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PUBLISHED BY THE DONALD E. BIEDERMAN ENTERTAINMENT
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Volume 8, Number 1

2018-2019



SYMPOSIUM

FAKE NEWS AND “WEAPONIZED DEFAMATION”:
GLOBAL PERSPECTIVES

EDITOR’S NOTE

ARTICLES

Fake News and Freedom of the Media
Andrei Richter

A Federal Shield Law That Works: Protecting Sources, Fighting Fake
News, and Confronting Modern Challenges to Effective Journalism
Anthony L. Fargo

Combating Russian Disinformation in Ukraine:
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Monroe E. Price & Adam P. Barry

Defamation as a “Weapon” in Europe and in Serbia:
Legal and Self-Regulatory Frameworks
Jelena Surculija Milojevic

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**SYMPOSIUM
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Editor's Note

This issue is entirely devoted to articles from our 2018 symposium conference, entitled *Fake News and "Weaponized Defamation": Global Perspectives*, which drew scholars and practitioners to a packed lecture hall at Southwestern Law School in Los Angeles, California. Organized in partnership with the *Southwestern Law Review* and *Southwestern International Law Journal*, the symposium's Call for Papers yielded submitted abstracts from more than 100 scholars and practitioners from every corner of the world. Thirteen of the accepted articles were selected for publication in the Journal, the first four of which are published herein.

The first article, "Fake News and Freedom of the Media," by Dr. Andrei Richter, analyzes recent initiatives to curtail fake news at the United Nations, the World Conference of International Telecommunications Union, the European Union, and before the European Court of Human Rights. Special attention is paid to the policy deliberations that resulted in the 2017 Joint Declaration on fake news announced by the U.N. and other treaty organizations, which Richter helped negotiate in his capacity as the Senior Adviser of the Organization for Security and Co-operation in Europe's (OSCE) Representative on Freedom of the Media.

Professor Anthony Fargo's article proposes a federal shield law for the United States that could serve as a model for the American states in need of revisions to their laws and for nations around the globe that lack source protections. The proposed shield law would define journalists as persons engaged in fact-based reporting and opinion writing in any medium for distribution to the public. The proposal would bar federal investigators from fishing through telephone or internet service provider data in search of journalists' and suspected sources' e-mail, social media, and calling patterns. To address national security issues or imminent lawlessness, the government would have to prove to a judge that a discernible or imminent threat existed.

Professor Monroe Price and media lawyer Adam Barry write about the Internews initiative in Ukraine, which brings together international and Ukrainian experts to encourage governmental restraint against speech curbs and to create consensus-based standards and guidelines on free speech and media during conflict. Ultimately, Ukraine's media, civil society and government must find a way forward to balance free speech and national

security concerns in response to an avalanche of false and damaging propaganda from Russian government-controlled channels.

Professor Jelena Surculija Milojevic writes about media legislation in complement with the journalism profession's Code of Ethics in the Republic of Serbia. Milojevic posits that Serbia's national courts misconstrue the terms "defamation" and "public figure" in ways that are inconsistent with the decisions made by the European Court of Human Rights. The paper also examines the non-legal power of the profession-based Press Council to protect one's reputation.

In the coming months, the Journal will be publishing nine more fake news and weaponized defamation articles revised from papers delivered at our 2018 conference. For those who cannot wait, you can learn more about what happened at *Fake News and "Weaponized Defamation": Global Perspectives* by going to www.swlaw.edu/globalfakenewsforum.

In Volume 7:2, three paragraphs from an archived article were appended to Jonas Nordin's Introduction "The Swedish Freedom of Print Act of 1776." The Journal regrets the error, and it has been corrected in electronic editions. As always, your comments, suggestions, and feedback of any kind are welcome.

Professor Michael M. Epstein
Supervising Editor

FAKE NEWS AND FREEDOM OF THE MEDIA

Andrei Richter*

ABSTRACT

The notion of “fake news” has gained great currency in intergovernmental policies and regulation. At the same time no general approach on how to deal with the phenomena behind the notion has been found so far. Some believe “fake news” is the old media practice of disseminating “false information” that was somewhat dealt with by the League of Nations in the 1930s. Others see “fake news” as a new threat and challenge to democracy and international order. This article will differentiate disinformation and fake news notions and link the latter with the current spread of manipulation in the media.

Further, this article will summarize the modern response to “fake news.” The most recent provisions of the UN, EU and Council of Europe (including the European Court of Human Rights) acts will be analyzed. The decisions that aim to curtail “fake news” will be reviewed from the perspective of international commitments on freedom of expression and freedom of the media.

I. INTRODUCTION

We all have entered a new world of the media with a speed unheard of in human history. The current media environment means not just the non-stop appearance and development of new media platforms, products of convergence of traditional legacy media with the internet and mobile telecommunications. The process is accompanied by the revolutionary new approaches that media outlets should take towards the reader and/or viewer, to their own finances and business models, to the ever-increasing and louder

* Andrei Richter is a Fellow at Center for Media, Data and Society, School of Public Policy, Central European University (Budapest) and the Senior Adviser of the Organization for Security and Co-operation in Europe’s (OSCE) Representative on Freedom of the Media (Vienna, Austria). The analysis and opinions expressed are the author’s own and do not necessarily reflect those of the OSCE.

than ever user-generated content, to gate-keeping and news-aggregation. The media outlets have lost the ability to control the public dissemination of information, and thus to set the public agenda. They have lost the privilege of access to confidential sources who now fully use the anonymity that internet provides, such as the “black boxes.” Today media tools allow politicians and other individuals to bypass traditional media. For example, through tweets, and investigative media blogs.

At least in the short perspective it all leads to weakening of professional media entities and places heavier burden on professional journalists. Thereby, bringing about an unlimited growth in online media which does not necessarily adhere to professional standards of journalism. That creates a situation when legitimate expressions of personal views are merged with false or doctored information, hate campaigns against individuals, often in a political context, with the objective of sewing insecurity and fear that result in harming democratic political processes. The advance of new forms of digital media, as was noted by the European Parliament, have posed serious challenges for quality journalism. These challenges include a decrease in critical thinking among audiences making them more susceptible to disinformation and manipulation.¹

The most recent developments in the dissemination models for media content, mostly online, have brought about the notion of “fake news,” which subsequently gained great currency in intergovernmental and national policies and regulation.

Some believe it is an old media practice of disseminating “false information” that has been in existence since the media was established and journalism became a profession.² Others see it as a brand new threat and challenge to democracy and international order. At the same time no general normative, institutional, and judicial framework on how to deal with the phenomena behind the notion of “fake news” has been found so far.

Using the comparative legal method, this article will analyze sources of international law to determine their approaches to addressing the dissemination of false information or “fake news.” This methodological approach provokes relevant sources that are often not observable if the focus is on individual international organizations or covenants. Comparative studies can reveal the continuity and discrepancies of legal responses in

1. *See Resolution on EU Strategic Communication to Counteract Propaganda Against it by Third Parties*, EUR. PARL. DOC. PV 23/11/2016 - 10.6 (2016).

2. Robert G. Parkinson, *Fake news? That's a Very Old Story.*, WASH. POST, Nov. 25, 2016, https://www.washingtonpost.com/opinions/fake-news-thats-a-very-old-story/2016/11/25/c8b1f3d4-b330-11e6-861652b15787add0_story.html?utm_term=.3497739aeb9d.

various contexts that all claim to share common global values of free speech and free media.

II. ENVIRONMENT AND DEFINITIONS

The current ecosystem of false information online is characterized by Syed as a set of the following distinct features: filters – communities – amplification – speed – profit incentives.³

A. *Filters*

As Syed observes, “an obvious feature of online speech is that there is far too much of it to consume.”⁴ Syed continues stating that “the networked, searchable nature of the internet yields two interrelated types of filters” which are categorized as “manual filters,” or “explicit filters.”⁵ “Explicit filters” include search terms or Twitter hashtags, which can be used to prompt misinformation. “Implicit filters” are things like algorithms that either watch one’s movements or change based on how one manually filters which explains the way platforms decide what content to serve an individual user in order to maximize his/her attention to the online service.⁶

B. *Communities*

Filters can create feeds that are insular “echo chambers,” reinforced by a search algorithm.⁷ Syed notes that individuals easily produce information, shared in online communities built around affinity, political ideology, hobbies, etc. Through developing their own narratives, these communities create their own methods to produce, arrange, discount, or ignore new facts.⁸ These narratives allow communities to make, as Syed observes, “cloistered

3. Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J. F. 337, 346-53 (2017).

4. *Id.*

5. *Id.*

6. *Id.*

7. Syed refers here to Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories: Causes and Cures*, 17 J. POL. PHIL. 202 (2009); and also Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. PERSONALITY & SOC. PSYCHOL. 1141 (1986) (explaining the interaction between group polarization and other social psychological phenomena). *But see* Richard Fletcher & Rasmus Kleis Nielsen, *Are News Audiences Increasingly Fragmented? A Cross-National Comparative Analysis of Cross-Platform News Audience Fragmentation and Duplication*, 67 J. COMM. 476 (2017) (finding no support for the idea that online audiences are more fragmented than offline audiences).

