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IN ASSOCIATION WITH THE
AMERICAN BAR ASSOCIATION FORUMS ON COMMUNICATIONS LAW AND THE
ENTERTAINMENT AND SPORTS INDUSTRIES

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2024–2025



SYMPOSIUM

IN THE SHADOW OF TERRITORIAL CONFLICT:
LEGACIES OF SOVIET-ERA MEDIA CONTROL AND SPEECH NORMS

EDITOR'S NOTE

Michael M. Epstein

ARTICLES

Fatullayev as a Model of Post-Soviet Media Control in the Shadow of Armed Conflicts
Andrei Richter

The Consequences of Inaction: An Inquiry into International Criminal Liability
of Social Media Companies for Artsakh 2020
Rajika L. Shah

Weaponization of Social Media: The Cause of the Conflict Between Azerbaijan and Nagorno-Karabakh
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Editor's Note

This is the second installment of articles from the *Journal of International Media & Entertainment Law's* symposium, entitled *In the Shadow of Territorial Conflict: Legacies of Soviet-era Media Control and Speech Norms*. Much has happened in the post-Soviet sphere since we convened in 2023. The Russia-Ukraine conflict has become a war of attrition. Russia is deploying North Korean troops, and Ukraine is seeking missiles that will land deeper into Russian territory. Unrest has broken out in the Republic of Georgia, as its government questions closer ties to the European Union. Even more consequential to many who attended the symposium, the Republic of Artsakh, an ethnic Armenian enclave in Nagorno-Karabakh, was overrun by forces from Azerbaijan. The fall of Artsakh was swift and unexpected, effectively ending an ethnic Armenian presence in the mountainous region. Throughout all this, war reporting, government censorship, and social media information—and disinformation—continued to abound in the post-Soviet space, even if some in the West turned their attention to the Middle East.

This issue begins with *Fatullayev as a Model of Post-Soviet Media Control in the Shadow of Armed Conflicts* an essay by Dr. Andrei Richter, research professor at Comenius University in Bratislava. Adapted from his keynote address at the symposium, the essay asks whether media control in the region is a Soviet-era legacy adapted to modern times. Richter's principal focus is the court case of *Fatullayev v Azerbaijan*, which led to a judgment of the European Court of Human Rights in 2010 and in 2022.

In *Consequences of Inaction: An Inquiry into International Criminal Liability of Social Media Companies for Artsakh 2020*, Rajika L. Shah, shares her research into the potential liability of social media companies in the Nagorno-Karabakh war and how negative social media posts can lead to real-life hate crimes against Armenian communities. Shah is a professor at Loyola Law School in Los Angeles, where she directs the Justice for Atrocities Clinic

Weaponization of Social Media: The Cause of the Conflict Between Azerbaijan and Nagorno Karabakh, by Robert Avetisyan, addresses strategies to mitigate disinformation and hate on social media in the Nagorno-Karabakh conflict by promoting information literacy and demanding adherence to the criminalization of dissemination of stigma, prejudices, and

other dangerous speech that incites violence. Ambassador Avetisyan has served as the Permanent Representative of the Nagorno-Karabakh Republic (also known as the Artsakh Republic) to the United States.

Russell L. Weaver's symposium contribution, *Social Media, Propaganda, and the Ukrainian Conflict*, examines how Russia has used the internet to try to manipulate and control public opinion regarding the Ukraine War. Weaver cites instances in which Russia planted falsehoods on official news outlets as a way of blurring the facts, defining false narratives, and manipulating audiences. He is a Professor of Law and Distinguished University Scholar at the University of Louisville.

Completing this issue is *Media Coverage and State Propaganda in Armed Conflicts: An International Law Perspective at the Armenian-Azerbaijan "Propaganda War,"* by Ines Gillich. The author presents a stark contrast between news coverage of the conflict by international media and reporting by regional sources and examines media issues under the lens of public international law. Gillich is Associate Professor of Public Law, European Law and Public International Law, at the University of Cologne.

My thanks to our faculty peer reviewers, and to our hard-working student editors, led this year by Daniella Ashouri. As always, the *Journal* welcomes feedback from its readers.

Professor Michael M. Epstein
Supervising Editor

FATULLAYEV AS A MODEL OF POST-SOVIET MEDIA CONTROL IN THE SHADOW OF ARMED CONFLICTS

Andrei Richter *

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I. INTRODUCTION

When we look at the media control systems in some of the post-Soviet independent states, we often see strong traces of communist-era regulation, adapted to the technological challenges of the 21st century.

Establishing tight control over the media and civil society, following the disintegration of the USSR and the formation in its place of fifteen sovereign states, brought about great social sufferings, loss of life, and loss of home – in the physical sense, loss of jobs and economic sufferings for millions of former Soviets. It was not a peaceful process, as it might stay in our collective memory.

Illustrative are the following figures on the outcome of the armed conflicts:

- The civil war in Tajikistan (in 1992-97) led to up to 157,000 people being killed, 37,500 households being destroyed, some 600,000 people fled to neighboring Afghanistan, and 195,000 were dispersed across other post-Soviet states.¹

* Professor Researcher, Department of Journalism, Comenius University in Bratislava (Slovakia).

¹ Bakhtiyor Sobiri, *The Long Echo of Tajikistan’s Civil War*,

OPENDEMOCRACY, (June 23, 2017),

<https://www.opendemocracy.net/en/odr/long-echo-of-tajikistan-s-civil-war/>.

- The number of civilian casualties in the first Chechen war (1994-96) is estimated to be at 50,000.² The conflict led to some 260,000 persons displaced.³
- The ongoing Russian military aggression in Ukraine is the latest bloodshed of enormous proportions. By all means, it is also a legacy of the USSR collapse.

The Nagorno-Karabakh war, which started in February 1988, was the first major conflict on the eve of the collapsing USSR. It was also the longest, with still no peace in sight, and –until recently– “the most dangerous conflict in the post-Soviet space.”⁴ The conservative estimates of the total number of civilian and military casualties of the Karabakh war speak of 55,000 lives lost in total just during the period 1988-1996. Over one million people were displaced during the conflict in and around Nagorno-Karabakh,⁵ in addition to the almost complete exodus of some 120,000 ethnic Armenians following the blockade and surrender of the unrecognized independent Artsakh in September 2023.

What are the elements of the post-Soviet media control in the shadow of these conflicts? Is it a Soviet-era legacy adapted to modern times? What happens when it clashes with the democratic perception of media regulation and media freedom? Is it realistic to expect dramatic changes in relation to the independence of the press?

These questions are discussed within the example of the court case of *Fatullayev v Azerbaijan* that led to a judgment of the European Court of Human Rights in 2010⁶ and in 2022⁷

² See Christoph Zurcher, *The Post-Soviet Wars: Rebellion, Ethnic Wars, and Nationhood in the Caucasus*, 100 (2007).

³ See Kaz de Jong, et al., *The Trauma of Ongoing War in Chechnya*, Amsterdam: Médecins Sans Frontières, Aug. 2014, at 3, <https://reliefweb.int/report/russian-federation/trauma-ongoing-war-chechnya>

⁴ Thomas de Waal, *The Nagorny Karabakh Conflict in its Fourth Decade*, CEPS Working Document No. 2021-02, Brussels: CEPS, (Sept. 2021) https://www.ceps.eu/download/publication/?id=34122&pdf=WD2021-02_The-Nagorny-Karabakh-Conflict-in-its-Fourth-Decade.pdf

⁵ See Jessica Atwood, *Civil War: Azerbaijan and Nagorno-Karabakh Republic (1992-1994)*, in: *Civil Wars of the World: Major Conflicts since World War II*, Vol. 1, 143, (Karl DeRouen Jr. & Uk Heo., eds., ABC-CLIO, 2007).

⁶ *Fatullayev v. Azerbaijan*, Eur. Ct. H.R., 40984/07, (2010), <https://hudoc.echr.coe.int/fre?i=001-98401>.

⁷ See *Fatullayev v. Azerbaijan (no. 2)*, Eur. Ct. H.R., 32734/11, (2022), <https://hudoc.echr.coe.int/fre?i=001-216685>.

(Azerbaijan is a member of the Council of Europe, and thus subject to the Court's jurisdiction).

In this case, a popular young Azerbaijani journalist was sentenced, for reporting on the Nagorno-Karabakh war in a different way from the official storytelling on the conflict.⁸ There are many elements in the case—and the fate of Fatullayev himself— emblematic of the challenges independent journalism faces in the post-Soviet authoritarian countries. These challenges raise a host of issues related to the legal problems of journalism, including, online journalism. The issues are likely pertinent to Azerbaijan, but also to other countries, once called Newly Independent States, who enjoy—or perhaps, suffer from—similar legal and political rules and traditions.

