinion and Expression*, U.N. OFF. HIGH COMM’R FOR HUM. RTS., <https://perma.cc/CTH8-TJP2>.

<sup>67</sup> This section does not include a discussion of HRC interpretations emerging from the individual complaints mechanism, because there have not been cases focused on ICCPR Article 20(1) to date.

<sup>68</sup> U.N. Hum. Rts. Comm., General Comment No. 11: Prohibition on Propaganda for War and Inciting National, Racial, or Religious Hatred (Art. 20), 19th Sess., U.N. Doc. CCPR/C/GC/11 (July 9, 1983) [hereinafter General Comment 11]. For a discussion of the HRC’s deliberations on General Comment 11, see DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*, 484–90 (1991). The HRC also emphasized the importance of ICCPR Article 20(1) in its General Comment on the right to life. See U.N. Hum. Rts. Comm., 124th Sess., General Comment No. 36: Article 6: Right to Life, ¶ 59, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) (“A particular connection exists between article 6 and article 20 . . . . Failure to comply with . . . article 20 may also constitute a failure to take the necessary measures to protect the right to life under article 6.”).

<sup>69</sup> General Comment 11, *supra* note 68, ¶ 2 (observing that Article 20(1) “extends to all forms of propaganda *threatening or resulting in* an act of aggression or breach of the peace” contrary to the UN Charter) (emphasis added). Former U.N. Special Rapporteur David Kaye also understands this interpretation as limiting the possible scope of propaganda in ICCPR Article 20(1). See Kaye, *supra* note 26, at 141 (“The Human Rights Committee sought to narrow [ICCPR Article 20(1)’s] breadth . . . [and clarified that] it does not address broader state propaganda or audience manipulation.”).

United Nations,” thereby excluding situations of self-defense or self-determination from the scope of the term.<sup>70</sup> Although this HRC interpretation provides that states “should” refrain from war propaganda, which suggests a moral rather than legal obligation, a subsequent interpretation clarified that the prohibition also applies to state actors.<sup>71</sup>

An examination of the HRC’s reactions to States Parties’ periodic reports from 2011 to 2022 does not reveal much about its views on the scope of ICCPR Article 20(1), but it does indicate variations in national approaches to implementing the Article.<sup>72</sup> Of the States Parties that reported on their implementation of Article 20(1), some highlighted laws covering “calls” for war;<sup>73</sup> “incitement” for war;<sup>74</sup> and/or advocacy, encouragement, or support for war.<sup>75</sup> Some specified that their laws covered “aggressive” war.<sup>76</sup> Others merely

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<sup>70</sup> General Comment 11, *supra* note 68, ¶ 2.

<sup>71</sup> See U.N. Hum. Rts. Comm., General Comment No. 29: States of Emergency (Article 4), ¶ 13(e), U.N. Doc. CCPR/C/GC/21/Rev.1/Add. 11 (Aug. 31, 2001) (noting that a State Party may not invoke a state of emergency to “engage itself, contrary to article 20, in propaganda for war”).

<sup>72</sup> This Essay’s examination of State Party reports and HRC reactions begins in 2011 because that is the year the HRC adopted its most significant, formal interpretation of freedom of expression and reflected its contemporary pivot towards a more speech-protective approach. See Michael O’Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No. 34*, 12 HUMAN RIGHTS L. REV. 627, 647–53 (2012) (describing how General Comment 34 reflects an evolution in the HRC’s approach to freedom of expression by broadening its scope). The HRC reviewed over 130 State Party reports from March 2011 to November 2022; some States Parties were reviewed more than once during this period. See *Sessions for CCPR: International Covenant on Civil and Political Rights*, U.N. HUMAN RIGHTS TREATY BODY DATABASE, <https://perma.cc/7HTU-6543>.

<sup>73</sup> See, e.g., U.N. Hum. Rts. Comm., Mongolia State Party Report, ¶¶ 186–88, U.N. Doc. CCPR/C/MNG/5 (Sept. 16, 2009) [hereinafter Mongolia State Party Report (2009)]; U.N. Hum. Rts. Comm., Kazakhstan State Party Report, ¶¶ 134–36, U.N. Doc. CCPR/C/KAZ/1 (Oct. 5, 2009) [hereinafter Kazakhstan State Party Report (2009)]; U.N. Hum. Rts. Comm., Ukraine State Party Report, ¶ 214, U.N. Doc. CCPR/C/UKR/7 (Sept. 16, 2011) [hereinafter Ukraine State Party Report (2011)]; U.N. Hum. Rts. Comm., Russian Federation State Party Report, ¶¶ 298–300, U.N. Doc. CCPR/C/RUS/8 (May 17, 2019) [hereinafter Russia State Party Report (2019)].

<sup>74</sup> See, e.g., U.N. Hum. Rts. Comm., China (Macau) State Party Report, ¶¶ 456–60, U.N. Doc. CCPR/C/CHN-MAC/1 (May 30, 2011) [hereinafter China (Macau) State Party Report (2011)]; U.N. Hum. Rts. Comm., Tajikistan State Party Report, ¶¶ 214–16, U.N. Doc. CCPR/C/TJK/2 (Sept. 22, 2011) [hereinafter Tajikistan State Party Report (2011)]; U.N. Hum. Rts. Comm., Madagascar State Party Report, ¶ 267, U.N. Doc. CCPR/C/MDG/4 (Dec. 21, 2015) [hereinafter Madagascar State Party Report (2015)]; U.N. Hum. Rts. Comm., Viet Nam State Party Report, ¶¶ 190–91, U.N. Doc. CCPR/C/VMN/3 (Jan. 30, 2018) [hereinafter Viet Nam State Party Report (2018)]. Colombia reported that it criminalizes incitement to war, which it limits to “conduct intending to provoke war or hostilities against Colombia by another nation or nations.” U.N. Hum. Rts. Comm., Colombia State Party Report, ¶ 188, U.N. Doc. CCPR/C/COL/7 (Apr. 7, 2015) [hereinafter Colombia State Party Report (2015)].

