

THE PRESENT STATUS OF PROPAGANDA IN INTERNATIONAL LAW*

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I

INTRODUCTION

It is appropriate to open this volume with a brief statement on why, in this symposium-saturated society, a symposium on this particular subject is justified. The answer may be sought under two headings: Why take up propaganda at all? And why adopt, of all the possible approaches to the problem of propaganda, an approach from the point of view of international law?

A. Why Take up Propaganda at All?

As to this question, my answer would be that propaganda is one of the most dangerous sources of international friction and war, and that there is every reason to believe that it will get much worse. Of course, as we have been often told, international wars ultimately can be traced to deep-seated clashes of interest; but clashes of interest we will always have with us—the problem is how to prevent them from erupting into organized war. It is at this point that the presence of unrestrained propaganda can sometimes make the difference between peace and war.

Perhaps the best illustration of propaganda's potential impact, because of its enormous consequences not only for a great war but for a whole era of conflict, is the period leading up to World War I. From the turn of the century down to the outbreak of war, there had been going on an intensive campaign of irredentist propaganda by Serbia in Bosnia and Herzegovina. Both sides were acutely aware of the significance, danger, and potential of this propaganda. As early as 1909 Serbia had agreed to renounce its opposition to the annexation of Bosnia and Herzegovina and had promised to live on good-neighbor terms with Austria-Hungary. But the Serbs continued to carry on their agitation through underground channels, with some of the propaganda being definitely of a terrorist character. Not all of the propaganda was clandestine. No less than eighty-one Serbian publications were excluded from Austria-Hungary on the ground that they flagrantly violated the domestic criminal code. It is significant that the famous Austrian ultimatum of 1914 was heavily

* Much of this paper is adapted from the book co-authored by the author and Professor John B. Whitton, *PROPAGANDA: TOWARDS DISARMAMENT IN THE WAR OF WORDS* (1964).

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concerned with demanding of the Serbian government an official condemnation of all propaganda directed against the monarchy and with an agreement to suppress by every possible means all criminal and terroristic propaganda. The Serbian government ostensibly agreed to this, but in actual practice went so far as almost to seem to condone the assassination of Archduke Ferdinand. As scholars look back upon the explosive situation in the summer of 1914, they are inclined to conclude that, as a result of nationalistic propaganda, a peaceful disposition of the controversies had already become virtually impossible.

Since that time the potentialities of propaganda, both for good and for evil, have been magnified many times over by a number of developments, not least of which is the vastly increased effectiveness of communication through various scientific developments. One of the sharpest advances in the power of propaganda occurred with the advent of radio. There were many reasons for this. One was the swiftness of this mode of communication. Another was that it could reach people whether literate or illiterate. Still another was the extreme difficulty of combating it or blocking it, since, unlike printed publications, which could ordinarily be stopped at the border, radio signals could never be completely excluded. Perhaps the most important reason of all, however, was the potential of the timbre and expression of the human voice compared with the cold printed page. The total effect may be summed up by saying that, for the first time in history, it became possible to exploit mob psychology without assembling the mob physically in one place.

If this was so as to radio, the prospect that now looms of achieving the same breadth of coverage by television is nothing less than appalling. In the past, the role of television has been limited partly by its short range and partly by the expense of receivers. The latter has been rapidly overcome by the use of communal receivers in public squares and in coffee houses and by the gradual reduction in the cost of the equipment. The former is being rapidly eliminated by satellite relays. We therefore can look forward to the time when in the most remote parts of the world there will be added to the impact of the human voice such devices as film clips showing alleged atrocities, and various other graphic devices whose potential for conveying conviction and arousing emotion is many times that of either radio or the printed page. A world audience already becoming somewhat skeptical of the claims of international radio propaganda will now be presented with visual proofs of the broadcasters' charges and statements, just as television commercials visually prove to us that one detergent washes clothes whiter than another (by the simple expedient of coloring the first batch of clothes blue before turning the camera on it) or prove the superiority of a particular razor by shaving the fuzz off a peach, or prove the efficacy of an antacid preparation by a drawing showing a thin, firm line of white protectively moving around the inside of a beautifully symmetrical stomach.

B. Why Adopt the Legal Approach?

Why do we approach propaganda from the point of view of international law? Let us suppose at the outset, for the sake of argument, that it can be demonstrated that the more dangerous forms of international propaganda are downright illegal, as will be undertaken in a moment. The reaction in some circles might well be: "So international propaganda of various kinds is illegal. So what?"