II. NATIONAL COURTS ON FATULLAYEV

At the peak of the events discussed below, Mr Eynulla Fatullayev, was thirty years old, and the founder and editor-in-chief of the weekly Russian-language newspaper “Realny Azerbaijan,” (translated as “Real-life Azerbaijan”). The newspaper was published in the country's capital, Baku, and was popular for its investigations and frequent criticism of state authorities and officials. Some, including the Interior Minister and members of the Parliament, have repeatedly demanded initiation of criminal defamation cases and filed civil defamation lawsuits against him.⁹

Azerbaijan is one of the eight post-Soviet states that opted to keep criminal defamation in its national Penal Codes, as was a tradition of the Soviet criminal laws.¹⁰

Despite the public promises to decriminalize defamation by the national authorities, including a relevant commitment in the National Programme for Action to Raise Effectiveness of Protection of Human Rights and Freedom, decreed by President Aliyev in 2011, this legacy of the Soviet times is firmly in place

⁸ Fatullayev v. Azerbaijan, *supra* note 6.

⁹ See Zaur Rasulzade, *Family of the editor-in-chief of newspaper "Real Azerbaijan" is under pressure*, Caucasian Knot, (October 3, 2006), <https://eng.kavkaz-uzel.eu/articles/4749>.

¹⁰ See Andrei Richter, *Gesetze und Strategien zur Medienfreiheit im postsowjetischen Raum*, Religion & Society in East and West (RGOW) Zurich 2, 2019 at 20-23.

today.¹¹ Also, Aliyev called for a “moratorium” of civil defamation lawsuits by civil servants to the press, but somehow it was not implemented into practice.¹²

As a result of a criminal defamation trial, Fatullayev was found guilty of slandering a member of the Government and sentenced to two years of suspended imprisonment in 2006.

In addition, Fatullayev was severely beaten in the streets of Baku, and his father was kidnapped. The kidnappers’ ransom note demanded a closure of his publications. Furthermore, both he and other editorial staff repeatedly received threatening phone calls in connection with published and forthcoming articles.

In 2005, shortly before the publication in question, Fatullayev traveled, as a journalist to Nagorno-Karabakh (or Artsakh, as Armenians call it), which went under the control of Armenian forces following an outburst of the armed conflict in 1991-94.

This was, however, a rare case of an Azerbaijani citizen visiting those places, since there was virtually no travel across the separation line or between the nationals of the two countries. As noted by de Wall in 2021, “The two societies have had practically no contact with one another since the late 1980s.”¹³

During his trip, Fatullayev met and talked with some local officials, as well as with ordinary people. As a result of this trip, the journalist published in his weekly, “Realny Azerbaijan,” an article titled “The Karabakh Diary.”

A. “THE KARABAKH DIARY”

Written in the form of a travelogue about what the author saw during his trip, the story conveyed the content of his conversations with locals. The controversial moment of the “diary” was the topic of the bloodshed that happened in the Karabakh settlement of Khojali on February 26, 1992. This day was a turning point in the history of the conflict. Khojali was the place of the only airport in Nagorno-Karabakh.

¹¹ See Press Release, OSCE, OSCE Media Freedom Representative Concerned About Increasing Pressure on Media in Azerbaijan Following Online Defamation Provisions (May 15, 2013), <https://www.osce.org/fom/101513>.

¹² Parliamentary Assembly of the Council of Europe, *Honouring of obligations and commitments by Azerbaijan*, Resolution 1545 (2007), Apr. 16, 2007 at 8.1.1, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17527&lang=en>.

¹³ Thomas de Waal, *supra* note 4 at 15.

In Azerbaijan, by a decree of President Heydar Aliyev,¹⁴ what happened then was formally considered as an episode in the genocide by Armenians of the peaceful Azeri population.¹⁵ On that day, according to the Azerbaijani official history, Armenian armed formations, with the help of the Soviet army, killed hundreds of unarmed people from among the inhabitants of Khojali.

In “The Karabakh Diary,” the journalist recalled a conversation, a few years before his trip in 2005, with refugees from Khojali, who were living in the Azerbaijani town of Naftalan. They told him: on the eve of the assault on the encircled Khojali, Armenians repeatedly warned the Azerbaijani civilians about the coming offensive with the help of loudspeakers, calling them to leave through a safe corridor along the Kar-Kar river. According to these refugees, they did use the safe passage and were not shot at. At the same time, some paramilitaries from the battalions of the Popular Front of Azerbaijan (PFA), who were defending Khojali, abandoned their positions and joined other civilians, and for an unknown reason crossed the Kar-Kar and led them towards the village of Nakhichevanik, which at that time was under the control of armed Armenians. He recalled the conversation in his article, as during the trip to Karabakh it was confirmed by a local official, an ethnic Armenian. Comparing the two pieces of information, Fatullayev asserted: “Apparently, the PFA battalions were not so much striving to save the civilians of Khojali as to shed even more blood in their plan to have [the then President of Azerbaijan] Mutalibov overthrown.”¹⁶

B. COMMENTS ON *AZERITRIColor*

More than a year after the publication of “The Karabakh Diary” (in December 2006 and in January 2007) a person registered under the username “Eynulla Fatullayev” posted a number of comments on a popular Internet forum *AzeriTriColor* (<http://www.atc.az>). They were posted in a forum thread dedicated to controversies in the content of “The Karabakh Diary.” In several responses to

¹⁴ Father of his successor, current President Ilham Aliyev.

¹⁵ “О геноциде азербайджанцев” (“On genocide of Azeris”), Decree of the President of Azerbaijani Republic (Mar. 26, 1998), https://genocide.preslib.az/ru_s13.html.

¹⁶ Карабахский дневник (The Karabakh Diary), (text in Russian: <http://nv.am/karabahskij-dnevnik-azerbajdzhanskogo-zhurnalista/>).

questions from the forum participants, this person (“Eynulla Fatullayev”) wrote, in particular, the following:

I have visited this town [Naftalan] where I have spoken to hundreds (I repeat, hundreds) of refugees who insisted that there had been a corridor and that they had remained alive owing to this corridor . . .

You see, it was wartime and there was a front line... Of course, Armenians were killing [the civilians], but part of the Khojali inhabitants had been fired upon by our own [troops]... Whether it was done intentionally or not is to be determined by investigators . . .

[They were killed] not by [some] mysterious [shooters], but by provocateurs from the NFA battalions . . . [The corpses] had been mutilated by our own . . .¹⁷

In response came a campaign against Eynulla Fatullayev in a number of Azerbaijani media outlets, peaked with the demands for him to disclose his ties with Armenia and be stripped of his citizenship.

Next, a civil defamation lawsuit was filed by the head of the “Center for the Protection of Refugees and Displaced Persons” against “Realny Azerbaijan” weekly and Fatullayev in connection with the dissemination of information discrediting the relatives of the victims of the tragedy, veterans, soldiers of the National Army of Azerbaijan and the entire Azerbaijani people. In court, Fatullayev unsuccessfully denied his ownership of the statements on the *AzeriTriColor* forum. The district court redressed the claims, namely the publication of a refutation in the weekly and on the *AzeriTriColor*, as well as compensation for moral damages in the amount of approximately 18,000 Euros, which were supposed to be spent on improving the conditions for the refugees residing in Naftalan.

Somewhat later, a group of refugees and former soldiers who participated in the battle of Khojali, and whose interests were represented by the same head of the Refugees Protection Center, filed an application to open a criminal case against Fatullayev to the same district court in accordance with the private prosecution

¹⁷ Fatullayev v. Azerbaijan, *supra* note 6 at 13.

procedure. They demanded that he be found guilty of insulting and slandering Azerbaijani soldiers. The same judge, who had considered the civil lawsuit, found Fatullayev guilty of criminal defamation, aggravated by the accusations of individuals of a grave or extremely grievous offense, and sentenced him to two and a half years imprisonment.

C. "THE ALIYEVS GO TO WAR"

A month before the two and a half year imprisonment verdict, under a pseudonym, "Realny Azerbaijan" published Fatullayev's analytical article, "The Aliyevs Go to War" with a completely different topic than Nagorno-Karabakh.

In it, the author expressed the opinion that in order to retain power, the national government was seeking support from the U.S. in exchange for facilitating a likely American aggression against Iran. The author believed that by openly supporting the anti-Iranian campaign, Azerbaijan should prepare for a long war that would lead to widespread destruction and human casualties. He wrote that according to the information from sources "close to official Paris", the Iranian Air Force and hundreds of missiles would strike targets in Azerbaijan. A long list of such targets was published as well, which included, oil platforms and terminals, governmental buildings and a number of large business centers that housed offices of foreign companies. The author said that it would be better for Azerbaijan to remain neutral in the brewing conflict, also because its Talysh minority, which is ethnically, geographically and linguistically close to the Iranians, would not support the war.¹⁸

The Ministry of National Security opened a criminal investigation for the creation of a terrorist threat into this publication.