<sup>75</sup> See, e.g., U.N. Hum. Rts. Comm., Serbia State Party Report, ¶¶ 407–09, U.N. Doc. CCPR/C/SRB/2 (Aug. 28, 2009) [hereinafter Serbia State Party Report (2009)]; U.N. Hum. Rts. Comm., Turkmenistan State Party Report, ¶¶ 612–17, U.N. Doc. CCPR/C/TKM/1 (Feb. 19,

confirmed that they had banned “propaganda” for war, without further defining the terms in Article 20.<sup>77</sup> Many countries noted provisions in their domestic laws extolling the peace-loving nature of their countries, or otherwise highlighted laws that were broader than a ban on war propaganda.<sup>78</sup> While many reported punishing war propaganda with criminal sanctions,<sup>79</sup> two European countries

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2010) [hereinafter Turkmenistan State Party Report (2010)]. Niger reported that its constitution bans advocacy for war, but that it had not adopted legislation on this topic. U.N. Hum. Rts. Comm., Niger State Party Report, ¶¶ 234–36, U.N. Doc. CCPR/C/NER/2 (Mar. 23, 2018) [hereinafter Niger State Party Report (2018)]. Georgia reported that its constitution bans the establishment of a political party that “propagates” war. U.N. Hum. Rts. Comm., Georgia State Party Report, ¶ 276, U.N. Doc. CCPR/C/GEO/5 (Apr. 28, 2020) [hereinafter Georgia State Party Report (2020)]. It also prohibits protests that propagate war “if they create a manifest, direct and substantial threat.” *Id.*

<sup>76</sup> See, e.g., Serbia State Party Report (2009), *supra* note 75, ¶ 408; Kazakhstan State Party Report (2009), *supra* note 73, ¶ 135; Ukraine State Party Report (2011), *supra* note 73, ¶ 214; Russia State Party Report (2019), *supra* note 73, ¶ 299.

<sup>77</sup> See, e.g., U.N. Hum. Rts. Comm., Ethiopia State Party Report, ¶¶ 204–05, U.N. Doc. CCPR/C/ETH/1 (Oct. 22, 2009) [hereinafter Ethiopia State Party Report (2009)]; U.N. Hum. Rts. Comm., Haiti State Party Report, ¶¶ 104–09, U.N. Doc. CCPR/C/HTI/1 (Jan. 23, 2013) [hereinafter Haiti State Party Report (2013)]; U.N. Hum. Rts. Comm., South Africa State Party Report, ¶¶ 212, 215, U.N. Doc. CCPR/C/ZAF/1 (Feb. 16, 2015) [hereinafter South Africa State Party Report (2015)]; U.N. Hum. Rts. Comm., Guinea State Party Report, ¶¶ 203, 210, U.N. Doc. CCPR/C/GIN/3 (Nov. 29, 2017) [hereinafter Guinea State Party Report (2017)]; U.N. Hum. Rts. Comm., Kenya State Party Report, ¶ 141, U.N. Doc. CCPR/C/KEN/4 (Apr. 26, 2019) [hereinafter Kenya State Party Report (2019)]. Some countries reported a ban on war propaganda, but only with respect to the media. See, e.g., U.N. Hum. Rts. Comm., Uzbekistan State Party Report, ¶¶ 665–67, U.N. Doc. CCPR/C/UZB/4 (Oct. 30, 2013) [hereinafter Uzbekistan State Party Report (2013)]; U.N. Hum. Rts. Comm., Lao People’s Democratic Republic State Party Report, ¶¶ 131–32, U.N. Doc. CCPR/C/LAO/1 (Apr. 27, 2017) [hereinafter Laos State Party Report (2017)]; U.N. Hum. Rts. Comm., Tajikistan State Party Report, ¶¶ 216, U.N. Doc. CCPR/C/TJK/2 (Nov. 29, 2017) [hereinafter Tajikistan State Party Report (2017)].

<sup>78</sup> See, e.g., U.N. Hum. Rts. Comm., Bolivia State Party Report, ¶¶ 126–28, U.N. Doc. CCPR/C/BOL/3 (Sept. 22, 2011) [hereinafter Bolivia State Party Report (2011)]; U.N. Hum. Rts. Comm., Djibouti State Party Report, ¶¶ 186–91, U.N. Doc. CCPR/C/DJI/1 (July 13, 2012) [hereinafter Djibouti State Party Report (2012)]; U.N. Hum. Rts. Comm., Turkey State Party Report, ¶¶ 272–74, U.N. Doc. CCPR/C/TUR/1 (Apr. 13, 2011) [hereinafter Turkey State Party Report (2011)]; U.N. Hum. Rts. Comm., Qatar State Party Report, ¶¶ 231–33, U.N. Doc. CCPR/C/QAT/1 (Oct. 15, 2019) [hereinafter Qatar State Party Report (2019)]; U.N. Hum. Rts. Comm., Sudan State Party Report, ¶ 114, U.N. Doc. CCPR/C/SDN/5 (Oct. 11, 2017) [hereinafter Sudan State Party Report (2017)].

<sup>79</sup> See, e.g., Mongolia State Party Report (2009), *supra* note 73, ¶ 187; Serbia State Party Report (2009), *supra* note 75, ¶ 408; U.N. Hum. Rts. Comm., Slovakia State Party Report, ¶¶ 407–10, U.N. Doc. CCPR/C/SVK/3 (Oct. 20, 2009); Turkmenistan State Party Report (2010), *supra* note 75, ¶ 216; U.N. Hum. Rts. Comm., Ukraine State Party Report, ¶¶ 168–71, U.N. Doc. CCPR/C/UKR/8 (Jan. 30, 2019); Colombia State Party Report (2015), *supra* note 74, ¶ 189; U.N. Hum. Rts. Comm., Kazakhstan State Party Report, ¶ 135, U.N. Doc. CCPR/C/KAZ/2 (Feb. 12, 2015); South Africa State Party Report (2015), *supra* note 77, ¶¶ 213–15; U.N. Hum. Rts. Comm., Bangladesh State Party Report, ¶ 216, U.N. Doc. CCPR/C/BGD/1 (Sept. 3, 2015) [hereinafter Bangladesh State Party Report (2015)]; U.N. Hum. Rts. Comm., Turkmenistan State Party Report, ¶¶ 215–16, U.N. Doc. CCPR/C/TKM/2 (Oct. 14, 2015) [hereinafter Turkmenistan State Party Report (2015)];



noted that their laws allowed for court-imposed prior restraints on such speech.<sup>80</sup> Several countries, primarily in Europe, reiterated their existing reservations to Article 20(1).<sup>81</sup>

In reviewing periodic reports, the HRC generally did not provide recommendations on Article 20(1) implementation, neither to the States Parties that did report on their implementation of the provision nor to the States Parties that were silent on the topic.<sup>82</sup> Even in its 2022 Concluding Observations to Russia, the HRC did not remark on the government's track record of spreading war propaganda.<sup>83</sup> When it did comment on Article 20(1) in its Concluding

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Madagascar State Party Report (2015), *supra* note 74, ¶ 267; U.N. Hum. Rts. Comm., Pakistan State Party Report, ¶¶ 162–63, U.N. Doc. CCPR/C/PAK/1 (Nov. 24, 2015) [hereinafter Pakistan State Party Report (2015)]; Guinea State Party Report (2017), *supra* note 77, ¶¶ 203, 210; Russian Federation State Party Report (2019), *supra* note 73, ¶¶ 298–99.