A proper answer to this challenge involves, of course, the whole place of law in international affairs, and in any such answer one must try to strike a balance between claiming too much and claiming too little. Certainly in the present state of international society, even the clearest demonstration of the illegality of a particular line of conduct is no guarantee that that line of conduct will be forthwith abandoned. On the other hand, it is one of the most persistent and pervasive phenomena of international affairs that no nation state, even the most revolutionary, wants to stand before the world community as a lawbreaker. It is almost impossible to find a single instance, in the story of international relations, of a country's bluntly stating: "We do not care whether this is legal or not; we will do as we please." Instead, states will sometimes try to deny the existence of a rule of law, or they will "interpret" it in such a way as to suit their purposes, or they will resort to elaborate legal façades to screen their conduct, or they will resort to *tu quoque* arguments—but they will not admit that they have broken the law.

A study of the history of propaganda reveals very clearly that, at those points where diplomatic protest or other formal international challenge has been aimed at propaganda on legal grounds, the answer has seldom been to deny the binding force of international law. In a significant number of cases, the alleged offender has changed his ways, by either, at worst, attempting to conceal his activities from sight or, at best, bringing them in line with the legal standards invoked. A striking illustration of the latter is the episode which began on November 19, 1792, with the famous decree voted by the French Convention which read as follows:¹

The National Convention declares in the name of the French nation that it will grant fraternity and aid to all peoples who desire to recover their liberty, and charges the executive power to give the generals the orders necessary to carry aid to these peoples and to defend the citizens who shall have been molested or could be molested for the cause of liberty.

The similarity between this announcement and the supposedly novel concept of support of "wars of national liberation" is startlingly apparent, and, predictably, the reaction in other countries was intense. There was a long diplomatic encounter between Britain and France,² Lord Grenville writing to Chauvelin that the French decree was understood in England "to encourage disorder and revolt in every

¹ 53 ARCHIVES PARLEMENTAIRES (1st ser.) 474 (1792).

² 35 ANNUAL REGISTER 128 (1793).

country,"³ and the French had very little success in trying to explain the decree away.⁴ The significance for present purposes lies in the historic fact that France not only withdrew the decree but placed a declaration in its Constitution that France had no intention of interfering with the governments of other nations.⁵ Most significant of all is Pitt's statement that this change of policy by the French was made "upon the express ground . . . that such interference, and such attempts, would be a violation of the law of nations."⁶

To the extent, then, that research, publication, and symposia of this kind can establish the fact that there is an international law of propaganda with reasonably definable standards, that fact in itself may go a long way toward inducing nations to refrain from the more obvious violations of these standards. Beyond this, there lies the entire area, which is the subject of later papers, of actual sanctions and remedies that could be employed, if the international community had the will to do so, to put even greater force into the prescriptions of the international law of propaganda.

II

THE LEGALITY OF STATE PROPAGANDA

My description of the present status of the law of propaganda will begin with a broad statement, which for obvious reasons cannot be fully documented in a presentation of this length but which is believed adequately supported by the book entitled *Propaganda* by Professor Whitton and myself.⁷ The broad statement is this: As to the more serious kinds of propaganda by nation states, that is, warmongering, subversive, and defamatory propaganda of such character as to contain a threat to the peace, international law already contains substantive principles and rules making such propaganda illegal. If this is so, how does one explain the widespread impression that the law of propaganda is either nonexistent or in a state of uncertainty and confusion? The reason, it is submitted, is that since the most important areas of propaganda law have been relatively noncontroversial, they have also attracted relatively little attention. Presumably everyone would agree that by far the most important aspect of the problem of propaganda is that of propaganda undertaken

³ Lord Grenville to M. Chauvelin, Dec. 31, 1792, *id.* at 116.

⁴ See M. Chauvelin to Lord Grenville, Dec. 27, 1792, *id.* at 114; Laprade, *England and the French Revolution, 1789-1797*, 28 *JOHNS HOPKINS STUDIES IN HISTORICAL AND POLITICAL SCIENCE* 113 (1909).

⁵ Decree of April 13, 1793, 62 *ARCHIVES PARLEMENTAIRES* (1st ser.) 3 (1793): "The National Convention declares, in the name of the French people, that it will not interfere, in any manner, in the government of other peoples." For the article in the constitution referred to here, see *CONSTITUTION OF 1793*, arts. 118-19:

"118. The French nation is the natural friend and ally of free nations.

"119. It does not interfere with the affairs of government of other nations. It suffers no interference of other nations with its own."

See HENRY C. LOCKWOOD, *CONSTITUTIONAL HISTORY OF FRANCE* 313 (1890). For the Decree of 1793, see JULES BASDEVANT, *LA RÉVOLUTION FRANÇAISE ET LE DROIT DE GUERRE CONTINENTAL* 164 (1901).