Three months later, Fatullayev, still imprisoned for defamation and now facing terrorist charges, was further accused of tax evasion on the grounds that he did not properly declare his personal income as the newspaper editor.¹⁹

Testimonies of eight employees of foreign companies were submitted at the trial on charges of intimidating the population with a terrorist threat. They testified that, having received by e-mail and

¹⁸ *Id.* at 27.

¹⁹ Muzaffar Suleymanov, *Azerbaijan: Editor slammed with hefty sentence*, Causasian Knot, (November, 1 2007), <https://eng.kavkaz-uzel.eu/articles/6577>

read the article “The Aliyevs Go to War”, they felt disturbed, anxious and frightened. The court concluded that the publication was intended to sow panic among the population. It also found that in the article’s author threatened to destroy public property and bring death to people in order to force the Government to abandon political decisions called for by the national interests.²⁰ In October 2007, it found Fatullayev guilty on all counts and convicted him of creating a terrorist threat, inciting ethnic hatred, and tax evasion.

The cumulative sentence, taking into account the partial absorption of penalties, amounted to eight and a half years imprisonment. When passing the verdict, the court stated, that taking into account a previous conviction on criminal defamation, the journalist was a repeat offender, and this qualified as an aggravating circumstance. The court also seized as material evidence twenty-three computers and memory disks in the editorial office of “Realny Azerbaijan.” By that time, the weekly could no longer be published and subsequently folded.

After losing all possible appeals, Fatullayev filed an application with the European Court of Human Rights (ECtHR) in Strasbourg, to consider if the national authorities had violated his right to freedom of expression. Three years later the Court handed its judgment.

III. EUROPEAN COURT OF HUMAN RIGHTS

The Strasbourg Court carefully studied the articles published in “Realny Azerbaijan” and on the Internet. It acknowledged that Fatullayev’s authorship of the online statements was proven beyond any doubt by the Azerbaijani judiciary.²¹ The ECtHR found that the state interference with the applicant’s (Fatullayev’s) right to freedom of expression was based on the Penal Code. Inevitably, however, the question arose as to whether the restrictive measures taken against him were necessary in a democratic society—an important condition for restricting free speech under European law. Examining this component of Azerbaijan’s possible violation of Article 10 of the ECHR the Strasbourg Court found that Fatullayev’s articles and comments in print and online dealt with the “matters of general interest.”²²

²⁰ Fatullayev v. Azerbaijan, *supra* note 6 at 41.

²¹ *Id.* at 93.

²² *Id.* at 87.

The Court observed that “The Karabakh Diary” was supposed to make up for the lack of information in society, while the article itself gives the impression that the author was trying to convey various ideas and views of the parties to the conflict in an unbiased manner. The fact that he relayed the allegations of the people he interviewed did not necessarily mean that he did so in order to prove their veracity. However, as this topic developed, the author began to mix his own views with the views of his interlocutors, including, for example, the motives for the actions of the PFA battalions. Thus, relying on a limited amount of information, the applicant was vague in expressing the idea that certain Azerbaijani military formations bore part of the responsibility for the fate of those killed in Khojali.²³

At the same time, the ECtHR noted, since the public discussion on the role and responsibility of the Azerbaijani authorities for the failure to prevent or, on the contrary, for provoking the Khojali events continued, the applicant, as a journalist, had the right, in accordance with Article 10 (“Freedom of Expression”) of the European Convention on Human Rights (ECHR),²⁴ to disseminate ideas related to this topic.

The Court noted that seeking historical truth is an integral part of freedom of expression, and “it is essential in a democratic society that a debate on the causes of acts of particular gravity which may amount to war crimes or crimes against humanity should be able to take place freely.”²⁵

Wars started to occupy a special place in Soviet history and mentality in the mid-1960s. The censorship, of course, was always on guard to prevent sacrilegious attempts to question the deeds of the Red Army during the Great Patriotic War of 1941-45, as well as in the Civil War that followed, the “glorious armed uprising in the 1917 October Revolution.” Interestingly, one of the first cracks in the Soviet media control system happened when *glasnost* allowed for the criticism of the war the USSR waged in Afghanistan.

With formal censorship gone, post-Soviet states started establishing legal acts of “defamation” to their official national narratives on history, especially on wars, both in criminal and administrative law. For example, since 2022 the Russian Criminal

²³ *Id.* at 91.

²⁴ Council of Europe, *European Convention on Human Rights*, 1950, https://www.echr.coe.int/documents/convention_eng.pdf.

²⁵ *Fatullayev v. Azerbaijan*, *supra* note 6 at 87.

Code provides for liability of public actions aimed at “discrediting the use of the [Russian] Armed Forces in the interest of the protection of interests of the Russian Federation”²⁶ Before 2022, the Administrative Code introduced the ban on public denial (including online) of the “decisive role of the Soviet people in the defeat of Nazi Germany and the humanitarian mission of the USSR in the liberation of European countries.”²⁷ Finally, a law prohibited in public speech “identifying the goals, decisions and actions of the leadership of the USSR . . . with the goals, decisions and actions of the leadership of the Nazi Germany . . . and the Axis.”²⁸

In Russia, the key principles of the official “memory politics” are: “Past events should be portrayed in a way that fuels national pride” and “We cannot allow anyone to impose a sense of guilt on us.”²⁹ These dictums fit well also in the context of Azerbaijan. The State, in Russia, but also in Belarus, Turkmenistan, and Uzbekistan has eventually become the sole arbiter of how recent and not-so-recent historical events are to be interpreted, specifically those that serve as a source of the mandate and legitimacy of the nationalist and populist elites. As they ban opposing views on history, the Governments attempt to establish a monopoly on truth in relation to particular events and their interpretation.³⁰ Most recently this is observed in the coverage by the Russian media of the aggression in Ukraine.

In this context, the ECtHR, reiterated that journalistic freedom implies the possibility of resorting to a certain degree of exaggeration or even provocation.³¹ At the same time, it rejected

²⁶ Уголовный кодекс Российской Федерации, (Criminal Code of the Russian Federation), June 13, 1996, 63-FZ at 280-3, <https://rulings.ru/uk/Razdel-X/Glava-29/Statya-280.3/>.

²⁷ Кодекс Российской Федерации об административных правонарушениях (Code of the Russian Federation on Administrative Offences), Dec. 30, 2001, 195-FZ at 13.48, <https://rulings.ru/koap/Razdel-II/Glava-13/Statya-13.48/>.

²⁸ Об увековечении Победы советского народа в Великой Отечественной войне 1941–1945 годов (“On the perpetuation of the Victory of the Soviet people in the Great Patriotic War of 1941-1945”), Federal Statute, Apr. 19, 1995, as amended on July 1, 2021, 80-FZ, at 6-1, <http://www.kremlin.ru/acts/bank/7872>.

²⁹ Igor Torbakov, *Memory Politics à la Russe: Memorial vs. Vladimir Putin's Repressive State*, in *Constructing Memory: Central and Eastern Europe in the New Geopolitical Reality*, Hanna Bazhenova, ed., Lublin: Institute of Central Europe, 2022 at 124.

³⁰ Andrei Richter, *Post-Communist Media Freedom and a New Monopoly on Truth*, *JOURNAL OF ROMANIAN STUDIES*, Vol. 3, 2, 2021 at 34.

³¹ Fatullayev v. Azerbaijan, *supra* note 6 at 100.

the possibility—that was suggested by Azerbaijan—of equating doubts in the official version of the events in Khojali with contesting the genocide of Jews during World War II.

Incidentally, neither Soviet, nor post-Soviet laws, that aim to prevent “defamation” of the history of World War Two, provided for a ban on denial or revision of clearly established historical facts of the Holocaust.

At the same time, laws in post-Soviet countries, such as Armenia (1988),³² Ukraine (2006),³³ and Belarus (2022),³⁴ have provided for a ban of denial or minimization of specific genocides of the population of these particular countries.