<sup>80</sup> See Serbia State Party Report (2009), *supra* note 75, ¶¶ 407, 409; U.N. Hum. Rts. Comm., Montenegro State Party Report, ¶¶ 230–32, U.N. Doc. CCPR/C/MNE/1 (Jan. 22, 2013) [hereinafter Montenegro State Party Report (2013)].

<sup>81</sup> See, e.g., U.N. Hum. Rts. Comm., Finland State Party Report, ¶ 199, U.N. Doc. CCPR/C/FIN/6 (Sept. 12, 2011); U.N. Hum. Rts. Comm., New Zealand State Party Report, ¶ 50, U.N. Doc. CCPR/C/NZL/6 (July 24, 2015); U.N. Hum. Rts. Comm., Concluding Observations on the Sixth Periodic Report of Australia, ¶¶ 7–8, U.N. Doc. CCPR/C/AUS/CO/6 (Dec. 1, 2017); U.N. Hum. Rts. Comm., Switzerland State Party Report, ¶ 199, U.N. Doc. CCPR/C/CHE/4 (Aug. 5, 2016); U.N. Hum. Rts. Comm., Concluding Observations on the Seventh Periodic Report of Norway, ¶¶ 6–7, U.N. Doc. CCPR/C/NOR/CO/7 (Apr. 25, 2018); U.N. Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Report of Luxembourg, ¶¶ 5–6, U.N. Doc. CCPR/C/LUX/CO/4 (Sept. 14, 2022) [hereinafter Concluding Observations on Luxembourg (2022)]; U.N. Hum. Rts. Comm., Replies of Ireland to the List of Issues in Relation to its Fifth Periodic Report, ¶ 5, U.N. Doc. CCPR/C/IRL/RQ/5 (Apr. 13, 2022). Belize does not have a reservation on ICCPR Article 20(1), but reported that it has no relevant legislation in place and no plans to adopt such legislation. U.N. Hum. Rts. Comm., Belize State Party Report, ¶ 196, U.N. Doc. CCPR/C/BLZ/1 (Sept. 26, 2017); U.N. Hum. Rts. Comm., Replies of Belize to the List of Issues, ¶ 69, U.N. Doc. CCPR/C/BLZ/Q/1/Add.2 (Nov. 16, 2018).

<sup>82</sup> Similarly, Kearney noted in his 2007 book, which reviewed the HRC's earlier practice, that "no State party has been rebuked by the Committee for engaging in propaganda for war." KEARNEY, *supra* note 30, at 172. However, there was a notable exception during the period reviewed for this Essay. Finland explained that it had and would maintain a reservation on Article 20(1), because the state had already criminalized the most serious offenses and would not consider expanding its criminal laws, because such an expansion "might blur the limits of this restriction [Article 20] on a basic right [Article 19]." U.N. Hum. Rts. Comm., Replies of Finland to the List of Issues, ¶ 10, U.N. Doc. CCPR/C/FIN/Q/6/Add.1 (May 3, 2013). The HRC responded that Finland's reservation was "without basis in light of the Committee's interpretation [of Article 20]." U.N. Hum. Rts. Comm., Concluding Observations on the Sixth Periodic Report of Finland, ¶ 4, U.N. Doc. CCPR/C/FIN/CO/6 (Aug. 22, 2013) [hereinafter Concluding Observations on Finland (2013)].

<sup>83</sup> See generally U.N. Hum. Rts. Comm., Concluding Observations on the Eighth Periodic Report of the Russian Federation, U.N. Doc. CCPR/C/RUS/CO/8 (Dec. 1, 2022).

Observations, the HRC did so to encourage (primarily European) States Parties to remove reservations on the Article.<sup>84</sup>

The U.N. Special Rapporteur has recently construed ICCPR Article 20(1) in a manner that similarly narrows its potential breadth. The Special Rapporteur understands “war” to cover “aggression or a breach of the peace contrary to the Charter of the United Nations,” which “precludes the misuse of this provision to crush internal disturbances,” and construes “propaganda” to mean “incitement” to such aggression.<sup>85</sup> In addition, the Special Rapporteur takes the position that Article 20(1) only covers propaganda *before* war, not *during* a war.<sup>86</sup> Given the questions swirling around this provision after Russia’s invasion of Ukraine, the Special Rapporteur called on the U.N. Office of the High Commissioner for Human Rights to develop guidelines that interpret Article 20(1) narrowly.<sup>87</sup>

## B. The ICCPR’s Tripartite Test for All Speech Restrictions

ICCPR Article 19(2) provides broad protections for freedom of expression, including the right to both impart and receive information.<sup>88</sup> However, governments may restrict expression if they can demonstrate compliance with a three-part test: any restrictions must be (1) provided by law, (2) imposed for legitimate goals, and (3) necessary to achieve those objectives.<sup>89</sup>

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<sup>84</sup> See, e.g., U.N. Hum. Rts. Comm., Concluding Observations on the Sixth Periodic Report of Norway, ¶ 14, U.N. Doc. CCPR/C/NOR/CO/6 (Nov. 18, 2011); Concluding Observations on Finland (2013), *supra* note 82, ¶ 4; U.N. Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Report of Ireland, ¶ 5, U.N. Doc. CCPR/C/IRL/CO/4 (Aug. 19, 2014); U.N. Hum. Rts. Comm., Concluding Observations on the Seventh Periodic Report of Sweden, ¶¶ 6–7, U.N. Doc. CCPR/C/SWE/CO/7 (Apr. 28, 2016); U.N. Hum. Rts. Comm., Concluding Observations on the Sixth Periodic Report of Denmark, ¶¶ 7–8, U.N. Doc. CCPR/C/DNK/CO/6 (Aug. 15, 2016); U.N. Hum. Rts. Comm., Concluding Observations on the Sixth Periodic Report of Belgium, ¶¶ 7–8, U.N. Doc. CCPR/C/BEL/CO/6 (Dec. 6, 2019); Concluding Observations on Luxembourg (2022), *supra* note 81, ¶ 5.

<sup>85</sup> *Special Rapporteur 2022 Report*, *supra* note 28, ¶ 39.

<sup>86</sup> See *id.* The U.N. Special Rapporteur’s understanding is more speech-protective than the EU General Court’s interpretation. See *RT France v. Council*, *supra* note 16 and accompanying text (finding that Article 20(1) also applies to propaganda during an ongoing war).

<sup>87</sup> *Special Rapporteur 2022 Report*, *supra* note 28, ¶¶ 39, 105.

<sup>88</sup> See ICCPR art. 19(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.”).

<sup>89</sup> See *id.* art. 19(3) (freedom of expression may be “subject to certain restrictions, but these shall only be such as are *provided by law* and are *necessary*: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order . . . or of public health or morals”) (emphasis added).