⁶ 35 *ANNUAL REGISTER* 46 (1793).

⁷ JOHN B. WHITTON & ARTHUR LARSON, *PROPAGANDA: TOWARDS DISARMAMENT IN THE WAR OF WORDS* (1964) [hereinafter cited as WHITTON & LARSON].

by nation states themselves. True, the question of controls does occasionally appear in relation to private publications or broadcasts, but in proportion to the total problem, this is a very small fraction of the subject. Yet it is around this fraction, particularly in the United States and to a lesser degree in some other Western countries, that the controversy has raged about the possible impact of propaganda controls on the traditional right of free speech. But obviously this question does not arise when the speaker is the government itself. The continuing debate, then, over the extent to which propaganda controls can be reconciled with free speech obscures the fact that, as to states themselves, the substantive law is reasonably clear in its prohibition of the kinds of propaganda that go beyond the merely strident, unpleasant, and abusive, and cross the line into the inflammatory, the warmongering, the menacing, and even the terrorist.

In trying to organize the law of propaganda on a systematic basis, Professor Whitton and I began by dividing the problem between propaganda undertaken by a state and propaganda undertaken by individuals. Cutting across these two principal divisions, we divided illegal propaganda into three categories: warmongering, subversive, and defamatory. Finally, as to each of the three kinds of illegal propaganda, whether undertaken by a state or an individual, we methodically searched the five sources of international law which the International Court of Justice is required to apply by article 38 of its Statute: "international conventions," "international custom," "the general principles of law recognized by civilized nations," and "as subsidiary means for determination of rules of law," "judicial decisions and the teachings of the most highly qualified publicists of the various nations."

Let me now merely indicate the conclusions reached by this process, without attempting to amass the supporting documentation.

A. Warmongering Propaganda

As to warmongering propaganda carried on by a state—presumably the most aggravated form of illegal propaganda—all five sources establish the illegality of such propaganda. As to treaties, one may begin with article 2, paragraph 4, of the United Nations Charter, stating that "Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." Even prior to the United Nations Charter, it was established by the Nuremberg trials that aggressive war was an international crime.⁸ It is only necessary to add to this the universally accepted principle that incitement by

⁸ General Assembly Resolution, Dec. 11, 1946, 1947 U.N. YEARBOOK 254 (U.N. Pub. Sales No. 1947.I.18). This, according to Pompe, "was the affirmation of the existence of an international criminal law as case law inaugurated by the International Military Tribunal." C. A. POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 316 (1953). See also International Law Comm'n, *Report*, U.N. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 12 (A/1316) (1950); POMPE, *op. cit. supra*, at 321 ff. Further substantiation of the Nuremberg principles is found in the Draft Code of Offences Against the Peace and Security of Mankind, adopted by the ILC at its Third Session (May 16 to June 27, 1951). For the report of the Third Session, see U.N. Doc. No. A/1858 (1951).

words to commit a crime is in itself illegal, to reach the conclusion that propaganda designed to foment aggressive war is illegal in itself.

This "principle of incitement" is fully supported by resort to the "general principles of law recognized by civilized nations." It has been familiar in the common law at least since *Rex v. Higgins*⁹ in 1801. It is a commonplace of civil law codes,¹⁰ as well as of codes of countries with Islamic backgrounds, such as Egypt,¹¹ the Sudan¹² and Libya.¹³ The Soviet law, as a matter of general principle, makes incitement criminal, stating, for example, "Whoever incites to a crime shall be considered its instigator" and "organizers, instigators, and accomplices shall be considered parties in crime along with the perpetrators."¹⁴ As to customary international law, one of the strongest evidences of the acceptance of the illegality of warmongering propaganda is the repeated, consistent, and unanimous affirmation of this proposition by the Members of the United Nations in such resolutions as those adopted in 1947,¹⁵ 1948,¹⁶ and 1950.¹⁷ As to the writings of publicists, as early as 1933 Pella asserted that, under the Covenant of the League of Nations and the Pact of Paris, war propaganda constituted a direct provocation to violate the stipulation of these accords.¹⁸

⁹ 2 East. 5, 102 Eng. Rep. 269 (K.B. 1801).

¹⁰ See GERMAN PENAL CODE § 48. See I R. MAURACH, DEUTSCHES STRAFRECHT 537 (2d ed. 1958); ADOLF SCHONKE, STRAFGESETZBUCH, KOMMENTAR 252 (9th ed., Schroeder, 1959). See generally 37 ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN 402, 404-05 (1903). Section 49a of the German Penal Code, as amended, similarly provides for the punishment of persons who attempt to cause another to commit a crime. However, this section is only applicable if the crime attempted to be instigated is a felony. The instigator is punished as one who attempts to commit a felony. See also MAURACH, *op. cit. supra*, at 548-58. This section was originally adopted in 1876 and followed an earlier Belgian law.