8. Joshua Green, *No One Cares About Russia in the World Breitbart Made*, N.Y. TIMES, July 15, 2017, <http://nytimes.com/2017/07/15/opinion/sunday/no-one-cares-about-russia-in-the-world-breitbart-made.html>.

and potentially questionable decisions about how to determine truth—an ideal environment to normalize and reinforce false beliefs.”⁹

C. Amplification

Syed notes that this process happens in two stages: “first, when fringe ideas percolate in remote corners of the internet, and second, when they seep into mainstream media.”¹⁰ As Syed further observes, the amplification dynamic matters for fake news in two ways:

First, it reveals how online information filters are particularly prone to manipulation—for example, by getting a hashtag to trend on Twitter, or by seeding posts on message boards—through engineering the perception that a particular story is worth amplifying. Second, the two-tier amplification dynamic uniquely fuels perceptions of what is true and what is false.¹¹

D. Speed

As Syed notes, “platforms are designed for fast, frictionless sharing.”¹² Frictionless sharing, as Syed notes, accelerates the amplification cycle and aids in maximum persuasion. Syed continues stating that,

memes are a convenient way to package this information for distribution: they are easily digestible, nuance-free, scroll-friendly, and replete with community-reinforcing inside jokes.¹³

Syed also notes that, automation software, called “bots,” are credited with circulating misinformation, because of how well they can trick algorithmic filters by exaggerating a story’s importance.¹⁴

9. Syed, *supra* note 3.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* citing Joseph Bernstein, *Never Mind the Russians, Meet The Bot King Who Helps Trump Win Twitter*, BUZZFEED NEWS, Apr. 5, 2017, https://www.buzzfeed.com/josephbernstein/fromutahwithlove?utm_term=.uuqR8aQBo#.ry1zRKOMD; Robyn Caplan & Danah Boyd, *Who Controls the Public Sphere in an Era of Algorithms? Mediation, Automation, Power, Data & Society*, DATA & SOCIETY, May 15, 2016, https://datasociety.net/pubs/ap/MediationAutomationPower_2016.pdf (discussing the power of social media outlet algorithms in “nudging” voters); Marc Fisher et al., *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST, Dec. 6, 2016, http://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-indc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html (detailing the spread of the “Pizzagate” misinformation campaign); Philip Howard et al., *Junk News and Bots during the U.S. Election: What Were Michigan Voters Sharing Over Twitter?*, OXFORD INTERNET INST., Mar. 26, 2017, <http://comprop.oxi.ox.ac.uk/research/working-papers/junk-news-and-bots-during-the-u-s-election-what-were-michigan-voters-sharing-over-twitter/> (discussing the ability of “computational

E. Profit Incentives

Syed states that “social media platforms make ‘fake news’ uniquely lucrative.” Syed notes that,

Advertising exchanges compensate on the basis of clicks for any article, which creates the incentive to generate as much content as possible with as little effort as possible. False news, sensationalist in its nature, fits these up-front economic incentives.¹⁵

Syed finds two noteworthy elements to this “uptick:” First, the mechanics of advertising on these platforms such as cheap distribution means more money.¹⁶ Second, the appearance of advertisements and actual news appear almost identical on these platforms which “further muddies the water between what is financially motivated and what is not.”¹⁷

The first known mentions of the phrase “fake news” trace back to the 19th century, but its use mostly remained dormant until the 2016 US presidential election campaign.¹⁸ Still the Google Books search tool shows that there was no significant number of mentions of the term until the 1990s.¹⁹ The usage of the term on the internet skyrocketed in fall 2016, and it was picked as word of the year, first, for 2016, by the Australian Macquarie Dictionary and then, for 2017, by the UK-based Collins Dictionary, which said usage of the term increased 365 percent in 2017.²⁰

propaganda” to distribute large amounts of misinformation over social media platforms); Philip N. Howard & Bence Kollanyi, *Bots, #StrongerIn, and #Brexit: Computational Propaganda during the UK-EU Referendum*, COMPROM Research Note 2016.1 (2016), <https://arxiv.org/pdf/1606.06356.pdf> (discussing the use of Twitter bots); Jared Keller, *When Campaigns Manipulate Social Media*, ATLANTIC, Nov. 10, 2010, <https://www.theatlantic.com/politics/archive/2010/11/when-campaigns-manipulate-social-media/66351/> (detailing how political campaigns can use social media to trick algorithmic filters on search engines); J.M. Porup, *How Mexican Twitter Bots Shut Down Dissent*, VICE, Aug. 24, 2015, https://motherboard.vice.com/en_us/article/z4maww/how-mexican-twitter-bots-shut-down-dissent (reporting on the use of twitter bots to attack government critics).

15. Syed, *supra* note 3.

16. *Id.*

17. *Id.*

18. *The Real Story of ‘Fake News’*, MERRIAM WEBSTER, <https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news> (last visited May 3, 2018). See also Forum on *Who started the expression ‘fake news’?*, ENGLISH LANGUAGE & USAGE STACK EXCH., Mar. 13, 2017, <https://english.stackexchange.com/questions/378178/who-started-the-expression-fake-news> (last visited May 3, 2018).

19. “Fake News” Phrase Search, GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph?content=%22fake+news%22&year_start=1986&year_end=2017&corpus=15&smoothing=0&share=&direct_url=t1%3B%2C%22%20fake%20news%20%22%3B%2Cc0 (last visited May 3, 2018).

20. Elle Hunt, *‘Fake news’ named word of the year by Macquarie Dictionary*, GUARDIAN, Jan. 24, 2017, <https://www.theguardian.com/australia-news/2017/jan/25/fake-news-named-word-of-the-year-by-macquarie-dictionary>; Julia Hunt, *‘Fake news’ named Collins Dictionary’s official Word of the Year for 2017*, INDEPENDENT, Nov. 2, 2017,

There appears to be no consistent, clear, and straightforward definition of the term “fake news.”²¹ Just months ago the word started being used as a catch-all term, Jeremy Peters of the New York Times wrote, “against any news they see as hostile to [someone’s] agenda.”²² The most prominent use of the term in that meaning was by then US President-elect Donald Trump at a press conference claiming that “[CNN is] terrible. ... You are fake news,” although CNN follows high standards on accuracy in reporting.²³

The London’s Guardian emphasizes that,

[s]trictly speaking, fake news is completely made up and designed to deceive readers to maximise traffic and profit. But the definition is often expanded to include websites that circulate distorted, decontextualised or dubious information through – for example – clickbait headlines that don’t reflect the facts of the story, or undeclared bias.²⁴

The word “fake” most probably originates in Low English (criminal slang) from the 17th century, where it was taken from to colloquial and then to mainstream language.²⁵ Today some dictionaries still do not include the term partly because of the self-explanatory nature of it.²⁶ Still, “fake news” is defined by Cambridge Dictionary as “false stories that appear to be news, spread on the internet or using other media, usually created to influence political views or as a joke,” and by Macquarie Dictionary as “disinformation and hoaxes published on websites for political purposes or to drive web

<http://www.independent.co.uk/news/uk/home-news/fake-news-word-of-the-year-2017-collins-dictionary-donald-trump-kellyanne-conway-antifa-corbynmania-a8032751.html>.

21. Martin Moore, *Written Evidence Submitted by the Centre for the Study of Media, COMMUNICATION AND POWER, KING’S COLLEGE LONDON (FNW0089)* (2017), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48248.html>.

22. Margaret Sullivan, *It’s Time to Retire the Tainted Term ‘Fake News,’* WASH. POST, Jan. 8, 2017, https://www.washingtonpost.com/lifestyle/style/its-time-to-retire-the-tainted-term-fake-news/2017/01/06/a5a7516c-d375-11e6-945a76f69a399dd5_story.html?utmterm=.8a8b4e01515d.

23. *Trump Calls CNN “Fake News”* (video), N.Y. TIMES (2016) <https://www.nytimes.com/video/us/politics/100000004865825/trump-calls-cnn-fake-news.html?mcubz=0>; *‘Fake news’: Trump Tweets glee as Three CNN Journalists Resign over Russia Story*, GUARDIAN, Jan. 27, 2017, <https://www.theguardian.com/media/2017/jun/27/three-cnn-journalists-resign-over-retracted-trump-russia-story>.

24. Elle Hunt, *What is Fake News? How to Spot It and What You Can Do to Stop It*, GUARDIAN, Dec. 17, 2016, <https://www.theguardian.com/media/2016/dec/18/what-is-fake-news-pizzagate>.

25. Anatoly Liberman, *“A fake etymology of the word “fake,” with deep thoughts on “Fagin” and other names in Dickens,*” OUPBLOG, Aug. 23, 2017, <https://blog.oup.com/2017/08/fake-fagin-etymology/>.