With regard to the applicant’s statements on the *AzeriTriColor*, the Strasbourg Court noted the allegations therein differed from those contained in “The Karabakh Diary”: unlike statements in the newspaper article, Fatullayev did not back up his claims on the forum with any evidence, nor did he refer to any specific sources. Again, the ECtHR recalled its previous judgments, which stated that the exercise of freedom of expression imposes duties and responsibilities, including reporting in good faith, in order to provide accurate and reliable information in accordance with the norms of journalistic ethics. Of course, in his website post, the applicant did not publish a journalistic report, he simply expressed his personal opinion during an online discussion. However, it was clear that, having registered under the name of a popular journalist Eynulla Fatullayev, he did not hide his identity and publicly disseminated views by posting them on a public and popular Internet forum. Therefore, by acting recklessly, he could not but know and remember the standards of professional ethics, said the Court.³⁵

Additionally, the Court held that the statements posted on the website were not value judgments, but statements of fact. The direct accusation of specific individuals of particular negative actions requires sufficient factual support. However, in this case, it was not necessary to clarify whether the statements on the site were false or unverified because the Azerbaijani courts concluded there

³² Law of Armenian SSR “On condemnation of the genocide of Armenians in 1915 in Ottoman Turkey,” Nov. 22, 1988.

³³ Law of Ukraine “On Holodomor of 1932-1933 in Ukraine,” 376-V, Nov. 28, 2006.

³⁴ Law of Belarus “On the Genocide of the Belarusian Nation,” 146-Z, Jan. 5, 2022.

³⁵ Fatullayev v. Azerbaijan, *supra* note 6 at 95.

were doubts that these statements harmed the reputation of specific people—four refugees and two former PFA militants.³⁶

The Strasbourg court did not agree with the conclusion of the domestic jurisprudence that the article contained allegations that insulted the dignity of the victims of the tragedy—four refugees from Khojali. Regarding the accusations against unnamed “provocateurs” from the PFA battalions, the ECtHR noted, even assuming these allegations were not sufficiently substantiated, these allegations, firstly, did not imply that *all* the Azerbaijani military or *all* Azerbaijani armed formations took part in the hostilities in this area, or that *all* the defenders of Khojali participated in this battle. Secondly, they did not contain accusations against specific individuals—there were no names or any other clarifying information provided.³⁷

In view of the foregoing, the ECtHR found that while “The Karabakh Diary” might have contained certain exaggerated or provocative statements, the author did not overstep the limits of journalistic freedom in fulfilling his duty to disseminate information on topics of general interest. The statements on the Internet forum may not have had a sufficient factual basis, but they did not defame the specific persons who acted as a private prosecution. Under the circumstances, the ECtHR concluded that the arguments given by the domestic courts in support of their judgments could not be considered relevant and sufficient, and therefore, the recognition of Fatullayev as guilty of criminal defamation did not meet a “pressing social need.”³⁸

But even if the intervention had met such a need, there would be problems with regard to compliance with the requirement that the punishment be proportionate to the offense. In earlier cases, the ECtHR generally found that investigative journalists tend to refrain from publishing sensitive topics if they risk being sentenced to imprisonment for criminal defamation. Fear of such punishment inevitably has a chilling effect on the freedom of expression of journalists.³⁹

Recalling that Fatullayev was sentenced to imprisonment in addition to the judicial punishment for the same statements in the civil process, the ECtHR did not dispute that sentencing is a principle matter for national courts. But at the same time, it noted

³⁶ *Id.* at 96-97.

³⁷ *Id.* at 99.

³⁸ *Id.* at 100.

³⁹ *Id.* at 101-102.

that the choice of imprisonment as a penalty for a media offense is compatible with the freedom of expression of journalists only in exceptional circumstances. Namely when other fundamental rights are seriously infringed, as, for example, in cases of inciting hatred or incitement to violence.⁴⁰

The Strasbourg Court considered the circumstances of the criminal case in the “The Karabakh Diary” article and the “*AzeriTriColor*” comments did not give grounds for sentencing the applicant to imprisonment. Regarding the “The Alievs go to war”, the ECtHR, in accordance with Article 10 of the European Convention on Human Rights, recalled the scope for the possible restriction of speech on political topics rather narrow. The Court has repeatedly pointed out that the boundaries of “permissible criticism” in relation to public authorities are wider than in relation to ordinary citizens or even individual politicians. Moreover, the dominant position held by the authorities obliges them to exercise restraint in bringing criminal cases, even when they have to deal with unfounded attacks and criticism from opponents, especially when there are other ways to respond to them.⁴¹

Again, if the publication cannot be considered an incitement to violence or an incitement to ethnic hatred, then the authorities may not, on the grounds of maintaining public order and security, restrict the public’s right to receive information on topics of general interest. The mere fact that Fatullayev discussed the social and economic situation in the areas populated by an ethnic minority of Talyshs, and voiced an opinion about possible political tension in those areas cannot be considered as incitement to ethnic hostility.⁴²

Incitement to ethnic hostility is a grave crime in all post-Soviet states. Following the terrorist attack of 9/11, a number of governments in the region pushed for anti-extremism legislation. Their logic is that extremism inevitably leads to terrorism. Incitement to ethnic hostility was included as an element of the crime of extremism, although the element of violence has also ceased to be a condition of the crime.⁴³

In Belarus, Moldova, Russia, and some Central Asian states, anti-extremism laws curb media freedom, including through direct

⁴⁰ *Id.* at 103-104.

⁴¹ *Id.* at 116.

⁴² *Id.* at 116, 126.

⁴³ See also: Andrei Richter, *Post-Soviet Perspective on Censorship and Freedom of the Media*, Moscow: IKAR, 2007, at 224-235.

out-of-court bans on media activity and shutdowns, as well as imprisonment of journalists.

The circumstances of this case convinced the ECtHR that there were no grounds for the domestic courts to issue a sentence of imprisonment. The applicant's conviction did not meet a pressing social need, was blatantly disproportionate to the legitimate aims put forward, and the interference was not necessary in a democratic society.⁴⁴

Analyzing the content of the article "The Aliyevs Go to War," the ECtHR noted that the publication of a list of possible targets on the territory of Azerbaijan did not in itself increase or decrease the chances of hypothetical aggression from Iran. Moreover, the authorities never made any allegations that, by publishing this list, the applicant disclosed any State secrets or harmed the country's defense capability. In the context of the article, the discussion of targets could only be perceived as an attempt to portray a dramatic picture of the consequences of the country's possible involvement in a future war. In this sense, the ECtHR did not agree with the opinion of the Azerbaijani courts that the journalist had to confirm the authenticity of the list as a factual statement. It stated that the list is an expression of opinion, and any opinion about future events inherently involves a high degree of uncertainty. The feasibility or impracticability of the scenarios proposed by the applicant to the Court was the subject of public discussion, and every reasonable reader could be expected to understand that the words about the possible course of a future war were hypothetical.⁴⁵

Taking into account the circumstances of the case, the ECtHR recognized the domestic court's assessment that Fatullayev threatened the state with terrorist acts as completely unfounded. It pointed out that the applicant, as a journalist and a private individual, clearly had no ability to influence any of the hypothetical events discussed in the article, and could not control any decision of the Iranian authorities to attack objects on the territory of Azerbaijan. Further, he did not endorse or incite a possible attack. The purpose of writing the article was to inform the public on possible consequences of the country's foreign policy, and more specifically, to question the decision to support the "anti-Iranian" resolution of the UN Security Council. However, the ECtHR found nothing in the article to suggest that the

⁴⁴ Fatullayev v. Azerbaijan, *supra* note 6 at 102-105, 128-131.

⁴⁵ *Id.* at 117-120.

applicant's allegations were aimed at intimidating or pressuring the Azerbaijani Government by illegal means. In its opinion, in this case the domestic courts had arbitrarily applied the rules of criminal law on terrorism.⁴⁶

As a result, the European Court of Human Rights found in *Fatullayev v. Azerbaijan* that the domestic courts had overstepped the existing margin of appreciation in applying restrictions on discussions of topics of public interest, and that his criminal conviction violated Article 10 of the ECHR. It held that the respondent State had an obligation to secure the applicant's immediate release. The court also awarded Fatullayev 25,000 Euros in compensation for non-pecuniary damages.⁴⁷

IV. EPILOGUE: AFTER THE JUDGMENT

The judgment in Strasbourg was made public on April 22, 2010. It was welcomed by a number of international NGOs, such as Reporters without Frontiers, PEN International, and the Committee to Protect Journalists.⁴⁸

However, Fatullayev was not released from prison. Shortly before the judgment a new charge of illegal drug possession was brought against the journalist. A new criminal case was opened, ending in July 2010 with a new prison sentence of two and a half years. The journalist claimed that the drugs had been planted, but in November 2010 the court of appeal upheld the verdict. He appealed again, in the European Court of Human Rights and would formally win the case in Strasbourg only in 2022.⁴⁹

In turn, the Government challenged the decision of the European Court on Human Rights in its Grand Chamber. On October 4, 2010, the Grand Chamber again demanded the release of Fatullayev. Only then, on November 11, 2010, the Plenum of the

⁴⁶ *Id.* at 121-124.