Words which unsuccessfully incite to commit crimes can nevertheless be punishable under §§ 110 and 111 of the German Penal Code. The former section makes it a misdemeanor, punishable by jail up to two years or with a fine, to publicly request an assembly of persons not to obey laws or validly promulgated ordinances and administrative regulations. The latter section provides for a like punishment of persons who, by the same means, successfully or unsuccessfully request an assembly of persons to commit crimes. See also BELGIAN PENAL CODE art. 66, paras. 4, 5; FRENCH PENAL CODE art. 60, para. 1; NETHERLANDS PENAL CODE art. 47, No. 2.

¹¹ EGYPTIAN PENAL CODE tit. 2, ch. 14:

"Art. 172: Whoever, by the means annunciated in the preceding article [*i.e.*, by means of the press], incites directly to commit the crimes of murder, plunder and arson, or crimes against the security of the State, without the said provocation being put into effect, will be punished by imprisonment.

.....

"Art. 177. Whoever incites by any of the same means the disobedience of laws or advocates acts qualified as crimes or misdemeanors by the law will be punished by the same punishments."

¹² SUDANESE PENAL CODE ch. 6, §§ 82-91.

¹³ LIBYAN PENAL CODE art. 100 (unofficial translation by Judge G. A. Good, C.B.E., former President of the Court of Appeals of Cyrenaica). See also LEBANESE PENAL CODE tit. 4, § 1, ch. 2, art. 217; JORDANIAN PENAL CODE ch. 2, art. 71; IRAQI PENAL CODE art. 54.

¹⁴ Law of Dec. 25, 1958, Concerning Approval of the General Principles of Criminal Legislation of the USSR and Constituent Republics § 17, [1959] *Vedomosti Verkhovnogo Soveta S.S.S.R.* No. 6 (U.S.S.R.).

¹⁵ Resolution of Fifth International Congress on Penal Law at Geneva, 18 *REVUE INTERNATIONALE DE DROIT PÉNAL* 44 (1947).

¹⁶ Resolution No. 2 of the United Nations Conference on Freedom of Information and of the Press, U.N. Doc. No. E/Conf. 6/C.1/19 (1948).

¹⁷ 1951 U.N. YEARBOOK 203-04 (U.N. Pub. Sales No. 1952.I.30).

¹⁸ Pella, *La Protection de la Paix par de Droit Interne*, 40 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 401 (1933).

Finally, under the heading of judicial decisions, the Nuremberg trials must be credited with having established the proposition that propaganda in aid of an aggressive war is itself an offense.¹⁹ In assessing the weight to be given to the Nuremberg trials, it is important to sort out those aspects of the trials which have been challenged by serious authorities and those which have not. For example, questions that might be raised about the propriety of applying international law to individuals are not of the heart of the matter here, since we are more interested in the substantive rules themselves, particularly as they might apply to states, free of the controversy about their applicability to individuals. The reference to propaganda in aid of producing war occurs repeatedly in the indictment, in the evidence, and in the judgments.²⁰ Among the individual defendants, it was most conspicuous in connection with Rudolph Hess,²¹ and Rosenberg,²² who was found guilty, among other things, of developing and spreading Nazi doctrines in numerous books and periodicals.

B. Subversive Propaganda

The illegality of warmongering propaganda, although thoroughly established by now, is of much more recent date than the illegality of subversive propaganda. The reason is that consummate paradox of international law: the fact that, for most of the period covered by international law, formal international war was not illegal, while any attempt by an outside power to aid in the overthrow of the government of a friendly power by subversion has always been illegal. Here again, since incitement of an illegal act is itself illegal, the rule of law is clear that if the offender is a state, the state is under a legal duty to refrain from spreading subversive propaganda hostile to the government of a foreign country in time of peace. Out of the long history of customary international law supporting this conclusion, one illustration has already been mentioned: the withdrawal by the French Convention of its decree offering aid to revolutionary movements, on the ground that this was in violation of the law of nations.²³ In more recent times, the most cogent evidence of what is accepted by the world community as the applicable standard is the repeated affirmation by the United Nations General Assembly and other United Nations bodies of the illegality of activities in aid of subversion and promotion of civil strife in other countries. For example, the General Assembly adopted in 1949, by vote of 53 to 5, with one abstention, a resolution entitled "Essentials of Peace," which called on all nations "to refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence, or integrity of any state, or at fomenting civil strife and sub-

¹⁹ See note 8 *supra*.