26. “Fake News” is omitted from both the Oxford Dictionary and the Merriam-Webster Dictionary, the latter explains its decision to omit the term. See MERRIAM WEBSTER, *supra* note 18.

traffic / the incorrect information being passed along by social media.”²⁷ A professor of journalism proposes the following definition: “topical information that is false by design and is disseminated through social media.”²⁸ Other scholars define it as “news articles that are intentionally and verifiably false, and could mislead readers.”²⁹ And, “media reports based on deliberately doctored or fabricated evidence.”³⁰

Facebook emphasizes that “[e]veryone keen to address the problem of ‘fake news’ should proceed carefully because it is challenging to draw clear lines between hoaxes, satire and opinion.”³¹

Some media professionals prefer to consider the term a misnomer and avoid its use. Joanne Lipman, Editor-in-Chief of the USA Today Network, which comprises over a hundred local media organizations, instituted a rule to not use that phrase because it is not correct. She believed that rather “false information” and “propaganda” are appropriate.³²

Indeed, “fake news” is a descendant of propaganda, false rumors, and political manipulation.³³ A recent review of 34 scholarly articles published

27. CAMBRIDGE DICTIONARY, “Fake News” Definition, <http://dictionary.cambridge.org/us/dictionary/english/fake-news> (last visited May 3, 2018); Elle Hunt, ‘Fake News’ Named Word of the Year by Macquarie Dictionary, *GUARDIAN*, Jan. 24, 2017, <https://www.theguardian.com/australia-news/2017/jan/25/fake-news-named-word-of-the-year-by-macquarie-dictionary>.

28. Brian Cathcart, “Written evidence submitted by Brian Cathcart,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0050), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48065.html>.

29. Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. OF ECON. PERSPECTIVES 213 (2017).

30. New Political Comm’n Unit, “Written Evidence submitted by New Political Communication Unit – Royal Holloway, University of London,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0066), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48178.html>.

31. “Written evidence submitted by Facebook,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0121), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/49394.html>.

32. *Trump and the Media: Media’s Challenge of Trump’s Daily Attacks*, CNN TRANSCRIPTS, Dec. 24, 2017, <http://transcripts.cnn.com/TRANSCRIPTS/1712/24/rs.01.html>.

33. Allcott & Gentzkow, *supra* note 29. See also Edson C. Tandoc, Jr., Wei Lim Zheng & Richard Ling, *Defining “Fake News”: A Typology of Ccholarly Definitions*, *DIGITAL JOURNALISM*, at 2, Aug. 30, 2017; Open University, “Written evidence submitted by the Open University,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0092), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48251.html>; Google, “Written evidence submitted by Google,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0123), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/68824.html>. See also Wikipedia which lists a

between 2003 and 2017 allowed Tandoc, et. al. to determine six ways to define “fake news”: satire, parody, fabrication, manipulation, propaganda, and advertising. These definitions are based on two dimensions: levels of facticity and deception.³⁴

One way to categorize these meanings is shown in the table below.³⁵ The recent usage of the term focuses on the categories marked in red, but the study by Tandoc, et. al. shows that the term has been used in different meanings in the past by scholars. This also reinforces an opinion that “fake news” has no coherent meaning.

A typology of fake news definitions

Level of facticity	Author's immediate intention to deceive	
	High	Low
High	Native advertising Propaganda	News satire
Low	Manipulation Fabrication	News parody

In his turn, Wardle placed “fake news” in the following seven compartments:

1. Satire or parody (no intention to cause harm but has potential to fool).
2. False connection (when headlines, visuals of captions don't support the content).
3. Misleading content (misleading use of information to frame an issue or an individual).
4. False content (when genuine content is shared with false contextual information).
5. Imposter content (when genuine sources are impersonated).
6. Manipulated content (when genuine information or imagery is manipulated to deceive).
7. Fabricated content (new content is 100% false, designed to deceive and do harm).³⁶

number of fake news stories from the past with their respective sources, https://en.wikipedia.org/wiki/Fake_news (last visited May 4, 2018).

34. Edson C. Tandoc Jr., Wei Lim Zheng & Richard Ling, *supra* note 33.

35. *Id.* at 12.

36. Claire Wardle, *Fake News. It's complicated.*, FIRST DRAFT, Feb. 16, 2017, <https://firstdraftnews.com/fake-news-complicated/>.

Disinformation, misinformation, and propaganda all have somehow similar meanings as “fake news.” Important factors to separate the terms are, however, the intent and motivation of the speaker, and the media used to disseminate the narrative.

Definitions of “disinformation” range from “false information deliberately and often covertly spread (as by the planting of rumors) in order to influence public opinion or obscure the truth” (Merriam-Webster), and “false information spread in order to deceive people” (Cambridge), to “false information which is intended to mislead, especially propaganda issued by a government organization to a rival power or the media” (Oxford).³⁷ The origins of the term apparently trace back to the Russian neologism “dezinformatsiya.”³⁸

In its turn, “misinformation” means “incorrect or misleading information” (Merriam-Webster), “wrong information, or the fact that people are misinformed/information intended to deceive” (Cambridge), or “false or inaccurate information, especially that which is deliberately intended to deceive” (Oxford).³⁹

The definition of “propaganda” is more ambiguous: while “fake news” is always *false*, propaganda might be true.⁴⁰ However, the aim to influence people’s opinion connects the terms (contrasted with misinformation which might be used for an honest mistake).⁴¹ “Fake news” undoubtedly remains today a major tool of propaganda.

There are no results in either of the above dictionaries (Merriam-Webster, Cambridge, Oxford) for another term close in meaning, “false information,” a reason for this perhaps lies in the self-explicatory nature of the phrase.

37. MERRIAM WEBSTER, Definition of “Disinformation,” <https://www.merriam-webster.com/dictionary/disinformation> (last visited May 3, 2018); CAMBRIDGE DICTIONARY, Definition of “Disinformation,” <http://dictionary.cambridge.org/dictionary/english/disinformation> (last visited May 3, 2018); OXFORD DICTIONARY, Definition of “Disinformation,” <https://en.oxforddictionaries.com/definition/disinformation> (last visited May 3, 2018).

38. According to Russian sources, the first office to design and implement disinformation campaigns (through the press in particular) was *Dezinformburo*, established by the Soviets in 1923. See Evgeniy Zhirnov, *Dezinformburo: 80 Years of Soviet Disinformation Service* [Дезинформбюро: 80 лет советской службе дезинформации], KOMMERSANT DAILY, Jan. 13, 2003, at, 7, <https://www.kommersant.ru/doc/358500>.

39. MERRIAM WEBSTER, Definition of “Misinformation,” <https://www.merriam-webster.com/dictionary/misinformation> (last visited May 3, 2018); CAMBRIDGE DICTIONARY, Definition of “Misinformation,” <http://dictionary.cambridge.org/dictionary/english/misinformation> (last visited May 3, 2018); OXFORD DICTIONARY, Definition of “Misinformation,” <https://en.oxforddictionaries.com/definition/misinformation> (last visited May 3, 2018).

40. Cathcart, *supra* note 28.

41. See *Propaganda and Freedom of the Media*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE 31-38 (Vienna, 2015), <http://www.osce.org/fom/203926>.

What are the important differences between “fake news” and other similar terms? While disinformation implies a thoughtful action to mislead and confuse, misinformation primarily refers to honest mistakes (although it might as well be used for deliberate falsity). Based on the definitions cited above, “fake news” is closer to disinformation and disinformation-based propaganda as they mostly imply an intent to deceive and mislead.⁴²

Disinformation and “fake news” remain somewhat different, however, as the former generally refers to large-scale, orchestrated political and military actions to deceive people, while “fake news” might be sporadic and applied as part of a more general mosaic, often aimed at confusing population or arguing that there is no truth in the media, or elsewhere in the world. It may run for other reasons, such as a careless desire to earn revenue from online advertising.⁴³

The most significant distinction between “fake news” and more traditional terms seems to be the fact that explains the recent boom in the use of this notion. “Fake news” is special both to disinformation and misinformation by its use of the media, as it is primarily spread on social media and elsewhere on the internet; the other terms do not postulate the way of dissemination.⁴⁴

III. INTERNATIONAL LAW AND POLICY

The problem of how to counteract the dissemination of false reports and information has naturally existed since the birth of the press. The desire to find a solution raises with the growth of media influence, intensified today with the role that social media plays in informing the public.

A. *United Nations*

One of the recurring issues within the United Nations at its dawn was the maintenance of peace and the building of friendly relations among States. The use of false and distorted reports – a basic instrument of political propaganda – was considered a major threat to peace and a deterrent to the

42. Alison Wakefield, “Written evidence submitted by Dr. Alison Wakefield, Institute of Criminal Justice Studies, University of Portsmouth,” UK PARLIAMENT: CULTURE MEDIA AND SPORT COMMITTEE (FNW0103), Mar. 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48275.html>.