⁴⁷ *Id.*

⁴⁸ See COMMITTEE TO PROTECT JOURNALISTS, Eynulla Fatullayev, Azerbaijan, Realny Azerbaijan, <https://cpj.org/awards/eynulla-fatullayev-editor-realny-azerbaijan/> (While still in prison, in 2009, Fatullayev won the International Press Freedom Award from the Committee to Protect Journalists in New York).

⁴⁹ See *Fatullayev v. Azerbaijan* (no. 2), *supra* note 7.

Supreme Court of Azerbaijan, in view of the Strasbourg judgment, overturned Fatullayev's sentences for his comments and articles.⁵⁰

However, the journalist remained behind bars for the illegal possession of drugs. In March 2011, the Council of Europe's Committee of Ministers urged Azerbaijan to respect the judgment of the ECtHR. In early May 2011, the Representative of the Organization for Security and Co-operation in Europe (OSCE) on Freedom of the Media, Dunja Mijatovic, during her visit to Baku asked and was granted by President Aliyev a meeting with Fatullayev in prison.⁵¹

On 26 May 2011, after four years behind bars, Fatullayev was pardoned by President Ilham Aliyev, as part of an annual amnesty for Republic's Day, which commemorates Azerbaijan's independence.⁵² Some expected the journalist to immediately flee the country, but he stayed.

Then came another big turn. By the end of 2012, Fatullayev started a new media company and became an ardent critic of the West. In particular, he equaled the human rights situation in Germany with that in his own country. He blamed his colleagues and supporters for being on the payroll of the enemy—Armenia. Soon thereafter, his ties with the international NGOs, as well as with other journalists and human right defenders who were oppressed by the regime, broke down.⁵³ He earned the title of “Distinguished Journalist of Azerbaijan” by a decree of the same President that had made his imprisonment possible.⁵⁴

Today Eynulla Fatullayev edits a popular Russian-language news website haqqin.az,⁵⁵ he runs a YouTube channel with fifteen

⁵⁰ Statement of the Supreme Court of the Republic of Azerbaijan, Dec. 8, 2010, <https://supremecourt.gov.az/ru/post/view/381>.

⁵¹ Press Release, “OSCE media freedom representative offers assistance to improve media freedom in Azerbaijan,” Press release (May 13, 2011), <https://www.osce.org/fom/77525>.

⁵² Khadija Ismayilova, *Azerbaijan: Jailed Journalist Released from Prison*, Eurasianet, (May 26, 2011), <https://eurasianet.org/azerbaijan-jailed-journalist-released-from-prison>.

⁵³ Antoine Blua, Rikard Jozwiak, *Amnesty International Cuts Ties With Former Azerbaijani Prisoner of Conscience*, Radio Free Europe / Radio Liberty, (Jan. 23, 2013), <https://www.rferl.org/a/amnesty-azerbaijan-fatullayev/24881428.html>.

⁵⁴ “On awarding honorary titles to the mass media workers of the Republic of Azerbaijan”, Ordinance of the President of the Republic of Azerbaijan, July 22, 2020, <https://azertag.az/ru/xeber/1543835>.

⁵⁵ See <https://haqqin.az/>.

thousand subscribers, where he posts interviews on various armed conflicts, mostly on Nagorno-Karabakh.⁵⁶

In August 2022, he again visited Armenian settlements in Karabakh. This time his visit was accompanied by the Russian peacekeepers to interview locals in English, under the guise of the “international press.”⁵⁷

In 2022, he also traveled to Ukraine, where he interviewed the local officials on the Russian aggression, and to Moldova, where he reported on the “frozen conflict” in Transdnistria. In both conflicts, Azerbaijan criticizes separatists, in line with its Nagorno-Karabakh conflict’s logic of separatists raising against the central power.

Fatullayev’s knowledge and memory of the standards of professional ethics, questioned by the ECtHR in 2010⁵⁸, resurfaced in 2017, when he and his website were scrutinized by the Advisory Commission on Counteracting the Propaganda (further on – Commission). This *ad hoc* Commission, a *de facto* supranational press council in the region, was set up by the media councils of Armenia, Azerbaijan, Belarus, Georgia, Moldova, Russia and Ukraine. Each of them delegated a representative tasked to deal with trans-border complaints in the region, mostly on propaganda-driven disinformation. In its peer review, the Commission found a story by Fatullayev, published on haqqin.az – unethical and unprofessional from an international standards viewpoint. The story had reported on the Azerbaijani opposition’s subversive activity in Tbilisi. The Commission considered it “a product of propaganda, not journalism, as it contains [seven] elements of propaganda bordering ‘hate speech.’”⁵⁹

⁵⁶ See Youtube,

<https://www.youtube.com/channel/UCKeYDENiNPGDR9e0KLuDKAg>.

⁵⁷ Naira Nalbandyan, *Житель Агавно: Азербайджанский журналист представился представителем международных СМИ и искажил беседу* (Settler in Agavno: Azerbaijani journalist pretended he represented international media and distorted the interview), Radio Azatutyun, (Aug. 18, 2022), <https://rus.azatutyun.am/a/31994718.html>.

⁵⁸ See footnote 36.

⁵⁹ Advisory Commission on Counteracting the Propaganda, Opinion of the Advisory Commission on Counteracting the Propaganda of the Network of Media Self-Regulation Bodies (NMSB) on the complaint of the Council of Charter of Journalists’ Ethics of Georgia as to the story published on website <https://haqqin.az> (Мнение Консультативной Комиссии по противодействию пропаганде Сети организаций медийного саморегулирования (СОМС) относительно жалобы Совета Хартии журналистской этики Грузии на публикацию сайта <https://haqqin.az>), 14

V. CONCLUSION

The fate of Fatullayev—including his brutal imprisonment and his complicated release—is emblematic of several trends in media control by authoritarian regimes in the post-Soviet world. These regimes are enforced by the new elites, who still have been brought up and trained by the Soviet-times institutions (like security services) and/or emerge as a natural continuation of the old *nomenklatura*.

These authoritarian regimes are capable and willing to attack critical journalists and the media with all the force available to them. Criminal defamation, accusations of extremist and terrorist speech, and betrayal of State values and traditions are their popular tools. But other crimes, such as tax evasion, spying, disclosure of personal secrets, clandestine collaboration with an enemy, or drug trafficking are also often used.

International human rights mechanisms are capable of making change, but their capability is quite limited, especially when such a regime has a veto power, like in the OSCE or the United Nations Security Council.⁶⁰

Over the years, the independent media in Azerbaijan, as well as in Belarus, Russia, and several Central Asian states, have been put under strict state control or extinguished. Therein state-run media dominates the “markets.”

Shutdowns of online and traditional media though, do not seem to remain an effective or a useful means of their control in the world of global modern technologies. The effect of the once popular tool of blocking the Internet gradually becomes weaker and weaker. To control the civil society—or whatever is left of it—and promote their own populist messages, the authoritarian regimes must be present online, in the social media. The biggest challenge for them is how to become popular in a plethora of voices.

To be successful online, authoritarian Governments need to win over, coerce, or buy popular voices to assist with propaganda.

September 2017, <https://www.mediacouncils.org/mnenie-konsultativnoj-komissii-po-protivodejstviyu-propagande-seti-organizatsij-medijnogo-samoregulirovaniya-soms-otnositelno-zhaloby-soveta-hartii-zhurnalistskoj-etiki-gruzii-na-publikatsiyu-sajta-ht/>.

⁶⁰ See Andrei Richter, *The Influence of the Council of Europe and Other European Institutions on the Media Law System in Post-Soviet States*, CENTRAL EUROPEAN JOURNAL OF COMMUNICATION (Wroclaw) 1, 2, 15-26 (2009). <https://wuwr.pl/cejc/article/view/6684>.

If they fail to follow the line, these popular journalists and bloggers are deemed to be labeled unpatriotic, foreign agents, or simply enemies of the people. They will be portrayed as morally dishonest and be embroiled in various scandals: drugs, sex, and bribes.

Ongoing armed conflicts and the recent COVID-19 pandemic raise worries and issues of national security and public health protection, which increasingly explain and enable governments to introduce their monopoly on information, at least in relation to storytelling on critical for their survival areas, such as historical narratives, elections, and opposition. Whenever this monopoly is broken by the international or local voices, regimes introduce the rule that resembles a monopoly on truth. That means facts that were not explicitly confirmed by the State are not true and cannot be proven in the court of law.⁶¹

⁶¹ See Andrei Richter, *The Legal Death of Media Freedom in Russia*, in: *Global Perspectives on Press Regulation, Vol. 1: Europe*, Paul Wragg, András Koltay (eds.), 181, Bloomsbury Publishing, 2023).