This tripartite test is often referred to as the “legality, legitimacy, and necessity test.”<sup>90</sup>

Any restrictions imposed under ICCPR Article 20 must conform to Article 19(3)’s tripartite test.<sup>91</sup> This section provides an overview of the test, to lay the groundwork for Part III’s proposal on the scope of ICCPR Article 20(1)’s ban on propaganda for war.

### 1. The legality test

Under the “provided by law” test—the legality test—any restrictions on speech must not, *inter alia*, be improperly vague.<sup>92</sup> Such a requirement serves to give the public appropriate notice and restrict the discretion of those implementing the law to avoid its unfair application.<sup>93</sup> The U.N. human rights machinery has identified improperly vague restrictions in a variety of laws, including laws on sedition,<sup>94</sup> national security,<sup>95</sup> false or biased news,<sup>96</sup> glorification of terrorism or violence,<sup>97</sup> and public order.<sup>98</sup> In addition, the

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<sup>90</sup> See David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 8, U.N. Doc. A/HRC/38/35 (Apr. 6, 2018) [hereinafter *Special Rapporteur 2018 Report*].

<sup>91</sup> U.N. Hum. Rts. Comm., General Comment No. 34, ¶¶ 50–52, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter General Comment 34] (explaining that ICCPR Article 19(3)’s tripartite test applies to all speech restrictions, including those implemented under Article 20). The burden is on the government to demonstrate that each prong of this test is met. *Id.* ¶¶ 22, 27. With respect to the EU’s ban on Russian media outlets, it should be noted that the EU General Court’s brief analysis of ICCPR Article 20(1) failed to include an assessment of ICCPR Article 19(3)’s tripartite test and the U.N. human rights machinery’s relevant interpretations. See *RT France v. Council*, *supra* note 16 and accompanying text.

<sup>92</sup> See General Comment 34, *supra* note 91, ¶ 25.

<sup>93</sup> See *id.*

<sup>94</sup> See, e.g., David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Special Rapporteur Commc’n No. OMN 1/2018, at 3 (Mar. 26, 2018), <https://perma.cc/CJ3Q-PBVR> (determining that Oman’s curtailment of expression that “prejudices the independence, unity or territorial integrity of the country” is unduly vague).

<sup>95</sup> See, e.g., David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Special Rapporteur Commc’n No. JOR 3/2018, at 3 (Dec. 7, 2018), <https://perma.cc/V97G-LDFJ> (observing that the criminalization of expression that “would subject Jordan to the danger of violent acts or disturb its relations with a foreign state” failed to “meet the level of clarity and predictability as required by international human rights law”).

<sup>96</sup> See, e.g., David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Special Rapporteur Commc’n No. ITA 1/2018, at 4 (Mar. 20, 2018), <https://perma.cc/5SK3-WLPR> (criticizing Italy’s ban on “manifestly unfounded and biased news” because of vagueness concerns).

<sup>97</sup> See, e.g., *Joint Declaration on Freedom of Expression and Responses to Conflict Situations*, ¶ 3, U.N. OFF. HIGH COMM’R FOR HUM. RTS. (May 4, 2015) [hereinafter *Joint Declaration on Responses to Conflict*].

legality test also prohibits overly broad laws,<sup>99</sup> which the U.N. machinery has condemned in a variety of contexts.<sup>100</sup>

## 2. The legitimacy test

Under the legitimacy test, speech restrictions may only be imposed for legitimate public interest objectives.<sup>101</sup> ICCPR Article 19(3) sets forth those objectives as “respect of the rights or reputations of others” and protection of national security, public order, public health, or morals.<sup>102</sup> The HRC has stated that this list of objectives is exclusive.<sup>103</sup> It has also recognized that states often improperly invoke these objectives as pretexts for restricting protected expression, causing them to fail the legitimacy test.<sup>104</sup>

## 3. The necessity test

The necessity test comprises two components. Under the first component, any restriction or burden on expression must be the “least intrusive” means to achieve the legitimate objective.<sup>105</sup> To assess whether this standard is met, it is helpful to consider three questions.<sup>106</sup> First, can the objective be achieved

*Situations*], <https://perma.cc/PBS8-LWEH> (calling on states to avoid vague concepts “such as ‘glorifying,’ ‘justifying,’ or ‘encouraging’ terrorism” in laws that restrict speech).

<sup>98</sup> See, e.g., Frank LaRue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 51, U.N. Doc. A/67/357 (Sept. 7, 2012) [hereinafter *Special Rapporteur 2012 Report*] (expressing vagueness concerns about Macedonia’s law limiting speech “causing national, racial or religious hate, discord, or intolerance”).

<sup>99</sup> See, e.g., *Joint Declaration on Responses to Conflict Situations*, *supra* note 97 (noting that any limitations on speech must “conform strictly to international standards, including by . . . not employing vague or unduly broad terms”).

<sup>100</sup> See, e.g., David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Special Rapporteur Comm’n No. GBR 6/2018, at 2 (July 17, 2018), <https://perma.cc/K53A-P565> (criticizing a U.K. draft law that would criminalize expressing “support of a proscribed organization” for its overbroad phrasing); Frank LaRue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 937, U.N. Doc. A/HRC/17/27/Add.1 (May 27, 2011) (criticizing as overly broad phrases such as “state of emergency” and “state of extreme danger” in a Hungarian law forcing media to transmit particular statements during such situations).

<sup>101</sup> See General Comment 34, *supra* note 91, ¶¶ 28–32.

<sup>102</sup> ICCPR art. 19(3).

<sup>103</sup> See General Comment 34, *supra* note 91, ¶ 22.

<sup>104</sup> See *id.* ¶ 30.

<sup>105</sup> *Id.* ¶ 34.

<sup>106</sup> See David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 52, U.N. Doc. A/74/486 (Oct. 9, 2019) [hereinafter *Special Rapporteur 2019 Report*].

through non-censorial means? For example, can the government through outreach efforts and modeling of appropriate behavior achieve its objective without limiting expression?<sup>107</sup> If the answer is yes, then the speech limitation is not the least intrusive means and is inappropriate. If the answer is no, the analysis continues. Second, has the government assessed its various options for limiting expression and selected the one that imposes the least burden on expression?<sup>108</sup> And third, after imposing the selected measure, has the government periodically examined whether it is effective? If the speech restriction does not achieve the objective, the restriction does not meet the least intrusive means test.<sup>109</sup>

The second component of the necessity test requires governments to demonstrate that the restriction is proportional.<sup>110</sup> In considering proportionality, governments must show that restrictions “target a specific objective and [do] not unduly intrude upon the other rights of targeted persons” and that “[t]he ensuing ‘interference with third parties’ rights [is] limited and justified in the light of the interest supported by the intrusion.”<sup>111</sup>

The U.N. human rights machinery’s application of these tests has often resulted in the finding that speech bans violate the necessity test when the speech is unlikely to result in imminent harm.<sup>112</sup> Under such circumstances, the

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<sup>107</sup> In the context of combating intolerance and before resorting to speech bans, states should use a variety of non-censorial tools, including “legislating against religious discrimination and hate crimes, engaging in inter-faith dialogues, promoting education on tolerance, reaching out to vulnerable populations to assist with grievances, and having governmental officials speak out against intolerance.” Evelyn Aswad & David Kaye, *Convergence & Conflict: Reflections on Global and Regional Human Rights Standards on Hate Speech*, 20 NW. J. HUM. RTS. 165, 176 (2022).