43. Emma Jane Kirby, *The City Getting Rich from Fake News*, BBC NEWS, Dec. 5, 2016, <http://www.bbc.com/news/magazine-38168281>.

44. Cathcart, *supra* note 28.

institution of a productive dialogue among countries.⁴⁵ At that time the United Nations, in preparation to its Conference on Freedom of Information adopted a Resolution of its General Assembly, invited the Governments of States Members to,

study such measures as might, with advantage, be taken on the national plane to combat, within the limits of constitutional procedures, the diffusion of false or distorted reports likely to injure friendly relations between States.⁴⁶

The majority of democracies then replied that false information is usually counteracted by official denials and press conferences, while the governments should assure the availability of a multiplicity of unfettered sources of news and information. Provided the peoples of a democracy have access to sufficient information from diverse sources, they are competent to distinguish the true from false and the wise from stupid, and on the basis of their judgment to form their own opinions and make their own decisions.⁴⁷

When deliberating what would become Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) and the never opened for signature or ratification *Convention on Freedom of Information* the Drafting Committee of the Commission on Human Rights submitted a particular provision.⁴⁸ The provision suggested that the right to freedom of expression – which carries with it duties and responsibilities – may be subject to restrictions with regard to “the systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples and States.”⁴⁹ The United States of America voiced opposition to this particular provision, though the issue of whether false news published with the intention of disrupting international peace was to be addressed in the ICCPR would resurface throughout the long drafting process. In particular, the United States and its allies saw that this limitation would require unacceptable censorship in order to determine what the true facts were. The US delegate in particular stated that “[t]he prosecution of offenders [of this restriction]

45. Ambeyi Ligabo, *Civil and Political Rights, Including the Question of Freedom of Expression*, REPORT OF THE SPECIAL RAPPORTEUR, U.N. Doc. E/CN.4/2005/64, Dec. 17, 2004, 17.

46. See UNITED NATIONS, “Measures to Counteract False Information” in FREEDOM OF INFORMATION; A COMPILATION (Lake Success, V1, 1950).

47. *Id.* at 204-05, 211, 214, 217.

48. A draft Convention appeared on the agenda of each regular session of the U.N. General Assembly from 1962 to 1980. See Ligabo, *supra* note 45.

49. MICHAEL G. KEARNEY, *THE PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW* 84 (Oxford University Press, 2007).

would not cure the evil. The cause of objectionable reports was political and could not be decided by tribunals.”⁵⁰

The provision on false reports was narrowly voted down in 1950 in the UN Commission on Human Rights (6:5 with four abstentions).⁵¹ In further discussions, now within the Third Committee of the UN General Assembly (1952) a ban on “dissemination of slanderous rumours which undermined relations between States” was reintroduced as part of the prohibition of war propaganda and incitement to national, racial or religious hatred, though also not for long.⁵² The drafters of the European Convention on Human Rights also considered the above UN’s language, but they too opted not to incorporate it.⁵³

Post-World War II both Articles 19 and 20 of the *International Covenant on Civil and Political Rights* (ICCPR) are a good reminder of both the essence of freedom of expression and the responsibilities that its exercise carries alongside. The former says:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as 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 (order public), or of public health or morals.⁵⁴

Article 20 stipulates:

1. Any propaganda for war shall be prohibited by law.

50. *Commission on Human Rights, Sixth Session Provisions Concerning Freedom of Information in the Draft Covenant on Human Rights*, U.N. ECONOMIC AND SOCIAL COUNCIL, U.N. Doc. E/CN.4/360, May 2, 1950.

51. KEARNEY, *supra* note 49, at 85, 89-90.

52. *Id.* at 116.

53. Tarlach McGonagle, “Fake News”: *False Fears or Real Concerns?*, 35 NETHERLANDS Q. OF HUMAN RIGHTS 203-09 (2017).

54. United Nations, *International Covenant on Civil and Political Rights*, INT’L COVENANT ON HUMAN RIGHTS, (adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of Dec. 16, 1966), Mar. 1976.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.⁵⁵

Relevant UN human rights bodies have made it clear that criminalizing “false” news is inconsistent with the right to freedom of expression. For example, commenting on the domestic legal system of Cameroon, the UN Human Rights Committee stated that “the prosecution and punishment of journalists for the crime of publication of false news merely on the grounds, without more, that the news was false, [is a] clear violation of Article 19 of the Covenant.”⁵⁶

On another occasion, the UN Human Rights Committee pointed that the sections of the media law dealing with false information unduly limited the exercise of freedom of opinion and expression as provided for under Article 19 of the Covenant. In this connection, the Committee was,

concerned that those offences carried particularly severe penalties when criticism was directed against official bodies as well as the army or the administration, [. . .] a situation which inevitably resulted in self-censorship by the media when reporting on public affairs.⁵⁷

On yet another occasion, the UN Human Rights Committee reiterated that false news provisions “unduly limit the exercise of freedom of opinion and expression.”⁵⁸ It has taken this position even with respect to laws which only prohibit the dissemination of false news that causes a threat of public unrest.⁵⁹

In 2000, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression urged all Governments to ensure that “press offenses are no longer punishable by terms of imprisonment, except in cases involving racist or discriminatory comments or calls to violence.”⁶⁰ He singled out such offences as publishing or

55. *Id.* Among the countries that made reservations in relation to Art.20 were Belgium, Denmark (as recently as 2014), Finland, France, Iceland, Ireland, Lichtenstein, Luxemburg, Netherlands, Norway, Sweden, Switzerland and the USA.

56. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Cameroon, INT’L COVENANT ON CIVIL AND POLITICAL RIGHTS, U.N. Doc. CCPR/C/79/Add.116, Nov. 1999, ¶ 24.*

57. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Tunisia, INT’L COVENANT ON CIVIL AND POLITICAL RIGHTS, U.N. Doc. CCPR/C/79/Add.43, Oct. 1994.*

58. *[19th Annual] Report of the Human Rights Committee, UNITED NATIONS, U.N. Doc. A/50/40, Oct. 3, 1995, at § 89.*

59. *Id.*

60. Abid Hussain, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, COMMISSION ON HUMAN RIGHTS, U.N. Doc. E/CN.4/2000/63, Jan. 18, 2000, at §205.*

broadcasting “false” or “alarmist” information, where “prison terms are both reprehensible and out of proportion to the harm suffered by the victim [...] as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights.”⁶¹

Finally, in 2017 the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression together with the Organization for Security and Co-Operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information issued a Joint declaration on freedom of expression and “fake news,” disinformation and propaganda (to be reviewed below).⁶²

B. *Right of Correction or Reply*

Related to the issue of false information in the context of international organizations is the debate and conclusions reached at different fora on the right to correction or reply as both a defense from information attacks from one state against another and as a human right.

The right is a controversial issue in the field of media law. While it may be provided in the Constitution of Greece, former Yugoslav Republic of Macedonia, Portugal, Slovenia, Turkey and Ukraine, there is no general right of reply in the U.K. or U.S.⁶³ The controversy surrounding the right of reply in relation to freedom of the media is that, on the one hand, it might be limiting free speech because it requires the media outlets to provide time and space for a correction that is unacceptable to their editorial line. On the other, it can be viewed as expanding freedom of expression by fostering a public debate and by providing a greater flow of information.

61. *Id.*

62. *Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, March 3, 2017, <https://www.osce.org/fom/302796>.

63. DAVID THÓR BJÖRGVINSSON, *The Right of Reply*, in FREEDOM OF EXPRESSION: ESSAYS IN HONOUR OF NICOLAS BRATZA 163, 166-67 (Wolf Legal, 2012); see also Kyu Ho Youm, *The Right of Reply and Freedom of the Press: An International and Comparative Perspective*, 76 GEO. WASH. L. REV. 1017, 1017-21 (2008).

In early 1950s a French initiative led the UN General Assembly to adopt the *Convention on the International Right of Correction* aimed to maintain peace and friendly relations among nations.⁶⁴ It considered that,

as a matter of professional ethics, all correspondents and information agencies should, in the case of news dispatches transmitted or published by them and which have been demonstrated to be false or distorted, follow the customary practice of transmitting through the same channels, or of publishing, corrections of such dispatches

(both the “correspondents” and “information agencies” were broadly defined therein).⁶⁵

The Convention acknowledged the impracticality to establish an international procedure for verifying the accuracy of media reports that might lead to the imposition of penalties for the dissemination of false or distorted reports. However, it did prescribe that if a contracting State’s international relations or “national prestige or dignity” suffers from false or distorted by a news dispatch, it has the right to submit its version of the facts to those States where such dispatch has been disseminated, with a copy to the journalist and media outlet concerned to enable a correction. Then, within five days, the recipient State is obliged to release the correction to the media operating in its territory. In case of failure to do so, the correction will be given appropriate publicity by the UN Secretary-General.