THE CONSEQUENCES OF INACTION: AN INQUIRY INTO INTERNATIONAL CRIMINAL LIABILITY OF SOCIAL MEDIA COMPANIES FOR ARTSAKH 2020¹ Rajika L. Shah²

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¹ This report was prepared at the request of the Armenian Bar Association. It was researched and drafted in the spring semester of 2021 by Meighann Mahoney, Sarina Piliguin, and Tamar Thomassian, students in the Loyola Genocide Justice Clinic at LMU Loyola Law School, which was at that time a program of the Loyola Center for the Study of Law and Genocide ("CSLG"). CSLG 2021 summer interns Rebecca Brown, Garen Kosoyan, and Angelina Sophonpanich provided additional research assistance. The author presented the report's findings at the conference "In the Shadow of Territorial Conflict: Artsakh and Other Legacies of Soviet-era Media Control and Speech Norms," held at Southwestern Law School on February 4, 2023, and finalized the report for publication.

² Visiting Associate Clinical Professor and Director, Loyola Justice for Atrocities Clinic (formerly the Loyola Genocide Justice Clinic), LMU Loyola Law School.

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I. INTRODUCTION

On July 12, 2020, clashes between Armenian and Azerbaijani forces began along their respective northern borders.³ The several days of fighting proved to be the most serious and deadliest escalation of hostilities between the two nations since the Four-Day War in April 2016.⁴ In Azerbaijan, tens of thousands of people gathered in the capital Baku, demanding the government declare war against Armenia.⁵

Two months later, on September 27, 2020, Azerbaijan, with the help of Turkish military aid and equipment, initiated a military attack in the territory of Artsakh, or Nagorno-Karabakh,⁶ a geographically isolated enclave with a predominantly ethnic Armenian population that falls within Azerbaijan's borders, but has maintained a de facto separatist government known as the Republic of Artsakh since the

³ Associated Press, *Clashes Resume on Armenian-Azerbaijani Border*, WASH. POST (July 16, 2020, 6:38 AM EDT), https://www.washingtonpost.com/world/europe/clashes-resume-on-armenian-azerbaijani-border/2020/07/16/7c858fa6-c750-11ea-a825-8722004e4150_story.html.

⁴ *Id.*

⁵ *Azerbaijan Protestors Demand War After Armenia Clashes*, BBC NEWS (July 15, 2020), <https://www.bbc.com/news/world-europe-53415693>.

⁶ This report may refer interchangeably to both terms to describe the same region.

early 1990s.⁷ Shortly thereafter, both the Republic of Artsakh and Armenia issued statements announcing the general mobilization of troops in defense.⁸ Azerbaijan reportedly used missiles, aerial drones, cluster munitions, and phosphorus bombs in attacks on Artsakh.⁹ Many attacks strategically targeted civilians and key medical and civilian infrastructure such as hospitals, churches, and schools.¹⁰ Azerbaijani forces also launched direct attacks on Armenia, targeting both military and civilian infrastructure.¹¹ Active fighting ended when the parties signed a Russia-brokered peace treaty on November 10, 2020.¹² For purposes of this Report, the entire forty-four-day war is called the “2020 Conflict.”

Before, during, and after the 2020 Conflict, accounts on social media platforms, including Instagram, TikTok, Facebook, Twitter, and Reddit, were used as a primary means of disseminating conflict-related information—including misinformation, disinformation, and hate

⁷ As a result of a subsequent Azerbaijani offensive in Nagorno-Karabakh that began on September 19, 2023, virtually all of the indigenous ethnic Armenians in the territory fled to Armenia out of fear for their safety and what the future might hold under Azerbaijani government rule. See Joel Gunter, *Deserted Nagorno-Karabakh Reveals Aftermath of Lightning-Fast Armenian Defeat*, BBC NEWS (Oct. 3, 2023), <https://bbc.com/news/world-europe-66995976>. The government of the Republic of Artsakh ceased to exist as of January 1, 2024. George Wright, *Nagorno-Karabakh: Armenia Says 100,000 Refugees Flee Region*, BBC NEWS (Sept. 30, 2023), <https://www.bbc.com/news/world-europe-66969845>.

⁸ *Azerbaijan Launches Wide Scale Offensive*, EVN REP. (Sept. 27, 2020), <https://www.evnreport.com/spotlight-karabakh/azerbaijan-launches-wide-scale-offensive>.

⁹ *Azerbaijan: Unlawful Strikes in Nagorno-Karabakh*, HUM. RTS. WATCH (Dec. 11, 2020, 3:00 AM), <https://www.hrw.org/news/2020/12/11/azerbaijan-unlawful-strikes-nagorno-karabakh>.

¹⁰ *Id.*

¹¹ Hugh Williamson & Tanya Lokshina, *Unlawful Attacks on Medical Facilities and Personnel in Nagorno-Karabakh*, HUM. RTS. WATCH (Feb. 26, 2021), <https://www.hrw.org/news/2021/02/26/unlawful-attacks-medical-facilities-and-personnel-nagorno-karabakh>.

¹² Robyn Dixon, *Cease-Fire in Nagorno-Karabakh Provokes Protests in Armenia, Celebrations in Azerbaijan*, WASH. POST (Nov. 10, 2020, 2:51 PM EST), https://www.washingtonpost.com/world/europe/nagorno-karabakh-ceasefire-armenia-russia-azerbaijan/2020/11/10/b1b9bcc0-231b-11eb-9c4a-0dc6242c4814_story.html.

propaganda¹³—throughout the region and worldwide.¹⁴ Though some of the posts shared information such as status updates and the current situation of the civilian population, widely disseminated social media postings also included a range of disinformation that severely inflamed emotions and contributed to further violence in the region.

Several posts included hate speech referring to Armenians as “dogs,” “wild beasts,” and “rats” who should be driven out of Nagorno-Karabakh, which has an indigenous ethnic Armenian population.¹⁵ Disturbingly, extremely graphic images and videos of Azerbaijani soldiers appearing to commit horrific war crimes against ethnic Armenians also began spreading on social media.¹⁶ This was

¹³ For the purposes of this Report, disinformation is “verifiably false or misleading information . . . created, presented and disseminated . . . to *intentionally* deceive the public” and “[m]ay cause public harm,” while misinformation may be accidental. See European Commission, *Code of Practice on Disinformation*, EUR. UNION (Sept. 2018), <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation> (emphasis added). Propaganda is a broader concept that “can be described as a method of communication, by State organs or individuals, aimed at influencing and manipulating the behaviour of people in a certain predefined way” and thus contains a manipulative aspect. Eric De Brabandere, *Propaganda*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2019), ¶ 1. “Discriminatory propaganda” or “hate propaganda” incites atrocities and is related to hate speech. *Id.* at ¶ 21. The United Nations Office on Genocide Prevention and the Responsibility to Protect defines hate speech as “any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of . . . religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.” Office on Genocide Prevention and the Responsibility to Protect, *Strategy and Plan of Action on Hate Speech*, U.N. (May 2019), <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf>.

¹⁴ Katy Pearce, *While Armenia and Azerbaijan fought over Nagorno-Karabakh, their citizens battled on social media*, WASH. POST (Dec. 4, 2020, 7:45 AM EST), <https://www.washingtonpost.com/politics/2020/12/04/while-armenia-azerbaijan-fought-over-nagorno-karabakh-their-citizens-battled-social-media/>.

¹⁵ See Joe Nersessian, *The Mixed Messaging of Ilham Aliyev*, EVN REP. (Oct. 22, 2020), <https://www.evnreport.com/politics/the-mixed-messaging-of-ilham-aliyev> (quoting English translations of numerous speeches given by Azerbaijani President Ilham Aliyev before and during the 2020 Conflict).