<sup>108</sup> See *Special Rapporteur 2019 Report*, *supra* note 106, ¶ 52.

<sup>109</sup> See *id.*

<sup>110</sup> See General Comment 34, *supra* note 91, ¶ 34.

<sup>111</sup> David Kaye (Special Rapporteur on the Right to Freedom of Opinion and Expression) et al., *Mandates of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; and the Special Rapporteur on Freedom of Religion or Belief*, Comm. No. OL USA 6/2017, 3 (May 9, 2017) (quoting David Kaye (Special Rapporteur on the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 35, U.N. Doc. A/HRC/29/32 (May 22, 2015)), <https://perma.cc/7RZH-MX2C>.

<sup>112</sup> For example, in the context of hate speech laws, the U.N. Special Rapporteur has stated: “To prevent any abusive use of hate speech laws, the Special Rapporteur recommends that only serious and extreme instances of incitement to hatred be prohibited as criminal offences. The Special Rapporteur thus calls upon States to establish high and robust thresholds, including the following elements: severity, intent, content, extent, likelihood or probability of harm occurring, imminence and context.” *Special Rapporteur 2012 Report*, *supra* note 98, ¶ 79. In the context of speech restrictions imposed for national security purposes, the U.N. Special Rapporteur has similarly advised that speech should only be suppressed when “(a) the expression is intended to incite imminent violence, (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”

government can generally avail itself of less burdensome measures than speech bans to achieve its objectives. In addition, the U.N. human rights machinery has often found that prior restraints on expression fail the necessity test because other means are generally available to achieve the legitimate objectives.<sup>113</sup>

### III. RECOMMENDED APPROACH ON PROPAGANDA FOR WAR

With Part II's mapping exercise in mind, this Part proposes parameters for the ambiguous wording of Article 20(1) and reconciles this obligation with Article 19(3)'s tripartite test for speech restrictions. This Part draws on existing international jurisprudence to define the contours of "propaganda" and "war" and answers other questions about Article 20(1)'s scope.

#### A. The Meaning of "Propaganda"

As noted previously, governments bear the burden of demonstrating that any restrictions on expression meet Article 19(3)'s legality, legitimacy, and necessity test.<sup>114</sup> This tripartite test also applies to speech restrictions imposed under Article 20.<sup>115</sup> It would be peculiar indeed if the ICCPR generally required application of this tripartite test for speech restrictions but allowed governments to implement improperly vague speech bans or unnecessarily restrict speech on the topics specified in Article 20 (in other words, war and hate).

If an ICCPR State Party were to ban propaganda for war without significant additional definition of key terms, serious issues under the legality and necessity tests would arise.<sup>116</sup> "Propaganda" is a wide-ranging term that covers

Frank LaRue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 36, U.N. Doc. A/HRC/17/27 (May 16, 2011).

<sup>113</sup> See, e.g., Farida Shaheed (Special Rapporteur in the Field of Cultural Rights) et al., Special Rapporteurs' Joint Comm'n No. EGY 9/2015, at 9–10 (Aug. 19, 2015), <https://perma.cc/JK6Q-L32Z> (calling for the end of "prior-censorship bodies or systems"); David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 50, U.N. Doc. A/69/335 (Aug. 21, 2014) ("The imposition of prior censorship to protect children from harmful material provides an example of disproportionate restrictions that run counter to international human rights standards."); David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Special Rapporteur Comm'n No. CAN 1/2018, at 5 (Apr. 17, 2018), <https://perma.cc/4338-NAR6> ("While the enforcement of copyright law may be a legitimate aim, I am concerned that website/application blocking is almost always a disproportionate means of achieving this aim.").

<sup>114</sup> See *supra* notes 89–91 and accompanying text.

<sup>115</sup> See General Comment 34, *supra* note 91, ¶ 50–52.

<sup>116</sup> If an ICCPR State Party were to ban propaganda for war, the legitimacy test would be satisfied, either because Article 20(1) makes averting war a legitimate governmental objective and/or because such an aim qualifies under ICCPR Article 19(3) as a national security or public order

the intentional spreading of ideas to promote a cause, whether or not elements of bias are present.<sup>117</sup> Such a vague and broad term would fail the legality test, given the U.N. human rights machinery's rigorous approach to vagueness and overbreadth.<sup>118</sup> In addition, banning the intentional spreading of ideas to promote war would fail the necessity test because such a standard is untethered to the likelihood or imminence of the harm to be averted.<sup>119</sup> The U.N. human rights machinery has repeatedly pressed governments to examine options less intrusive than speech bans when harms are unlikely or possible only in the long term.<sup>120</sup>

In this regard, examination of the U.N. Committee on the Elimination of Racial Discrimination's interpretation of hate speech prohibitions is instructive.<sup>121</sup> This Committee monitors implementation of the Convention on the Elimination of Racial Discrimination (CERD), which contains a criminal prohibition on the "dissemination" of ideas of racial superiority or hatred in Article 4.<sup>122</sup> Similar to ICCPR Article 20(1)'s ban on "propaganda," CERD Article 4's ban on certain "dissemination" does not explicitly require an assessment of whether the speech is likely to result in near-term harm.<sup>123</sup> However, the CERD requires that "due regard" be given to freedom of expression in implementing this ban<sup>124</sup> and that freedom of expression must be guaranteed to all without discrimination.<sup>125</sup> Noting the HRC's approach to

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objective. *See supra* notes 101–104 and accompanying text for a discussion of Article 19(3)'s legitimate objectives.

<sup>117</sup> *See supra* note 39 and accompanying text.

<sup>118</sup> *See supra* notes 92–100 and accompanying text.

<sup>119</sup> *See supra* note 112 and accompanying text.

<sup>120</sup> *See supra* note 112–113 and accompanying text.

<sup>121</sup> *See generally* Comm. on the Elimination of Racial Discrimination, General Recommendation No. 35, U.N. Doc. CERD/C/GC/35 (Sept. 26, 2013) [hereinafter GR 35] (recommending interpretations of Article 4 of the treaty, which contains a mandatory ban on certain forms of hate speech).