Nevertheless, the Convention on the International Right of Correction has rarely been enforced in the past years. Thus, it is not clear how effectually it has served its original purpose.⁶⁶

While the individual’s right to reply or correction did not enter the universal documents on human rights, regional conventions pay some respect to its existence. The 1969 *American Convention on Human Rights*, stipulates in Article 14 (“Right of Reply”) that:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have

64. UNITED NATIONS, *Convention on the International Right of Correction*, in TREATY SERIES 191 (New York, Vol. 435, 1953) (entered into force on August 24, 1962), (the Convention has 12 signatories and 17 parties).

65. *Id.* at 194.

66. Youm, *supra* note 63 at 1023-24.

a person responsible who is not protected by immunities or special privileges.⁶⁷

The problem with the above provisions might include the presumed automatic nature of the right of reply if any “inaccurate” statements – or ideas [*sic*] are disseminated. Interestingly enough, the right to refute ideas stands only in the English official translation, while the Spanish original or other translations of the norm do not contain the word.⁶⁸ Still the Inter-American Commission on Human Rights held an advisory opinion that the right of reply applies only to statements of facts, not expression of opinion.⁶⁹

It is important to watch the possible phenomena of interpretation of this Convention by the Inter-American Court of Human Rights, competent with respect to matters relating to the fulfilment of the commitments made by the States Parties, of the “right to truth.” Kearney sees a possibility that taken its existing jurisprudence on this right in relation to the families of persons who “disappeared” during dictatorships it can be spread to the area of freedom of expression, as the current restrictions to the freedom in Article 13 (5) have “historically been premised on falsities, manipulation of the truth, and the withholding of information.”⁷⁰

A Council of Europe instrument, the 1989 *European Convention on Transfrontier Television*, envisioned in its Article 8 (“Right of reply”):

1. Each transmitting Party shall ensure that every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply or to seek other comparable legal or administrative remedies relating to programmes transmitted by a broadcaster within its jurisdiction [...]. In particular, it shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised. The effective exercise of this right or other comparable legal or administrative remedies shall be ensured both as regards the timing and the modalities.

67. *American Convention on Human Rights “Pact of San Jose, Costa Rica,”* ORGANIZATION OF AMERICAN STATES, Nov. 22, 1969, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

68. *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Conv. on Human Rights*, STANDING SENATE COMM. ON HUMAN RIGHTS, May 2003, Part IV (B)(3), <https://sencanada.ca/Content/SEN/Committee/372/huma/rep/rep04may03part1-e.htm>.

69. Youm, *supra* note 63 at 1025.

70. See KEARNEY, *supra* note 49 at 180: “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.” *Id.* at 180 n.352.

2. For this purpose, the name of the programme service or of the broadcaster responsible for this programme service shall be identified in the programme service itself, at regular intervals by appropriate means.⁷¹

According to the Convention's *Explanatory Report* a right of reply within the meaning of the Convention is a right exercised by a natural or legal person in order to correct inaccurate facts or information, in cases where such facts or information concern him/her or constitute an attack on his/her legitimate rights (especially in regards to his or her dignity, honor or reputation). The modalities of exercise of this right are determined by the transmitting party: right of reply, right of correction, right of rectification, right of recourse to special bodies or procedures. A right of reply or other comparable legal or administrative remedies are transfrontier in character. Therefore, they may be exercised equally by nationals and non-nationals, residents and non-residents of Parties to the Convention.⁷²

A basis for this provision is the 1974 Council of Europe *Resolution on the Right of Reply*.⁷³ Its aim was to,

provide the individual with adequate means of protection against the publication of information containing inaccurate facts about him, and to give him a remedy against the publication of information, including facts and opinions, that constitutes an intrusion in his private life or an attack on his dignity, honour or reputation, whether the information was conveyed to the public through the written press, radio, television or any other mass media of a periodical nature.⁷⁴

In practice this called for natural and legal persons irrespective of nationality or residence (with the exclusion of the state and other public authorities) to have an effective possibility for the correction, without undue delay, of incorrect facts relating to them which they have a justified interest in having corrected, such corrections being given, as far as possible, the same prominence as the original publication.

In 2004 the Council of Europe revised its 30-year-old right-of-reply resolution to reflect technological changes and the online media.⁷⁵ It recommended that the governments of the member states should examine

71. *European Convention on Transfrontier Television*, COUNCIL OF EUROPE, May 5, 1989, Art. 8, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007b0d8>.

72. *Explanatory Report to the European Convention on Transfrontier Television*, COUNCIL OF EUROPE, 1989, ¶¶ 168-70, <https://rm.coe.int/16800cb348>.

73. *Res. (74) 26: On the Right of Reply – position of the Individual in Relation to the Press*, COUNCIL OF EUROPE COMM. OF MINISTERS, July 2, 1974, <https://rm.coe.int/16805048e1>.

74. *Id.*

75. *Rec (2004) 16 [1]: On the Right of Reply in the New Media Environment*, COUNCIL OF EUROPE COMMITTEE OF MINISTERS, Dec. 15, 2004, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805db3b6.

and, if necessary, introduce in their domestic law or practice a right of reply or any other equivalent remedy, which allows a rapid correction of incorrect information in online or off-line media along the lines of eight particular minimum principles. The right of reply in its view should protect any legal or natural person from any information presenting inaccurate facts concerning that person and affecting his or her rights, while the dissemination of opinions and ideas must remain outside the scope of the Recommendation.

Most recently the need of the Member States of the Council of Europe to recognize in their national law and internal practice a right of reply or any other equivalent remedy to allow a rapid correction of incorrect information in online and offline media was reiterated in its Parliamentary Assembly's resolution aimed to address challenges of online media and journalism.⁷⁶

The existing limited case law of the European Court of Human Rights proves that reply and rectification need to be separated, the right of reply applies not only to private individuals, but also to public authorities, and that the right does not give an unfettered right of access to the media in order to put forward one's opinions.⁷⁷

The European Union's *Directive on Audiovisual Media Services* followed the path set by the Council of Europe by providing a clear-cut right of reply in television broadcasting. Its Chapter IX, Article 28 prescribes in particular that,

Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.⁷⁸

76. *Res. 2143 (2017): Online Media and Journalism: Challenges and Accountability*, PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, Jan. 25, 2017, ¶ 12(1)(3), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23455&lang=en>.

77. Björgvinsson, *supra* note 63 at 173-75; see also András Koltay, *The Right of Reply in a European Comparative Perspective*, 54 ACTA JURIDICA HUNGARICA 73, 75-76 (2013).

78. *Directive 2010/13/EU: on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)*, OFFICIAL JOURNAL OF THE EUROPEAN UNION, Mar. 10, 2010, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0013&from=EN>.

Another EU document, a non-binding recommendation of the European Parliament and of the Council of the EU finds that “the right of reply is a particularly appropriate remedy in the on-line environment because it allows for an instant response to contested information and it is technically easy to attach the replies from the persons affected” and says that “it is appropriate for the right of reply or equivalent remedies to apply to on-line media, and to take into account the specific features of the medium and service concerned.”⁷⁹

C. European Union

The European Parliament, in its landmark 2016 resolution on EU strategic communication to counteract propaganda, laid certain policy foundations to both anti-EU propaganda and disinformation in legacy and social media. The link between *propaganda* and *disinformation* was seen therein in the following way:

propaganda against the EU comes in many different forms and uses various tools... with the goal of distorting truths, provoking doubt, dividing Member States, engineering a strategic split between the European Union and its North American partners and paralysing the decision-making process, discrediting the EU institutions and transatlantic partnerships... in the eyes and minds of EU citizens and of citizens of neighbouring countries, and undermining and eroding the European narrative based on democratic values, human rights and the rule of law.⁸⁰

The link between propaganda and disinformation is seen also in the thesis that the former can only be fought by rebutting the latter and making use of positive messaging and information.⁸¹

The Resolution also made a distinction between *criticism*, on the one hand, and *propaganda or disinformation*, on the other, by pointing to “the context of political expression, instances of manipulation or support linked to third countries and intended to fuel or exacerbate this criticism.” Under the circumstances such narratives should provide grounds to question the reliability of messages.⁸²

79. *Recommendation of the European Parliament and of the Council: on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry*, OFFICIAL JOURNAL OF THE EUROPEAN UNION, Dec. 20, 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006H0952:EN:HTML>.

80. *Res. 2016/2030 (INI)*, EUROPEAN PARLIAMENT, November 23, 2016, ¶ 1 (issuing a resolution on EU Strategic communication to counteract propaganda against it by third parties).

81. *Id.* at ¶ 46.

82. *Id.* at ¶ 40.