²⁰ I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 29, 30, 31, 33, 34, 180, 181, 182, 187, 283-84, 294, 302-03, 318, 327, 337-38, 350-53 (Nuremberg, 1947).

²¹ *Id.* at 283-84.

²² *Id.* at 294.

²³ See text accompanying notes 5 and 6 *supra*.

verting the will of the people in any state."²⁴ Similarly, the Draft Code of Offences Against the Peace and Security of Mankind, formulated in 1952, includes the following as one of the offenses: "the undertaking or encouragement by the authorities of a state of activities calculated to foment civil strife in another state, or the toleration by the authorities of a state who organized activities calculated to foment civil strife in another state."²⁵ The Code goes on specifically to condemn "direct incitement to commit any of the offences defined in the preceding paragraphs of this Article."²⁶ It might be mentioned in passing that there is no exception made for this kind of activity when it is described by one of the parties as a "war of national liberation."

The writings of publicists, reflecting this cogent line of customary international law, are emphatic on this rule. Vattel wrote, "It is unlawful for Nations to do any act tending to create trouble in another state, to stir up discord, to corrupt its citizens, to alienate its allies."²⁷ He added, "It is in violation of the laws of Nations to call on subjects to revolt when they are actually obeying their sovereign, although complaining of his rule."²⁸

If there ever was a time when a ringing reaffirmation of this ancient and well-established rule was needed, that time is now. In the week of February 10, 1966, for example, Fidel Castro bluntly asserted the right of one country to aid revolutionary movements in others;²⁹ indeed, the action of the Tri-Continental Solidarity Conference in Havana, advocating the use of armed force by so-called liberation movements, was viewed as so flagrant a violation of this principle that all the Latin American members of the United Nations except Mexico had filed a protest with Secretary-General U Thant on February 7, 1966, against this action.³⁰ The tendency to slight this fundamental rule of international conduct is not confined to those communist states who would like us to believe that there is some magic in the words "national liberation" that can make this bedrock principle of international law dissolve. For example, well before India actually took over the enclave of Goa, the government of India had been supplying money, advice, encouragement, and leadership to Portuguese of Indian origin in Goa who were engaged in a movement to rebel against the colonial power, Portugal, and go over to India. And as to the United States, Professor Quincy Wright had this to say about "Captive Nations Week":

Whatever may be the responsibility of governments in regard to libelous and seditious utterances by private agencies, it seems clear that such action by official agencies is violative of existing international law It is difficult to see what is the purpose of the President's Proclamation of Captive Nations Week if it is not

²⁴ 1950 U.N. YEARBOOK 344, Res. 290 (IV) (U.N. Pub. Sales No. 1951.I.24).

²⁵ Art. 2(5), 1952 U.N. YEARBOOK 842 (U.N. Pub. Sales No. 1953.I.30).

²⁶ Art. 2(12-ii), 1952 U.N. YEARBOOK 842 (U.N. Pub. Sales No. 1953.I.30).

²⁷ EMMERICH DE VATTEL, THE LAW OF NATIONS § 18 (Chitty ed. 1863).

²⁸ *Id.* § 56.

²⁹ Letter to Secretary-General U Thant, Feb. 10, 1966, replying to a letter of February 7 from 18 Latin American countries, U.N. Security Council Doc. No. S/7134 (1966).

³⁰ N.Y. Times, Feb. 7, 1966, p. 28, col. 3; *id.*, Feb. 11, 1966, p. 12, col. 1.

to encourage an inside revolt by the people in those states against the governments recognized by the United States It, therefore, seems impossible to reconcile the approval by Congress and the Proclamation by the President of "Captive Nations Week" with the international obligation of the United States to respect the independence of other states.³¹

As to treaties, one finds a number of both bilateral and multilateral treaties throughout history agreeing to refrain from propaganda against the parties to the agreement.³² Several Pan-American conventions include this type of provision.³³

C. Defamatory Propaganda

When we come to defamatory state propaganda, we find again that there appears to be general agreement on the principle of the illegality of the more inflammatory types of defamation. Hyde has summed up the law as follows: "International law clearly forbids the higher officials of a state to indulge in uncomplimentary or insulting comments upon the personality of another state or its rulers"³⁴

If one consults customary international law on this point, one runs head-on into the unpleasant fact that this rule has received, to put it mildly, a considerable battering in practice. We are therefore confronted with the perennial question of the extent to which a rule of law can be considered to survive when its violation is widespread. Generally, a rule of law does not disappear because it is frequently violated. The world is full of deadbeats who do not pay their bills, but we do not therefore conclude that the legal binding force of contracts has disappeared. However, this well-known fact about international defamation does make it desirable to place heavier reliance on sources of law other than custom and practice. For this reason, it is interesting and profitable, at this point, to see what can be achieved by the full exploitation of the third primary source of law listed in the Statute of the International Court, the "general principles of law recognized by civilized nations."