¹⁶ See Andrew Roth, *Two Men Beheaded in Videos from Nagorno-Karabakh War Identified*, GUARDIAN (Dec. 15, 2020), <https://www.theguardian.com/world/2020/dec/15/two-men-beheaded-in-videos-from-nagorno-karabakh-war-identified>; see also Ulkar Natiqqizi & Joshua Kucera,

not surprising given the long-standing policy and practice by government authorities in Azerbaijan to “deliberately amplif[y] and exacerbate[.]” the effects of past conflict dating back to the post-Soviet era by actively stoking anti-Armenian hatred and fear among the people of Azerbaijan and repressing freedom of the press.¹⁷

Social media posts stirring up nationalist sentiment simplified the narrative and “contributed to the deepening of hatreds and dehumanization of the other.”¹⁸ This manifested in real life as hate crimes against Armenian communities around the world began to increase. For example, (i) on September 17, 2020, the Armenian Church of St. Gregory in San Francisco, California, was burned in a suspected case of arson;¹⁹ (ii) on October 28, 2020, a group of Turkish nationals known as the Grey-Wolves took to the streets of Lyon, France looking for Armenians to kill;²⁰ and (iii) on October 29, 2020,

Evidence of Widespread Atrocities Emerges Following Karabakh War, EURASIANET (Dec. 9, 2020), <https://eurasianet.org/evidence-of-widespread-atrocities-emerges-following-karabakh-war>.

¹⁷ Roza Malkumyan, *Baku’s Hostility Has Not Abated since the Fall of Nagorno-Karabakh*, FREEDOM HOUSE (Nov. 30, 2023), <https://freedomhouse.org/article/bakus-hostility-has-not-abated-fall-nagorno-karabakh>. In 2020, Azerbaijan ranked 168th out of 180 countries on Reporters Without Borders (RSF) World Press Freedom Index, while Armenia ranked 61st. *World Press Freedom Index*, RSF, <https://rsf.org/en> (last visited June 12, 2024).

¹⁸ See EUR. RES. FOR MEDIATION SUPPORT, MEDIA AND DISINFORMATION IN THE NAGORNO-KARABAKH CONFLICT AND THEIR ROLE IN CONFLICT RESOLUTION AND PEACEBUILDING, (Jan. 2021) (report on exploratory seminar held on Dec. 17, 2020), at 9-10 (hereinafter, “ERMES Report”).

¹⁹ *Fire Burns Armenian Church Building Overnight in San Francisco; Arson Suspected*, CBS S.F. (Sept. 17, 2020), <https://sanfrancisco.cbslocal.com/2020/09/17/armenian-church-burns-san-francisco-arson-suspected/>.

²⁰ Tim Hume, *Turkish Ultranationalist Group Linked to “Hunt For Armenians” in France*, VICE (Oct. 29, 2020, 3:47 PM), <https://www.vice.com/en/article/epddna/turkey-france-armenia-grey-wolves-lyon>; see also Patrick Keddie, *France has Banned the ‘Grey Wolves’ – But Who are They?*, AL JAZEERA (Nov. 24, 2020), <https://www.aljazeera.com/features/2020/11/24/france-has-banned-the-grey-wolves-but-who-are-they>.

three Armenian men were stabbed in Fresno, California, at a “Defend Armenia” rally.²¹

Despite the large number of these types of posts and their widespread circulation in the context of a long-simmering conflict, major social media companies—all of whom had policies in place in 2020 regarding the dissemination of hate speech and promotion of violence—appeared unprepared to handle the “rapid-fire dissemination” of “nationalist and ultra-nationalist narratives . . . across social media [that] often resemble[d] those from violent extremist groups.”²²

This Report analyzes the potential liability of social media companies—whose ubiquitousness and influence today as the primary means of communication for billions of smartphone users around the world are unrivaled by any other form of mass media—and/or the decisionmakers at such companies under international criminal law for the consequences of failing to prevent the spread of disinformation and hate speech on their platforms during the 2020 Conflict.²³

Part II of this Report provides a brief background to the long history of tension in the region, particularly as understood in the context of the early twentieth century Armenian Genocide. Part III reviews the role of inflammatory social media posts before, during, and after the 2020 Conflict. Part IV examines the international criminal precedent for mass media actors and companies who play a role in inciting atrocities. Part V considers the scrutiny Facebook received from the UN-authorized Independent International Fact-Finding Mission on Myanmar for the role its platform played in the extreme violence targeting Rohingya Muslims in 2017. Finally, Part VI concludes that, while top social media executives cannot be held criminally liable in international law for the specific anti-Armenian hate speech posted on their platforms in relation to the 2020 Conflict because they did not personally endorse and amplify such speech, social media companies certainly could have done more to implement measures they knew or should have known by at least 2018 would help

²¹ Sara Sandrik, *Defend Armenia Protesters Call Fresno Stabbing Attack a Hate Crime*, ABC 30 (Oct. 29, 2020), <https://abc30.com/defend-armenia-fresno-rally-river-park-stabbing/7463718/>.

²² See ERMES Report, *supra* note 18, at 10.

²³ This report does not address any potential civil liability that may arise for social media companies or their key decision-makers in connection with the 2020 Conflict, whether in the United States or internationally.

stem the outpouring of violent content during conflict situations. Their failure to do so in 2020 resulted in exacerbated tensions and nurtured a breeding ground for atrocity crimes to occur.

II. BACKGROUND: A HISTORY OF TENSION

There is a long history of tension in the South Caucasus regarding Nagorno-Karabakh. Though the mountainous region was populated for centuries by both Christian Armenians and Turkic Muslim Azeris, by the late nineteenth century, when it was overtaken by the Russian empire, Nagorno-Karabakh had a majority ethnic Armenian population.²⁴ After the Bolshevik revolution in the early 1920s, Nagorno-Karabakh was established as an autonomous region of the Soviet Union, but within the borders of Soviet Azerbaijan.²⁵

As the Soviet Union moved toward collapse in the late 1980s, a separatist movement developed, and fighting broke out in Nagorno-Karabakh in 1988.²⁶ Although Nagorno-Karabakh petitioned to become part of Armenia when the Soviet Union fell, it ultimately remained within Azerbaijan's borders.²⁷ In 1991, the separatists declared themselves the independent Republic of Artsakh.²⁸ By the time a cease-fire took hold in early 1994, "separatists, with Armenian support, controlled Nagorno-Karabakh and seven surrounding Azerbaijani territories, constituting a total of 14 percent of Azerbaijan's overall territory."²⁹ Known as the first Karabakh war, it left between 15,000-30,000 people dead and more than a million displaced.³⁰ Though a formal mediation and peace process was

²⁴ *Nagorno-Karabakh Profile*, BBC (Jan. 30, 2024), <https://www.bbc.com/news/world-europe-18270325>; see also *Armenia*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/countries/armenia> (last updated Oct. 1, 2024).

²⁵ *Nagorno-Karabakh Profile*, *supra* note 24; see also CIA: THE WORLD FACTBOOK, *supra* note 24.

²⁶ CIA: THE WORLD FACTBOOK, *supra* note 24.

²⁷ See PATRICIA CARLEY, U.S. INST. OF PEACE, *NAGORNO-KARABAKH: SEARCHING FOR A SOLUTION* (1998).

²⁸ *Nagorno-Karabakh Profile*, *supra* note 24.

²⁹ CIA: THE WORLD FACTBOOK, *supra* note 24.

³⁰ See CARLEY, *supra* note 27; Mathieu Droin et al., *A Renewed Nagorno-Karabakh Conflict: Reading Between the Front Lines*, CTR. FOR STRATEGIC &

established in 1992 through the Minsk Group of the Organization for Security and Cooperation in Europe (OSCE), it was largely ineffective, and a proposed settlement plan collapsed in early 1998.³¹ The situation remained in a “simmering stalemate . . . punctuated by armed clashes” until 2020.³²

These tensions occurred within the larger backdrop of the Armenian Genocide carried out by Ottoman Turks from 1915 to 1923. During that genocide, as many as 1.5 million ethnic Armenians living in the Ottoman Empire were murdered and expelled from their homes, forced to march hundreds of miles with little to no food, water, or shelter from Eastern Anatolia into the Mesopotamian desert.³³ Those most responsible for the Armenian Genocide were never held legally accountable, and modern Turkey (the successor state to the Ottoman Empire) has consistently refused to acknowledge the massacres of the Armenians as a genocide.³⁴ Since Azeris are Turkic Muslims with close ties to Turkey, and Armenia is geographically bound by Turkey to the west and Azerbaijan to the east, there is a strong sense that the past, with all its hatreds and suspicion, is still very much alive.³⁵

III. SOCIAL MEDIA AND THE 2020 CONFLICT

A. MANIPULATED SOCIAL MEDIA PROMOTED VIOLENT ANTI-ARMENIAN RHETORIC

Before, during, and after the 2020 Conflict, numerous observers documented a variety of tactics utilized by Azerbaijan and Turkey to inflame anti-Armenian sentiment and shape public opinion in favor of the conflict.

As early as 2012, research showed that the online discourse in Azerbaijan consisted largely of “hate blogs” expressing hatred and propaganda against Armenians while promoting positions that were

INT'L STUD. (Sept. 22, 2023), <https://www.csis.org/analysis/renewed-nagorno-karabakh-conflict-reading-between-front-lines>.