<sup>122</sup> CERD Article 4 requires States Parties to: "declare an offense punishable by law all *dissemination of ideas based on racial superiority or hatred*, incitement to racial discrimination, as well as all . . . incitement to [violence] 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." International Convention on the Elimination of All Forms of Racial Discrimination art. 4(a), Dec. 21, 1965, 80 Stat. 271, 660 U.N.T.S. 195 [hereinafter CERD] (emphasis added).

<sup>123</sup> *See id.*

<sup>124</sup> CERD Article 4 states that States Parties must implement its hate speech ban "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention." *Id.* Both the Universal Declaration of Human Rights and CERD Article 5 protect freedom of expression. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948); CERD art. 5(d)(viii).

<sup>125</sup> *See* CERD art. 5(d)(viii).

ICCPR Article 19(3),<sup>126</sup> the CERD Committee determined that the legality and necessity tests apply to hate speech restrictions involving the “dissemination” of ideas of racial superiority.<sup>127</sup> Applying ICCPR Article 19(3)’s principles, the Committee interpreted the prohibition of “dissemination” of certain hateful speech to require an examination of intent, likelihood of harm, and imminence of the harm.<sup>128</sup>

Such a principled approach is also warranted in the context of Article 20(1). After applying ICCPR Article 19’s legality and necessity tests, Article 20(1)’s ban on propaganda should be understood to cover the intentional spreading of information that is likely to lead to imminent war. This interpretation of Article 20(1)’s scope is consistent with views expressed by scholars and the U.N. Special Rapporteur that propaganda means speech that “incites” war.<sup>129</sup> The HRC has also interpreted propaganda as encompassing speech “threatening” war or that “actually results in war” rather than mere dissemination of ideas in favor of war that is untethered to the likelihood of near-term harm.<sup>130</sup> Presumably, for speech to truly pose a threat of war or result in war, the speech must be likely to trigger war in the near term.

Though scholars and U.N. experts did not explain clearly *how* they reached their conclusions in defining and narrowing the scope of propaganda, application of Article 19’s tripartite test provides the doctrinal underpinning for such conclusions. In this regard, it is notable that the EU General Court’s decision upholding the EU ban on Russian media outlets improperly invoked

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<sup>126</sup> See, e.g., GR 35, *supra* note 121, ¶¶ 4 n.9, 12 n.14, 16 n.18 (citing General Comment No. 34 for its interpretation of Article 19’s protections of freedom of expression).

<sup>127</sup> See *id.* ¶¶ 12, 19 (“The application of criminal sanctions should be governed by the principles of legality, proportionality, and necessity.”).

<sup>128</sup> See *id.* ¶ 16 (stating that “the intention of the speaker, and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question,” should be considered to determine if dissemination and incitement offenses fall within the scope of CERD Article 4). Patrick Thornberry, chief drafter of GR 35, has noted that this interpretation “decisively rejects any suggestion of a ‘strict liability’ approach to dissemination and incitement . . . [by linking] them with principles of criminal law on mental elements in crime.” Patrick Thornberry, *International Convention on the Elimination of All Forms of Racial Discrimination: The Prohibition of ‘Racist Hate Speech’*, in *THE UNITED NATIONS AND FREEDOM OF EXPRESSION AND INFORMATION: CRITICAL PERSPECTIVES* 121, 131 (2015). The requirement of “imminence” also narrows “the scope of potential hate speech prosecutions.” *Id.* at 132.

<sup>129</sup> See *supra* notes 54, 85 and accompanying text. It should be noted that the concept of “incitement” appears in Article 20(2)’s mandatory ban on certain hateful speech, which the U.N. human rights machinery has interpreted to require an imminent and likely risk of defined harms. See *Special Rapporteur 2012 Report*, *supra* note 98, ¶¶ 44, 45(c).

<sup>130</sup> See *supra* notes 68–70 and accompanying text; see also Kaye, *supra* note 26, at 141 (noting that this interpretation seeks to rein in the potential scope of propaganda).



ICCPR Article 20(1) because it neglected to apply Article 19(3)'s rigorous legality and necessity tests in its analysis.<sup>131</sup>

## B. The Meaning of “War”

Defining “war” in ICCPR Article 20(1) is tricky for a variety of reasons. Beyond the fact that the ICCPR does not define the term, the U.N. Charter (which predates the ICCPR) does not use the term “war” at all because its drafters sought to “prohibit not only conflicts arising from a *formal state of war*, but the resort to *armed conflict* generally.”<sup>132</sup> Rather than banning “war,” the Charter therefore prohibits U.N. member states from the “use of force against the territorial integrity or political integrity of any State, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>133</sup> Illicit uses of force span a continuum of acts, with the most “serious and dangerous” rising to the level of “acts of aggression.”<sup>134</sup> The Charter, however, explicitly allows member states to use force in individual or collective self-defense if an armed attack occurs, until the Security Council takes measures to maintain peace.<sup>135</sup> Several scholars and U.N. experts agree that “war” in Article 20(1) means an act of aggression that is contrary to the U.N. Charter and does not cover civil wars, internal strife, wars seeking self-determination or independence, or the use of force in self-defense.<sup>136</sup>

The international community has attempted to define the term “acts of aggression” over many decades. The phrase appears in two articles of the U.N. Charter: Article 1, which lays out the U.N.’s purposes,<sup>137</sup> and Article 39, which lists the types of events that trigger the Security Council’s power to order legally binding measures, including the use of force.<sup>138</sup> Although the U.N. Charter does

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<sup>131</sup> See *RT France v. Council*, *supra* note 16 and accompanying text.

<sup>132</sup> MURPHY, *supra* note 34, at 575 (emphasis added).

<sup>133</sup> U.N. Charter art. 2(4).

<sup>134</sup> See G.A. Res. 3314, Definition of Aggression, art. 3 (Dec. 14, 1974) [hereinafter UNGA Res. 3314]; see also *id.* annex (“aggression is the most serious and dangerous form of the illegal use of force”).

<sup>135</sup> U.N. Charter art. 51. The Security Council has the power to authorize states to use force against other states to maintain peace and security. See *id.* art. 42.

<sup>136</sup> See *supra* notes 56, 70, 85 and accompanying text.

<sup>137</sup> See U.N. Charter art. 1(1) (“To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of *acts of aggression or other breaches of the peace*, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a *breach of the peace*”) (emphasis added).