The Resolution described the current situation as a growing, systematic pressure upon Europeans to tackle information, disinformation and misinformation campaigns and propaganda from countries and non-state actors (such as transnational terrorist and criminal organizations) in its neighborhood, which are intended to undermine the very notion of objective information or ethical journalism, casting all information as biased or as an instrument of political power, and which also target democratic values and interests. The European Parliament saw that targeted information warfare, once extensively used during the Cold War, is back as an integral part of modern hybrid warfare, defined as,

a combination of military and non-military measures of a covert and overt nature, deployed to destabilise the political, economic and social situation of a country under attack, without a formal declaration of war.⁸³

Therefore, the European Parliament encouraged legal initiatives and a “truly effective strategy” to be developed at the international and nation levels to provide more accountability when dealing with disinformation. Apparently, these legal efforts should provide and ensure a framework for quality journalism and variety of information by combating media concentrations, which have a negative impact on media pluralism.⁸⁴

Among other initiatives the Resolution urged to develop media literacy and quality journalism education, strengthen the role model of public service media, etc.

It specifically called for reinforcement of the East StratCom task force, EU’s main office to combat propaganda and disinformation, including through “proper staffing and adequate budgetary resources.”⁸⁵ Even earlier, in 2015, the European Council asked the EU High Representative, Federica Mogherini, to submit an action plan on strategic communication to address Russia’s ongoing disinformation campaigns. As a result, the EEAS’s East StratCom task force was set up in September 2015. It relies heavily on volunteers to collect the disinformation stories (over 3,000 disinformation examples since 2015) it presents and explains in its weekly newsletters, as part of its efforts.⁸⁶

83. *Id.* at ¶ D.

84. *Id.* at ¶¶ 35, 46 & 48.

85. *See*, “Questions and Answers about the East Stratcom Task Force,” EUROPEAN UNION EXTERNAL ACTION, Nov. 8, 2017, [86. Naja Bentzen, ‘Fake news’ and the EU’s response, EUROPEAN PARLIAMENTARY RESEARCH SERVICES, April 2017, \[http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/599384/EPRS_ATA%282017%29599384_EN.pdf\]\(http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/599384/EPRS_ATA%282017%29599384_EN.pdf\); *See also*, Federica Mogherini, High Rep’ve for Foreign Affairs, European Union, Speech at “Hybrid threats and the EU: State of play and future](https://eeas.europa.eu/headquarters/headquarters-homepage_en/2116/%20Questions%20and%20Answers%20about%20the%20East%20StratCom%20Task%20Force; Res. 2016/2030 (INI), supra note 80 at ¶¶ 27, 42.</p></div><div data-bbox=)

Countering disinformation may not be enough. Just recently the External Action of the EU noted that,

Unfortunately, experience tells us that when a fake news is out, it is already too late [to counter it]. Reacting is very important, but it is even more crucial to make sure that the real news reaches the broadest possible audience, both inside and outside our Union. So our first duty is to talk about what we are doing, to explain with the maximum of transparency our policies, spread the real stories about the positive impact that our European action has on the lives of so many people.⁸⁷

Following the work of the *High Level Expert Group on Fake News and Online Disinformation* in early 2018, the European Commission came up with a Communication to the EP and the Council titled “Tackling online disinformation: a European Approach”. In its own words, the Communication “presents a comprehensive approach” aimed at responding to this phenomenon in the digital world by promoting transparency and prioritising “high-quality information, empowering citizens against disinformation, and protecting” democracies and policy-making processes in the EU.⁸⁸

The debate within the EU on “fake news” is very much focused on the issue of liability of internet intermediaries for dissemination of provocative information. A point of reference here is the 2000 *Directive on electronic commerce* of the European Parliament and of the Council which firmly spoke, in its Section 4, that the “information society service providers” were not to be liable for mere conduit, caching, or hosting, nor were they obliged to monitor the information which they transmitted or stored in particular with the aim to actively seek facts or circumstances indicating illegal activity.⁸⁹ These rules apply under certain conditions of non-interference and passive provision of information society services (Art. 12). Such information society services provide a wide range of economic activities which take place online, such as those offering online information or commercial communications, or those providing tools allowing for search, access and retrieval of data; they also include services consisting of the transmission of information via a

progress” Conference, Oct. 2, 2017, https://eeas.europa.eu/headquarters/headquarters-homepage/33141/speech-high-representative-vice-president-federica-mogherini-conference-hybrid-threats-and-eu_en.

87. *Id.*

88. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Tackling online disinformation: a European Approach”. COM/2018/236 final. 26 April 2018.

89. *Directive 1000/31/EC: on certain legal aspects of information society services, in particular electronic commerce in the Internal Market*, THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, June 8, 2000, at Art. 11 § 4, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=EN>.

communication network, in providing access to a communication network or in hosting information provided by a recipient of the service.⁹⁰

The above provisions of the “Directive on electronic commerce” do not affect the possibility for a court or administrative authority, in accordance with the EU Member States' national legal systems, of requiring the service provider to terminate or prevent an infringement or establishing a system for removal or disabling of access to illegal information (Art. 14). National law may indeed establish obligations for the providers to promptly inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service (Art. 15).

D. Council of Europe

Article 10 (“Freedom of expression”) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, or ECHR) reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁹¹

The issue of false information was a subject of the Resolution 2143 (2017) of the Parliamentary Assembly of the Council of Europe (PACE) “Online media and journalism: challenges and accountability.”⁹² The

90. Television and radio broadcasting are not information society services as they are not provided at individual request. By contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by email are information society services. The use of email or similar individual communications for instance by natural persons acting outside their trade, business or profession is neither an information society service.

91. *European Convention on Human Rights*, COUNCIL OF EUROPE, 1950 (as amended by Protocol No. 14 (CETS n. 194), Art. 10, https://www.echr.coe.int/Documents/Convention_ENG.pdf).

92. *Res. 2143 (2017)*, *supra* note 76.

Resolution referred to an undefined line “between what could be considered a legitimate expression of personal views in an attempt to persuade readers and disinformation or manipulation.” It noted with concern the growing number of online media campaigns designed to misguide sectors of the public through intentionally biased or false information, hate campaigns against individuals and also personal attacks, often in a political context, with the objective of harming democratic political processes.⁹³

The Resolution suggested a number of steps to be taken by the national authorities, such as inclusion of media literacy in the school curricula, support to awareness-raising projects and targeted training programs aimed at promoting the critical use of online media; and support to professional journalistic training.⁹⁴

Even before, in another of its resolutions, PACE while acknowledging that the internet “belongs to everyone; therefore, it belongs to no one and has no borders” and that there is the need to preserve its openness and neutrality, noted that internet also “intensifies the risk of biased information and manipulation of opinion.”⁹⁵ Therefore it “must not be allowed to become a gigantic prying mechanism, operating beyond all democratic control” or “a *de facto* no-go area, a sphere dominated by hidden powers in which no responsibility can be clearly assigned to anyone.”⁹⁶ The Parliamentary Assembly recommended to the member States of the Council of Europe considering actions that would prevent the risk of information distortion and manipulation of public opinion, mostly through coherent regulations and/or incentives for self-regulation concerning the accountability of the internet operators.⁹⁷

E. *European Court of Human Rights*

The overall bulk of the case law of the European Court of Human Rights (ECtHR), established by the European Convention on Human Rights, that relates to dissemination of false information is mostly about the restrictions or penalties imposed by the national authorities for the protection of the reputation or – to a lesser degree – the right to respect for private and family life of others.

93. *Id.* at ¶ 6.

94. *Id.* at ¶ 12.1.

95. *Id.*

96. *Res. 1970 (2014): Internet and Politics: the impact of new information and communication technology on democracy*, PARLIAMENTARY ASSEMBLY, Jan. 29, 2017, ¶ ¶ 12, 14, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20447&lang=en>.

97. *Id.* at ¶ 19.9.

The national law in the member states of the Council of Europe generally says that defamatory accusations should be factually false or ungrounded in order to be found by a court liable. A defamatory statement may be declared null and void if the defendant has not succeeded in proving its truthfulness. In order for defamation to constitute a violation of law, it is generally imperative that the information was false, i.e. it was untrue. At the same time, a remedy may only be used when the allegedly defamatory statement consists of facts, since the truthfulness of value judgments is not susceptible of proof. If a statement is found to be defamatory, the person who made it may be ordered to pay compensation to the aggrieved party.

The relevant case law of the ECtHR reveals numerous complaints on a possible violation by the restrictions or penalties of the applicant's right to freedom of expression (under the above-cited Article 10 of the ECHR), evaluates if the interference with the right to freedom of expression was indeed prescribed by law and was necessary in a democratic society, pursued a legitimate aim and was proportionate to it. The case law usually takes into account the role of the press in a democratic society, public interest factor and possible status of the defamed person as a public figure whose limits of acceptable criticism are wider than as regards a private individual. In addition, the ECtHR is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.⁹⁸ Subject to paragraph 2 of Article 10, freedom of expression is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society."⁹⁹

The ECtHR has repeatedly noted that the safeguard afforded by Article 10 to journalists in relation to their factual reporting on issues of general interest is subject to the proviso that they are acting in *good faith* in order to provide *accurate and reliable information* in accordance with the *ethics of journalism*, that includes an ordinary obligation to verify factual statements.¹⁰⁰ For example, in the *Goodwin* case, the ECtHR noted that the central rationale for the shielding of journalists' confidential sources was to

98. See *Prager and Oberschlick v. Austria*, App. No. 15974/0, 313 EUR. CT. H.R., § 38 (1995).

99. See *Jersild v. Den.*, 298 EUR. CT. H.R., §31 (1994); see also *Steel and Morris v. the U.K.*, App. No. 68416/01, EUR. CT. H.R., §87 (2005).