A study of the defamation laws of the world's various legal systems produces an overwhelmingly one-sided result, which should not be particularly surprising. All of the legal traditions and codes studied have made defamation illegal and in some degrees criminal. The source of this principle is to be found in both ancient traditions and modern legislation. As examples of the former, consider the verse in the *Koran* which reads,

³¹ Wright, *Subversive Intervention*, 54 AM. J. INT'L L. 533 (1960).

³² See, e.g., 1 A. F. PRIBAM, *THE SECRET TREATIES OF AUSTRIA-HUNGARY* 51, 137 (1920); 1 *SOVIET TREATY SERIES*, 1917-1928, at 4 (Shapiro ed. 1950); 13 DE MARTENS, *NOUVEAU RECUEIL GÉNÉRALE DE TRAITÉS* (3d ser.) 246, 249 (Triepel ed. 1925).

³³ See, e.g., Convention on Rights and Duties of States, art. 8, Seventh International Conference of American States (Montevideo, 1933), 28 AM. J. INT'L L. SUPP. 75, 76 (1934); CHARTER OF THE ORGANIZATION OF AMERICAN STATES, arts. 15, 26, 27, 46 AM. J. INT'L L. SUPP. 43, 46, 48 (1952). See also "Declaration on Solidarity for the Preservation of the Political Integrity of the American States Against the Intervention of International Communism," approved by a vote of 17 to 1 at the Tenth Inter-American Conference (Caracas, 1954), 48 AM. J. INT'L L. SUPP. 123 (1954).

³⁴ 1 CHARLES C. HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 709 (2d rev. ed. 1945).

O ye who believe! Let not a folk deride a folk who may be better than they . . . [are], nor let women . . . [deride] women who may be better than they are; neither defame one another, nor insult one another by nicknames. Bad is the name of lewdness after faith. And whoso turneth not in repentance, such are evil-doers.³⁵

and the famous early trial for criminal libel in the common law tradition, *De Libellis Famosis*, tried in 1605.³⁶ Among the modern statutes embodying the principle of defamation is the Sudanese Penal Code:

Whoever intentionally insults and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause a breach of the peace or the commission of any other offense, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.³⁷

Similarly, the Russian Criminal Code contains penalties for slander, libel, and insult. Thus, it states:

Insult, that is, intentional degrading of the honor or dignity of a person, expressed in an improper form shall be punished by corrective labor for a period of up to six months, or by a fine of up to fifty rubles, or by public censure, or entails application of measures of public compulsion.³⁸

There is no question, then, but that the principle of defamation itself is one of the general principles of law recognized by civilized nations. As such, under the view held by the great majority of international lawyers,³⁹ it is also a principle of international law. There are some minority views on this subject, holding that the general principles referred to are only those that are themselves of international character, but it seems difficult to accept this interpretation of the International Court's Statute, since this has the effect of depriving this third source of law of all content. So interpreted, it would add nothing to the sources of law already listed, and consequently this interpretation violates a primary rule of construction of documents and statutes, which is that they should not be so construed as to make them empty and meaningless.

The exact scope of defamation and its limits have to become themselves the subject of an examination of recognized general principles, but the most important of these,

³⁵ KORAN, Sura (Chapter) "The Private Apartments," verse 11.

³⁶ 5 Co. Rep. 125a, 77 Eng. Rep. 250 (K.B. 1605).

³⁷ SUDANESE PENAL CODE ch. 27, § 443.

³⁸ R.S.F.S.R. CRIMINAL CODE § 131 (U.S.S.R. 1960).

³⁹ From the vast literature on this subject—general principles of law as a source of international law—the following are recommended: BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1953); I PAUL GUGGENHEIM, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 149-53 (Geneva, 1953-54). MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942*, at 610-12 (1943); C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* 106-23 (1958); ARTHUR LARSON, *WHEN NATIONS DISAGREE* (1961); H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW passim* (1927); MYRES S. MCDUGAL, *STUDIES IN WORLD PUBLIC ORDER passim* (1960); I L. OPPENHEIM, *INTERNATIONAL LAW* 29 ff. (8th ed. Lauterpacht, 1955); KOPELMANAS, *Quelques Réflexions au Sujet de l'Article 38, 3° du Statut de la Cour Permanente de Justice Internationale*, 43 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 285 (1936); VERDROSS, *Les Principes Généraux du Droit dans la Jurisprudence Internationale*, 52 *HAGUE RECUEIL* 195 (1935).

the principle of acceptance of fair comment on a matter of public interest, receives a surprising amount of international consensus,⁴⁰ although there is understandably some room for disagreement on where the precise boundaries of the doctrine lie.