<sup>138</sup> See *id.* art. 39 (“The Security Council shall determine the existence of any *threat to the peace, breach of the peace, or act of aggression* and shall make recommendations, or decide what measures shall be taken in

not define an “act of aggression,” the General Assembly in 1974 provided guidance. First, it said that an act of aggression was “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the [U.N. Charter].”<sup>139</sup> The General Assembly advised that “acts of aggression” could include invading or attacking another country or its armed forces, blockading a country, using armed forces in another state in a manner that exceeds the host state’s consent, allowing a third state to use a state’s territory to commit an act of aggression, and sending armed groups into another state to commit serious acts.<sup>140</sup> However, the General Assembly indicated that only the most grave forms of the illegal use of force constituted aggression, and it cautioned that the Security Council could decide that an initial assessment that an act of aggression had been committed was not justified “in light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.”<sup>141</sup> In other words, the General Assembly recommended a high threshold to identify an act of aggression and observed that a significant amount of political judgment is involved in deciding if a particular use of force constitutes an “act of aggression.”<sup>142</sup>

The U.N. human rights machinery’s recommendation to interpret “war” as an “act of aggression” clarifies certain elements of the term “war” but leaves other aspects subject to judgment calls. For example, by pegging “war” to acts of aggression, clarity is gained that “war” refers to the most grave, illicit uses of force under the U.N. Charter. That said, judgment calls will inherently remain about whether relevant circumstances warrant determining a particular use of force to be sufficiently grave.<sup>143</sup> Similarly, opining that lawful uses of force under

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accordance with Articles 41 and 42, to maintain or restore international peace and security.”) (emphasis added).

<sup>139</sup> UNGA Res. 3314 (annex), *supra* note 134, art. 1. This paragraph summarizes the key themes of UNGA Res. 3314, but it should be noted that the Resolution’s definition of acts of aggression contains further nuances and caveats. *See, e.g., id.* (defining the term “state”).

<sup>140</sup> *See id.* art. 3.

<sup>141</sup> *Id.* art. 2.

<sup>142</sup> In 2010, the States Parties to the treaty that created the International Criminal Court (ICC) adopted amendments that generally define an “act of aggression” as a violation of U.N. Charter Article 2(4) as clarified by the U.N. General Assembly’s recommended interpretations. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90. *See also* MURPHY, *supra* note 34, at 555. These amendments must be ratified by each ICC State Party. *Id.* Some commentators have expressed concerns that these amendments may depart from UNGA Res. 3314’s definition of “acts of aggression” by focusing more on whether a particular act is a “manifest” violation of the U.N. Charter rather than whether, under particular circumstances, it is a grave form of the illicit use of force. *See* Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT’L L. 257, 270 (2015).

<sup>143</sup> For example, the use of force to save citizens from atrocities perpetrated by their own government (often called humanitarian intervention) is not explicitly authorized by the U.N.

the Charter are not covered by “war” brings some clarity that propaganda that favors the use of force in self-defense and when authorized by the U.N. Security Council is not prohibited. However, judgment calls about whether the use of force in self-defense in a particular situation is necessary and proportional or otherwise lawful are unavoidable.<sup>144</sup> Likewise, there will be debates about whether a government’s use of force has exceeded the scope of Security Council authorizations,<sup>145</sup> which could render it illegal. Often, no guidance will be available from the Security Council, General Assembly, or International Court of Justice about whether particular uses of force constitute acts of aggression and thus numerous (and likely contentious) judgment calls remain ingrained in applying the U.N. Charter’s framework to define “war” in ICCPR Article 20(1).

A further layer of complexity arises from the fact that the HRC and the U.N. Special Rapporteur have stated that “war” in Article 20(1) also covers “breaches of the peace” in contravention of the U.N. Charter.<sup>146</sup> Like the concept of “act of aggression,” the phrase “breach of the peace” appears in Articles 1 and 39 of the U.N. Charter but was left undefined.<sup>147</sup> In the Security Council’s practice of interpreting this phrase, it “almost always has chosen to declare a situation to constitute a ‘threat to the peace’” rather than a “breach” of the peace,<sup>148</sup> which leaves this phrase somewhat ambiguous. While a breach of the peace could no doubt be said to occur during “hostilities between armed units of two states,” it would also “reach well beyond such situations . . . to include all situations in which a ‘threat to the peace’ is no longer merely a threat

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Charter. See BARRY E. CARTER, ALLEN S. WEINER & DUNCAN B. HOLLIS, *INTERNATIONAL LAW* 1011 (7th ed. 2018). The U.N. General Assembly has reiterated that Security Council authorization is necessary for uses of force undertaken for the purpose of humanitarian intervention. See G.A. Res. 60/1, ¶ 139, World Summit Outcome Document (2005) (noting that U.N. member states, in the context of genocide and other atrocities, are “prepared to take collective action, in a timely and decisive manner, *through the Security Council, in accordance with the Charter, including Chapter VII*”) (emphasis added). Questions could arise about how propaganda in favor of humanitarian intervention (when not authorized by the Security Council or properly justified as self-defense) should be treated under Article 20(1).

<sup>144</sup> See MURPHY, *supra* note 34, at 583–86 (explaining how customary international law rules require that self-defense measures “be necessary and proportionate to the armed attack” and describing examples of disputes about the application of these standards). In addition, the Security Council and International Court of Justice (ICJ) have expressed differing views about whether non-state actors can commit “armed attacks,” which affects whether a state can lawfully invoke the right to self-defense to justify its use of force. See *id.* at 586–88 (noting that the Security Council believes states have a right of self-defense that arises from armed attacks by terror groups, but that the ICJ has held that armed attacks by non-state actors do not trigger states’ right to self-defense).

<sup>145</sup> See PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* 751–58 (2d ed. 2012) (describing concerns of many Global South countries that NATO exceeded the Security Council’s authorization to use force in Libya in 2011).

<sup>146</sup> See *supra* notes 70, 85 and accompanying text.

<sup>147</sup> See *supra* notes 137–138.

<sup>148</sup> See MURPHY, *supra* note 34, at 592.

but has already materialized.”<sup>149</sup> The Security Council has determined that “threats to the peace” have occurred in a range of situations, including “serious humanitarian crises and even the outbreak of disease,”<sup>150</sup> as well as the proliferation of weapons of mass destruction and internal conflicts.<sup>151</sup> Such threats to peace could materialize into breaches of peace that cover situations well beyond acts of aggression. U.N. human rights mechanisms should therefore remove “breaches of the peace” from their definition of “war” or at least clarify that their reference to “breaches of the peace” only encompasses those breaches that also rise to the level of an act of aggression.<sup>152</sup>

In reviewing this complex landscape, a few conclusions are warranted. First, it is reasonable and appropriate to define “war” in ICCPR Article 20 as referring to an “act of aggression” that violates the U.N. Charter. This means that “war” refers to the “most serious and dangerous” illicit uses of force by state actors under particular circumstances; it also excludes lawful uses of force under the Charter from the meaning of “war.” Second, application of the U.N. Charter framework requires a variety of judgment calls involving both the lawfulness and gravity of the use of force in various contexts that the U.N. machinery must be sensitive to when monitoring implementation of Article 20(1). Similarly, national laws will need to carefully navigate this framework to avoid overly broad or vague bans on “war.” Third, the U.N. machinery should no longer refer to “breaches of the peace” in defining “war,” or it should clarify that its reference to “breaches of the peace” refers solely to those that overlap with “acts of aggression.”