100. See *Goodwin v. U.K.*, App. No. 17488/90, EUR. CT. H.R., § 39 (1996); *Fressoz and Roire v. Fr.*, App. No. 29183/95, EUR. CT. H.R., §54 (1999); *Bladet Tromso and Stensaas v. Nor.*, App. No. 21980/93, EUR. CT. H.R., § 65 (1999).

strengthen “the vital public-watchdog role” of the media and not to adversely affect its ability “to provide accurate and reliable information.”¹⁰¹

At the same time, the ECtHR noted that disinformation *per se* does not fall outside protected freedoms:

Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would... place an unreasonable restriction on the freedom of expression...¹⁰²

Despite the dominance of defamation and privacy case law, there are several judgments of the European Court of Human Rights that relate to the topic of the article by evaluating false statements in a political speech that is not related to reputation or private life.

For example, in a decision of admissibility of an application to the ECtHR (*Bader v. Austria*, 1995) the applicant, an Austrian professor, claimed that the public broadcaster ORF disseminated biased information on the need of the country’s EU accession which was incompatible with its obligation of objectivity under the national Broadcasting Act.¹⁰³ Bader, therefore, requested to annul the results of the EU accession referendum held earlier same year.

However the European Commission of Human Rights (which until 1998 served as a buffer between applicants and the ECtHR) found that the applicant was not actually affected by the claimed violation of his right to information and had formed his opinion on the referendum purpose irrespective of the possible bias in ORF; it noted that the right to freedom to receive information “basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him” and Article 10 of the ECHR did not, in general, embody an obligation on Governments to impart information to the individual. The Commission could not find grounds for the allegation that any alleged insufficiency of information provided by the Austrian authorities in relation to the above referendum prevented the applicant from the effective exercise of his right to freedom of thought. Thus, the application was found inadmissible.

In a judgment on the 2008 case of *Balsytė-Lideikienė v. Lithuania* the ECtHR reviewed an application of the editor and publisher of “Lithuanian Calendar – 2000.”¹⁰⁴ The applicant complained that her right to free

101. *Goodwin v. U.K.*, App. No. 17488/90, Eur. Ct. H.R., § 39 (1996).

102. *Salov v. Ukraine*, 65518/01, Judgment, 06/09/2005 ¶ 113.

103. *Id.*

104. *Balsytė-Lideikienė v. Lith.*, App. No. 72596/01, EUR. CT. H.R. (2008).

expression was violated by the national authorities that had seized and destroyed the calendar she had published and banned its further distribution. The seizure of the calendar copies happened after the national authorities (a parliamentary committee and the office of the Prime Minister) requested an investigation into possible violation of the national law through its distribution in bookstores. A particular reason was that the back cover of "Lithuanian calendar 2000" contained a map of the Republic of Lithuania, where the neighboring territories of the Republic of Poland, the Russian Federation and the Republic of Belarus were falsely marked as "ethnic Lithuanian lands under temporary occupation." Moreover, the Foreign Ministry of Lithuania received diplomatic notes from the Russian Embassy and the Embassy of Belarus. The national courts found neither calls for violence, nor expressions of hatred against the ethnic groups or the superiority of the Lithuanians over other nationals in the calendar, while the negative statements about the Jewish population were not found as anti-Semitic. However, the courts referred that the publication had caused negative reactions from part of society as well as from the diplomatic representations of some neighboring States.

However, the appellate instance attested that the comments in the calendar were based on the ideology of extreme nationalism, which rejected the idea of civil society's integration and endorsed xenophobia, national hatred and territorial claims. It emphasized that the breach of the administrative law committed by the applicant was not serious, and that it had not caused significant harm to society's interests. Therefore, it affirmed an imposition on the applicant of an administrative warning and the confiscation of the publication.

In the ECtHR the Lithuanian Government argued, in particular, that by withdrawing the publication from distribution and imposing an administrative warning on the applicant, the authorities had sought to prevent the spreading of ideas which might violate the rights of ethnic minorities living in Lithuania as well as endanger Lithuania's relations with its neighbors.

In its judgment the ECtHR had particular regard to the general situation of the Republic of Lithuania. It took into account the Government's explanation as to the context of the case that after the re-establishment of the independence of the Republic of Lithuania in 1990 the questions of territorial integrity and national minorities were sensitive. The ECtHR also noted that the publication received negative reactions from the diplomatic representations of the Republic of Poland, the Russian Federation and the Republic of Belarus. As to the language of the publication it held that the applicant "expressed aggressive nationalism and ethnocentrism" thus "giving

the Lithuanian authorities cause for serious concern.” The ECtHR found no breach of Article 10 of the ECHR.

In another case the applicants, employees of the Soviet Novosti Press Agency (NPA) bureau in Switzerland, complained of being victims of the decision of the nation’s collective executive head of government and state, the Federal Council, to close their employer (M.S. and P.S. v. Switzerland).¹⁰⁵ The decision was made on the constitutional provision that entitled to expel foreigners who constitute danger for the security of the state. This decision was based on the conclusions of a 25-page police report and conclusions of the Federal Attorney-General, all classified confidential. Apparently, the conclusions said that the report demonstrated that from the beginning the NPA bureau in Bern was not about providing information but “operated as a centre of disinformation, subversion and agitation.”¹⁰⁶ The conclusions also said as follows:

The activities engaged in to influence the political decision-making process in our country clearly constitute an interference in Swiss internal affairs. They violate Swiss sovereignty and compromise our relations with other countries.¹⁰⁷

The ECtHR noted that the closing of the NPA was not intended to punish the applicants but to prevent certain activities. In dismissing the application, it said the closing “might possibly be an infringement of the fundamental rights of the agency but not those of the applicants.”¹⁰⁸

In yet another case against Switzerland that came from the national regulator’s ban to use particular satellite dishes enabling to watch Soviet TV, a violation of Article 10 was found. The State’s interference was not “necessary in a democratic society.”¹⁰⁹ The concurring opinion of Judge De Meyer said in particular: “The freedom to see and watch and to hear and listen is not, as such, subject to States’ authority.”¹¹⁰

F. OSCE Representative on Freedom of the Media

In a very few cases the OSCE Representative on Freedom of the Media (RFOM) dealt with particular instances of the effect of “fake news” on media freedom. For example, on 15 March 2010 Dunja Mijatović, the RFOM at that time, issued a press release in relation to a panic-spreading fake report carried

105. Predecessor to the current information agency called *Rossiya Segodnya* [Russia Today], RUSSIA TODAY, http://xn--c1acb12abdlkab1og.xn--p1ai/about_us/.

106. M.S. and P.S. v. Switz., App. No 10628/83, EUR. CT. H.R. (1985).

107. *Id.*

108. *Id.*

109. Autronic AG v. Switz., App. No. 12726/87, EUR. CT. H.R. (1990).

110. *Id.*

on by Georgia's privately owned *Imedi* television channel, which said that President Saakashvili had been assassinated and that Russian troops were advancing toward Tbilisi.¹¹¹ The point of the RFOM's statement was to underline that this particular issue is about irresponsible journalism and the impact it may have on media freedom and security:

Broadcasters and other media outlets ought to behave responsibly and not mislead the public by spreading false information. This is of particular importance in Georgia and other countries whose societies may be more prone to alarm due to recent armed conflicts.¹¹²

This incident, said the OSCE Representative on Freedom of the Media, showed that self-regulation principles and mechanisms, which are an essential tenet of freedom of speech, need to be expeditiously enhanced and strengthened.¹¹³

In 2017 the topic for the 19th annual joint declaration by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information was chosen to be "*On freedom of expression and "fake news," disinformation and propaganda.*"¹¹⁴

The free speech rapporteurs took note of the growing prevalence of disinformation (sometimes referred to as "false" or "fake news") and propaganda in legacy and social media, fueled by both States and non-State actors, and the various harms to which they may be a contributing factor or primary cause. The rapporteurs expressed their concern that disinformation and propaganda are often designed and implemented so as to mislead a population, as well as to interfere with the public's right to know and the right of individuals to seek and receive, as well as to impart, information and ideas of all kinds, regardless of frontiers, protected under international legal guarantees of the rights to freedom of expression and to hold opinions.¹¹⁵ They emphasized that some forms of disinformation and propaganda may

111. Dunja Mijatovic, Press Release: OSCE media freedom representative calls on Georgian broadcasters to abide by ethical standards of journalism, OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA, Mar. 15 2010, <http://www.osce.org/fom/51949>.

112. *Id.*

113. *Id.*

114. *Joint Declaration on Freedom of Expression and "Fake News," Disinformation and Propaganda*, FOM.GAL/3/17, Mar. 3, 2017, <https://www.osce.org/fom/302796?download=true>.