Treaties forbidding defamatory propaganda, generally along with other types of illegal propaganda, are quite numerous. They are sometimes multilateral, as in the case of Latin American agreements,⁴¹ and sometimes bilateral, as in the case of the agreements between Tunisia and the United Arab Republic,⁴² between India and Pakistan in 1948,⁴³ between Santo Domingo and Haiti in 1949,⁴⁴ and many others. The broadest effort of this kind is the treaty against propaganda represented by the "Convention Concerning the Use of Broadcasting and the Cause of Peace" completed at Geneva on September 23, 1936.⁴⁵ Twenty-two states became parties to it, and most of these have again affirmed adherence to the treaty in response⁴⁶ to an inquiry by the General Assembly in a 1954 resolution reviving the Convention.⁴⁷

III

THE LEGALITY OF PRIVATE PROPAGANDA

So far we have considered the dominant portion of the propaganda problem, which is that of state responsibility for state propaganda, with a conclusion for which the legal underpinnings are as sturdy as those of almost any doctrine of international law: warmongering, subversive, and defamatory propaganda by a state, as defined in this discussion, are illegal as a matter of substantive international law. The next question is the degree of responsibility for a state for acts of private propaganda engaged in by individuals. There is not space within the compass of this treatment to examine all the intricacies of this problem, but in order to complete the pattern of the discussion, one may at any rate set down the conclusions reached by Professor Whitton and me in our examination of this question. The conclusion is that the basic rule does not impose responsibility upon the state under international law for acts of propaganda by private individuals and corporations but that there are several identifiable exceptions to this rule.⁴⁸ One such exception is that, when nations have made actual treaties between themselves assuming greater responsibility for acts of individuals, this greater responsibility of course applies to the parties of the treaty. Moreover,

⁴⁰ GERMAN PENAL CODE § 193; NETHERLANDS PENAL CODE art. 261, para. 3; SUDANESE PENAL CODE ch. 27, § 436; R.S.F.S.R. CONST. art. 125 (U.S.S.R. 1936); WILLIAM L. BURDICK, *LAW OF CRIME* § 799a (1946); A. Y. VYSHINSKY, *THE LAW OF THE SOVIET STATE* 617 (1954).

⁴¹ See especially Resolution XXXII, "The Preservation and Defense of Democracy in America," Ninth International Conference of American States (Bogota, 1948), 1 *ANNALS OF THE ORGANIZATION OF AMERICAN STATES* 134 (1949).

⁴² See *N.Y. Times*, Feb. 8, 1961, p. 9, cols. 1-3.

⁴³ See *N.Y. Times*, May 7, 1950, p. 22, col. 1.

⁴⁴ 1 *ANNALS OF THE ORGANIZATION OF AMERICAN STATES* 326 (1949).

⁴⁵ 186 *L.N.T.S.* 303-17 (1938); 32 *AM. J. INT'L L. SUPP.* 113 (1938).

⁴⁶ U.N. ANNUAL REPORT OF THE SECRETARY-GENERAL, JUNE 16, 1956 TO JUNE 15, 1957, GEN. ASS. OFF. REC. 12th Sess., Supp. I, 1957, p. 83.

⁴⁷ U.N. Gen. Ass. Res. 841 (IX), Dec. 17, 1954, 1954 U.N. YEARBOOK 241-42 (U.N. Pub. Sales No. 1955.I.25).

⁴⁸ WHITTON & LARSON 134-66.

subversive propaganda by individuals which goes to the extreme of terrorist activity, and most clearly incitement to assassination, engages the responsibility of the state under international law. The third exception is that every state is under a duty to act in order to suppress a hostile expedition being prepared on its soil against a foreign government, and is therefore also bound to suppress propaganda directly connected with such an expedition as an overt act. For example, the United States enacted a statute in 1794,⁴⁹ which may very well have been the first statute deliberately designed to codify a rule of international law, punishing anyone for beginning a military or naval expedition against a friendly foreign state, including anyone who "prepares a means for" or "furnishes the money for" such an expedition. This is the statute, incidentally, that was called to the attention of the Kennedy Administration—unfortunately too late to be of any help—in connection with the Bay of Pigs invasion.⁵⁰

Again, because of a long history of international diplomatic custom, a state is responsible for defamation by individuals directed against foreign diplomats.⁵¹ And finally, because of the universal relatively high degree of control of governments over radio, the better view,⁵² in spite of some disagreement,⁵³ is that states are bound by international law to assure that their territory is not used for the emission of radio signals which would be in the category of warmongering, subversive, or defamatory propaganda.