### C. Additional Issues of Scope

Concerning the question of whether the word “prohibit” in Article 20(1) requires criminal or civil sanctions, it seems clear that civil sanctions would be sufficient to implement the obligation. As previously noted, the word “prohibit” means to forbid without specifying the nature of sanctions.<sup>153</sup> That said, when the international community desires to specify criminal sanctions, it knows how to do so. For example, under the CERD, a contemporaneously negotiated human rights treaty, certain hate speech is required to be an “offence punishable

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<sup>149</sup> BRUNO SIMMA ET AL., *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* (VOL. II) 1293 (2012).

<sup>150</sup> MURPHY, *supra* note 34, at 592.

<sup>151</sup> *See* SIMMA ET AL., *supra* note 149, at 1280–83.

<sup>152</sup> In other words, “Aggression . . . always constitutes a breach of the peace.” *Id.* at 1293. But a “breach of the peace” is a broader concept than aggression and thus not every breach of the peace is an act of aggression. *Id.*

<sup>153</sup> *See supra* note 42 and accompanying text.

by law,” which is a clear call for criminal sanctions.<sup>154</sup> In addition, the Special Rapporteur has interpreted ICCPR Article 20(2), which “prohibits” certain hateful speech, to require civil rather than criminal sanctions.<sup>155</sup> Interpreting Article 20 to compel civil rather than criminal sanctions is also consistent with the understandings of most scholars, though some note that certain egregious situations could properly result in criminal sanctions.<sup>156</sup>

On the issue of whether the ban on propaganda for war applies to speech by state actors, scholars have proceeded cautiously.<sup>157</sup> The HRC initially opined that states “should” refrain from such propaganda, but it later noted that the obligation applies to state actors,<sup>158</sup> though it has generally refrained from applying the ban to ICCPR States Parties during their periodic reviews.<sup>159</sup> As a legal and policy matter, it seems illogical for Article 20(1)’s prohibition to apply solely to private actors’ speech and allow states to engage in unlimited propaganda in favor of war, particularly given the power of state actors to incite war. Moreover, in applying ICCPR Article 19(3)’s least intrusive means test, states should engage in non-censorial methods prior to limiting speech.<sup>160</sup> As a practical matter, refraining from engaging in propaganda—and, indeed, speaking out against such propaganda—would be a tool that states must deploy before resorting to censorship of private actors.<sup>161</sup> In sum, Article 20(1) should be understood to apply to the speech of both state and private actors to avoid a nonsensical outcome.

As for the issue of the propaganda’s timing, the Special Rapporteur has stated that Article 20(1) applies only to propaganda *before* a war commences,<sup>162</sup> but the EU General Court has interpreted Article 20(1) to include propaganda *during* an ongoing war.<sup>163</sup> The text of Article 20(1) could be read either way, and the negotiating history does not appear to illuminate this issue. That said, it is important to recall that Article 20 is a unique article in a treaty that otherwise recognizes individually held civil and political rights and seeks to constrain

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<sup>154</sup> See *supra* note 122 and accompanying text.

<sup>155</sup> *Special Rapporteur 2012 Report*, *supra* note 98, ¶ 47.

<sup>156</sup> See *supra* notes 57–59 and accompanying text.

<sup>157</sup> See *supra* notes 60–63 and accompanying text.

<sup>158</sup> See *supra* note 71 and accompanying text.

<sup>159</sup> See *supra* notes 82–84.

<sup>160</sup> See *supra* notes 105–109 and accompanying text.

<sup>161</sup> For example, in the context of combating intolerance and implementing ICCPR Article 20(2)’s ban on advocacy of hatred that incites certain harms, the international community has called on states to speak out against intolerance before resorting to speech bans. See Aswad & Kaye, *supra* note 107, at 176.

<sup>162</sup> See *supra* note 86 and accompanying text.

<sup>163</sup> See *RT France v. Council*, *supra* note 16 and accompanying text.

governmental power. It is therefore appropriate to resolve ambiguities in Article 20's text in favor of a narrow construction, which would support the Special Rapporteur's approach.

#### IV. CONCLUSION

ICCPR Article 20(1)'s ban on propaganda for war emerged from a geopolitical battle in U.N. negotiations that the Soviet Union won, though Western liberal countries, particularly in Europe, have continued to resist this provision in various ways.<sup>164</sup> The U.N. human rights machinery, states, and scholars have generally overlooked Article 20(1) in the decades since its adoption.<sup>165</sup> But one scholar presciently warned that leaving this provision undefined would enhance its potential for misuse.<sup>166</sup>

In 2022, in an odd twist of fate, EU countries—including those that had expressed the most concern about the ICCPR's prohibition on war propaganda—instituted a broad ban on Russian state media's Ukraine war propaganda.<sup>167</sup> The EU General Court improperly invoked Article 20(1) to uphold the ban because it neglected to apply ICCPR Article 19(3)'s rigorous tripartite test to its analysis.<sup>168</sup> This situation has triggered a variety of questions about Article 20(1)'s scope, with the U.N. Special Rapporteur calling for a global process to elucidate its meaning.<sup>169</sup>

This Essay has engaged in a mapping exercise of existing approaches to Article 20(1) and proposed a framework for interpreting Article 20(1) consistently with Article 19(3)'s tripartite test for speech restrictions and other existing international jurisprudence. Ultimately, this Essay's analysis demonstrates that Article 20(1) of the ICCPR applies to the intentional spreading of information in favor of war that is likely to result in near-term (that is, imminent) war. The term "war" should generally be understood to mean an act of aggression by a state against another state, in contravention of the U.N. Charter. In addition, Article 20's prohibition requires civil rather than criminal sanctions, includes governmental speech, and applies to speech before a war is launched. The U.N. human rights machinery's timely reinforcement of such

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<sup>164</sup> See *supra* notes 81, 84 and accompanying text.

<sup>165</sup> See *supra* notes 30, 82 and accompanying text.

<sup>166</sup> See KEARNEY, *supra* note 30, at 246.

<sup>167</sup> See *supra* notes 2–5 and accompanying text.

<sup>168</sup> See *supra* notes 15–17, 91 and accompanying text. Many commentators have noted that the ban did not meet ICCPR Article 19(3)'s legality and necessity tests. See *supra* notes 21, 24–26 and accompanying text. It should be noted that the EU General Court's analysis also departed from the U.N. Special Rapporteur's view that ICCPR Article 20(1) only applies to propaganda before a war begins. See *supra* note 86 and accompanying text.

<sup>169</sup> See *supra* note 29 and accompanying text.

clarifications would help mitigate further misunderstandings and misuse of Article 20(1).