115. *Id.*

harm individual reputations and privacy, or incite to violence, discrimination or hostility against identifiable groups in society.¹¹⁶

They also highlighted the importance of unencumbered access to a wide variety of both sources of information and ideas, and opportunities to disseminate them, and of a diverse media in a democratic society, including in terms of facilitating public debates and open confrontation of ideas in society, and acting as a watchdog of government and the powerful.¹¹⁷ Moreover, they acknowledged that the human right to impart information and ideas is not limited to “correct” statements, that the right also protects information and ideas that may shock, offend and disturb, and that prohibitions on disinformation may violate international human rights standards, while, at the same time, this does not justify the dissemination of knowingly or recklessly false statements by official or State actors.¹¹⁸ In this context they welcomed and encouraged civil society and media efforts aimed at identifying and raising awareness about deliberately false news stories, disinformation and propaganda.¹¹⁹

The 2017 Joint Declaration specifically referred to the role played by the internet and other digital technologies in supporting individuals’ ability to access, as well as disseminate information and ideas. Both enable responses to disinformation and propaganda, while also facilitating their circulation.¹²⁰

The rapporteurs agreed therein on a number of ground laying general principles in regard to responses to disinformation and propaganda. They would include specific standards on disinformation comprised of (1) a call to abolish general prohibitions on the dissemination of information based on vague and ambiguous ideas (such as “false news” or “non-objective information”) as incompatible with international standards for restrictions on freedom of expression, and (2) a call to State actors not to make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).¹²¹ Here the rapporteurs point to the difference they see between “disinformation” and “propaganda.” Moreover, the State actors were urged, in accordance with their domestic and international legal obligations and their public duties, to ensure that they disseminate reliable and trustworthy information, including about matters of

116. *Id.* at 1-2.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at § 2.

public interest, such as the economy, public health, security and the environment.¹²²

A positive obligation to promote a free, independent and diverse communications environment, including media diversity, was put forward by the Joint Declaration as a key means of addressing disinformation and propaganda. That would include such measures as providing support for the production of diverse, quality media content; prohibiting undue concentration of media ownership; and rules requiring media outlets to be transparent about their ownership structures.¹²³

In this context the Governments were called to establish clear regulatory frameworks for broadcasters to be overseen by a body which is protected against political and commercial interference or pressure and tasked to promote a free, independent and diverse broadcasting sector. They were also urged to ensure the presence of strong, independent and adequately resourced public service media, which operate under a clear mandate to serve the overall public interest and to set and maintain high standards of journalism.¹²⁴

The freedom of expression mandates urged the Governments to take measures to promote media and digital literacy, including by covering these topics as part of the regular school curriculum and by engaging with civil society and other stakeholders to raise awareness about these issues. They should also consider other measures to promote equality, non-discrimination, intercultural understanding and other democratic values, including with a view to addressing the negative effects of disinformation and propaganda.¹²⁵

Specific recommendations to the journalists and media outlets included support of effective systems of self-regulation whether at the level of specific media sectors (such as press complaints bodies) or at the level of individual media outlets (ombudsmen or public editors) which include standards on striving for accuracy in the news, including by offering a right of correction and/or reply to address inaccurate statements in the media. They were called to consider including critical coverage of disinformation and propaganda as part of their news services in line with their watchdog role in society, particularly during elections and regarding debates on matters of public interest.¹²⁶

In conclusion, the Joint Declaration noted that all stakeholders – including intermediaries, media outlets, civil society and academia – should

122. *Id.*

123. *Id.* at § 3(d).

124. *Id.* at §§ 3(b) - (c).

125. *Id.* at §§ 3(e) - (f).

126. *Id.* at § 5.

be supported in developing participatory and transparent initiatives for creating a better understanding of the impact of disinformation and propaganda on democracy, freedom of expression, journalism and civic space, as well as appropriate responses to these phenomena.¹²⁷

IV. CONCLUSIONS AND RECOMMENDATIONS

The activity of the media to intentionally disseminate disinformation has been in the focus of international organizations for many years. Their main concern was a possibility that false news reports would harm international relations and cause wars. Fake news phenomenon is a continuation of the same threat, but with some distinct new features.

Those new features relate to the means of dissemination of the untrue stories, where the principal instruments are now internet and other telecommunications.

These new vehicles for lies allow for a historically high level of information attacks with the participation of thousands of “information soldiers” (trolls) and automatic bots do their job 24/7. Fake news cannot be stopped at the state borders for technological reasons.

These lanes of communication generally exclude a possibility to grant the right of reply or to ensure even the minimum journalistic rules, such as division of facts and opinions. Moreover, the nature of anonymous internet allows hiding the ownership of lies at a scale that pales the current standards for media transparency, even the least effective ones.

Disinformation and propaganda hit at the core of the prestige and respect the independent media enjoys in a democratic society. Therefore, journalists are also victims of intentionally false and manufactured biased news, though in most cases they are not their authors.

The overall aim of this “fake news” activity is not necessarily to make one believe in lies but to persuade that everyone lies and there is no truth, or perhaps, there are “alternative truths” or “alternative facts.”

Taken together “fake news” establish a fake cloud of vivid “pluralist truth,” which does not need proofs, knowledge, experts or even logic. Such “pluralist truth” is hard to be counteracted in a legal sense as it finds protection in the international and national standards on free speech. It is hard to be counteracted by the state authorities as this would mean violation of the very principles of free market of ideas and media pluralism. It is also problematic to be counteracted by the governments as it would mean another

127. *Id.* at § 6.

blow to the freedom of internet and online world, as well as an attempt to introduce censorship.

Historically the democracies have committed to respond to deliberate cross-border disinformation that is dangerous to peace and international cooperation through more openness of the governments, wider access of the population to diversified sources of information, right of reply, transparency of the media ownership and support for public service broadcasting. Dissemination of false and distorted reports – even systematic and intentional, even in the narrow cases of them undermining international peace – have not been recognized as a reason for restrictions of free expression.

Discussion shows that there is no effective legal prescription that would establish a separate tort or crime of disinformation *per se*.

At the same time, those who engage, through the media, in propaganda for wars of aggression, in advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence should not be shielded by their right to freedom of expression. Such propaganda and advocacy widely use disinformation as its instrument, therefore judicial initiatives to provide more accountability in this context should be encouraged.

A possible legal avenue of specific legal regulation of disinformation might emerge from a study on the applicability of existing national mechanisms that restrict misleading advertising to the cases of “misleading news”.

Legal requirements of transparency for websites with news content will be an important effort to strengthen the quality of journalism online. Such transparency of the media should be primarily aimed at informing the public of the sources of information (and perhaps their finances), rather than be limited to the authorities’ perusal alone.

Currently, “fake news” is more and more viewed as part of the transnational information warfare and hybrid wars. The governments look for additional concerted efforts to counter this wide-spreading activity. While strategically nothing new has yet happened in the international approach to false news, there are trends to be watched and studied.

They include calls to establish barriers to spreading of dangerous lies on social platforms. Under challenge is the principle that information service providers, as intermediaries, should never be held liable for the third-party content relating to their services. Attempts are aimed to achieve greater transparency over the algorithms used by information service providers that manage and curate information, making their terms of use in line with human rights standards and encouraging to develop ethical quality standards regarding due diligence of their media services. Additionally, it is considered

an important step to set up alert mechanisms against those who regularly post insulting or inflammatory text (“trolls”), with a view to excluding them from their forums.

There is a stronger focus on media and online literacy projects. Expansion of fact-checking platforms in the reporting process, to enable them with a possibility to provide the audience with an access to the professional media criticism facilitates, more generally, such literacy. It might be important that media literacy programmes include a *media freedom literacy* component, while internet literacy programmes should include an *online freedom* component. While public authorities and politicians might be media-savvy, they often lack a firm understanding of, and respect for, the role that the independent and pluralistic media and internet freedom play in an open and democratic society.

New initiatives are also put forward to support quality professional journalistic education and training in order to produce eminent journalistic analyses and high editorial standards, which would also promote the international values of freedom of expression and media plurality. A practical way to strengthen quality journalism could be the establishment of national and, perhaps, international syndicates of quality media outlets with high professional standards and effective self-regulation. They could serve as an economic model to support quality media operating within different markets and with no competition between them.

Efforts are made, at least in Europe, to strengthen the role of independent and sustainable public service media (PSM) online. The aim is to make them the backbone of traditional journalism with its professional standards, in particular through an exercise of the due editorial diligence with regard to user-generated or third-party content published on their internet portals. In front of the tide of “fake news” the public service media are encouraged to be the barrier for lies and manipulation. The role of the PSM involves their obligation not to shy away from covering the whole range of issues of public interest, including false news and relevant problems if those come into the focus of the public’s attention. Strengthening the PSM’s fact-checking in the reporting process enables them to provide the audience with access to professional media critique and more generally – to facilitate media and internet literacy.