The last category of liability that may be briefly considered is that of the liability of individuals for international propaganda. This in turn falls under two headings: liability for state propaganda and liability for private propaganda. As to state propaganda, the principal source of law again is the Nuremberg trials. As already noted, several individuals were convicted for offenses among which propaganda formed a part of the crime.⁵⁴ Individual responsibility for private propaganda has produced the least law of any segment of the subject, for the obvious reason that it has never formed, as stated at the outset, a very serious part of the total problem of propaganda. One problem is that, even if one could identify applicable rules of substantive law, it would be generally difficult to find a tribunal in which to enforce the rules. On the substantive side, one could readily apply the technique of corollary and simply say that if fomenting aggressive war is an international crime, and since an individual can be held liable for this crime when he acts on behalf of a state, there is no reason why he should not be held guilty of an offense under international law when he commits the same offense on behalf of himself.

As a practical matter, the most important treatment of this problem is left to

⁴⁹ Act of June 5, 1794, ch. 50, § 5, 1 Stat. 381, most recently re-enacted in 1948. 18 U.S.C. § 960 (1964).

⁵⁰ Larson, *The Cuba Fiasco and the Rule of Law*, Saturday Review, May 13, 1961, p. 28, at 53.

⁵¹ 2 HYDE, *op. cit. supra* note 32, at 1249-50.

⁵² 1 *id.* § 192.

⁵³ See, e.g., Lauterpacht, *Revolutionary Propaganda by Governments*, 13 TRANSACT. GROT. SOC'Y 162 n.(i) (1928).

⁵⁴ See text accompanying notes 20-22 *supra*.

domestic legislation. There are at least twenty-five nation states which provide in their domestic laws for the prosecution of individuals urging the state to go to war against a foreign state.⁵⁵ As to subversive propaganda, the United States statute has been mentioned,⁵⁶ and there are similar statutes in other countries, including Belgium, Spain, Czechoslovakia, Greece, Switzerland, Finland, Yugoslavia, Liechtenstein, and Israel.⁵⁷ In addition, there are many domestic statutes aimed at defamatory communications in the form of attacks on foreign diplomats or heads of state.⁵⁸

IV

SUMMARY AND PROLEGOMENA

One may now summarize the entire sweep of the substantive law of propaganda. As to warmongering, subversive, and defamatory propaganda by states, the illegality of propaganda is established. As to the liability of states for acts of individuals, the special circumstances under which responsibility exists can be identified, with non-liability in other circumstances remaining the current rule. Finally, as to individuals themselves, they are substantively responsible for illegal acts committed on behalf of states, when the states themselves would be responsible, but for acts of private propaganda their responsibility is less clear, except where domestic statutes have dealt with the topic.

This analysis of the current state of the substantive law of propaganda completes my assigned task in this symposium. It only remains to point out, as Professor Whitton and I are at great pains to do in our book, that the identification and publicizing of the substantive law of propaganda is only a beginning, but it is an indispensable beginning. There remains the question of the extent to which the world community believes it is desirable to make effective the controls represented by the substantive rules. This will be explored in other articles as will the lively topic of the extent to which controls, including controls by domestic law, can be harmonized with the constitutional and legal traditions of various countries. Finally, there is the practical question of sanctions, remedies, and methods of improvement of control. It is hoped that this discussion of the substantive law has brought the consideration of our topic at least to the point where we can conclude that a foundation of basic principles and rules is available if the members of the international community want to build upon it. The question, in short, of any shortcomings in the control of dangerous propaganda is not one of "can't"; it is one of "won't." It will be the task of the remainder of this symposium to consider whether that "won't" should be changed to "will" and, if so, how it can most effectively be done.

⁵⁵ L. JOHN MARTIN, *INTERNATIONAL PROPAGANDA: ITS LEGAL AND DIPLOMATIC CONTROL* 134, 238 (1958).

⁵⁶ See text accompanying notes 49 and 50 *supra*.

⁵⁷ See compilation of local laws aimed to curb propaganda causing international unrest, in Pella, *supra* note 18, at 801-03; MARTIN, *op. cit. supra* note 55, at 237; FERNAND TERROU & LUCIEN SOLAL, *LEGISLATION FOR PRESS, FILM AND RADIO* 314 (UNESCO Pub. No. 607, 1951).

⁵⁸ Van Dyke, *The Responsibility of States for International Propaganda*, 34 AM. J. INT'L L. 58, 69 (1940).