³¹ See CARLEY, *supra* note 27.

³² *Nagorno-Karabakh Profile*, *supra* note 24.

³³ See Michael J. Bazylar & Rajika L. Shah, *The Unfinished Business of the Armenian Genocide: Armenian Property Restitution in American Courts*, 23 SW. J. INT'L L. 223, 227-28 and accompanying notes (2017).

³⁴ *Id.*

³⁵ See also CARLEY, *supra* note 27.

“unsupportive of the [Nagorno-Karabakh] peace process. . . .”³⁶ A 2019 report on social media manipulation by the Computational Propaganda Research Project at Oxford University concluded that Azerbaijan and Turkey were both “authoritarian countries deploying computational propaganda . . . as a tool of information control.”³⁷ Such control was expressed “in three distinct ways: to suppress fundamental human rights, discredit political opponents, and drown out dissenting opinions.”³⁸ The same report labeled Azerbaijan and Turkey as having “medium cyber troop capacity,” meaning they possessed full-time staff who coordinated with multiple actors, tools, and strategies for social media manipulation, including potentially abroad.³⁹

The July 2020 clashes gave rise to the first wave of heavily manipulated, pro-Azerbaijani social media, with a small group of accounts being responsible for a significant portion of the information shared.⁴⁰ Initial signs of the Azerbaijani government’s role in promoting this online activity quickly became apparent, as pro-regime student groups were some of the primary accounts engaging in online disinformation campaigns.⁴¹

By September 2020, when war broke out, the Azerbaijani government ramped up its attempts to control the online sphere, blocking or slowing access to most social media platforms while

³⁶ Azru Geybullayeva, *Azerbaijani Blogs Talk About Armenians: Introducing Hate 2.0*, OSSERVATORIO BALCANI E CAUCASO TRANSEUROPA (Feb. 3, 2012), <https://www.balcanicaucaso.org/eng/Areas/Azerbaijan/Azerbaijani-blogs-talk-about-Armenians-introducing-Hate-2.0-111320>.

³⁷ SAMANTHA BRADSHAW & PHILIP N. HOWARD, UNIV. OF OXFORD: OXFORD INT. INST., 2019 GLOBAL INVENTORY OF ORGANISED SOCIAL MEDIA MANIPULATION 5 (2019), <https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/93/2019/09/CyberTroop-Report19.pdf>. The report defined computational propaganda as “the use of algorithms, automation, and big data to shape public life.” *Id.* at 1.

³⁸ *Id.*; see also Azru Geybulla, *In the Crosshairs of Azerbaijan’s Patriotic Trolls*, OPENDEMOCRACY (Nov. 22, 2016), <https://www.opendemocracy.net/en/odr/azerbaijan-patriotic-trolls/>.

³⁹ BRADSHAW & HOWARD, *supra* note 37. Armenia was listed as having “minimal cyber troop teams” that applied “a few tools of computational propaganda to a small number of platforms” and no foreign operations.

⁴⁰ Zarine Kharazian, *Patriotic Astroturfing in the Azerbaijan-Armenia Twitter War*, DFRLAB (July 21, 2020), <https://medium.com/dfrlab/patriotic-astroturfing-in-the-azerbaijan-armenia-twitter-war-9d234206cdd7>.

⁴¹ *Id.*

leaving Twitter mostly unblocked.⁴² This prompted a surge of virtual private network (VPN) app downloads in Azerbaijan as citizens tried to circumvent the block.⁴³ Although Twitter was not widely used in Azerbaijan, it ultimately helped the regime achieve its goals by allowing for greater surveillance and control of online information and providing additional channels for coordinating propaganda and harassment campaigns.⁴⁴

With the social media block in place, the pro-Azerbaijani content shared on social media platforms in the initial days of the Azerbaijani offensive in September originated mostly in countries friendly to Azerbaijan. A “substantial proportion” of such content shared in English was linked to accounts from Turkey and Pakistan.⁴⁵ Even online Turkish communities dedicated to sharing content about K-pop music mobilized to spread anti-Armenian hashtags.⁴⁶

The support for unadulterated violent rhetoric garnered on social media led to more displays of violent action being shared and broadcasted on various platforms. In Lyon, France, the Turkish ultranationalist militant group “Grey Wolves,” which is banned in a number of countries, posted videos of themselves on social media marching through neighborhoods with captions such as “looking for Armenians.”⁴⁷ The French police had to forcibly disperse the violent

⁴² Katy Pearce, *While Armenia and Azerbaijan Fought Over Nagorno-Karabakh, Their Citizens Battled on Social Media*, WASH. POST (Dec. 4, 2020), <https://www.washingtonpost.com/politics/2020/12/04/while-armenia-azerbaijan-fought-over-nagorno-karabakh-their-citizens-battled-social-media/>.

⁴³ An Azerbaijani Journalist, *Azerbaijanis Take Up Virtual Arms in Global Information War with Armenia*, EURASIANET (Oct. 11, 2020), <https://eurasianet.org/azerbaijanis-take-up-virtual-arms-in-global-information-war-with-armenia>.

⁴⁴ Pearce, *supra* note 42.

⁴⁵ ELISE THOMAS & ALBERT ZHANG, AUSTRALIAN STRATEGIC POL'Y INST., SNAPSHOT OF A SHADOW WAR: A PRELIMINARY ANALYSIS OF TWITTER ACTIVITY LINKED TO THE AZERBAIJAN-ARMENIA CONFLICT 20 (2020), <https://s3-ap-southeast-2.amazonaws.com/ad-aspi/2020-10/Snapshot%20of%20a%20shadow%20war.pdf>. Turkey, Pakistan, and Azerbaijan have launched coordinated hacking and social media campaigns in support of one another in previous conflicts.

⁴⁶ Lukas Andriukaitis, *Turkish Pop Culture Twitter Accounts Mobilize to Support Azerbaijan*, DRFLAB (Dec. 15, 2020), <https://medium.com/dfrlab/turkish-pop-culture-twitter-accounts-mobilize-to-support-azerbaijan-5b740511d792>.

⁴⁷ Hume, *supra* note 20.

mob who yelled threats that they were “going to kill the Armenians.”⁴⁸ Organized efforts of copy-pasted content targeted celebrities that showed any signs of support for Armenia, leading some, like rapper Cardi B, to retract their messages in the face of such overwhelming spam.⁴⁹

Perhaps most upsetting, videos and photographs apparently depicting war crimes and the brutal mistreatment of Armenian prisoners of war (POWs)—many of which seemed to have been filmed and posted by the alleged perpetrators themselves—were also widely circulated on social media.⁵⁰ A Human Rights Watch report noted that it was “telling that some of the [Azerbaijani] servicemen who carried out these abuses had no qualms about being filmed,” implying that the perpetrators feared no repercussions from the Azerbaijani regime for their crimes and that they felt emboldened to openly share their actions on social media platforms.⁵¹

B. THE RESPONSE FROM SOCIAL MEDIA COMPANIES WAS SLOW AND INEFFECTIVE

All of the social media companies that served as the main conduits for hate-based content—Instagram, TikTok, Facebook, Reddit, and Twitter—had policies in place at the time concerning hate speech and posts that incited, glorified, or otherwise served to spread violence. Despite that, activity violating such guidelines was rarely addressed effectively.

While some social media companies, such as Instagram, took some action to block, take down, or stop the spread of such information posted to their sites in connection with the 2020 Conflict, others, such as Facebook, TikTok, and Twitter, did not act or acted too late to allow for effective implementation of their anti-violence policies. For example, it took over a year of advocacy and the leaking during the war of an internal memo that exposed Facebook’s failures before

⁴⁸ *Id.*

⁴⁹ See, e.g., @josh_emerson, TWITTER (now X) (Oct. 6, 2020, 3:54 AM), https://twitter.com/josh_emerson/status/1313432532487208962 (posting a screengrab of the social media campaign targeting Cardi B).

⁵⁰ See, e.g., *Azerbaijan: Armenian Prisoners of War Badly Mistreated*, HUM. RTS. WATCH (Dec. 2, 2020), <https://www.hrw.org/news/2020/12/02/azerbaijan-armenian-prisoners-war-badly-mistreated>.

⁵¹ *Id.*

Facebook finally took down thousands of accounts and pages tied to the Azerbaijani regime that targeted opposition figures and independent media.⁵² Less than six months later, those troll networks returned to the platform and launched further harassment campaigns.⁵³

IV. INTERNATIONAL CRIMINAL TRIBUNALS HAVE HELD COMPANIES AND MEDIA EXECUTIVES LIABLE FOR THEIR ROLE IN ATROCITY CRIMES

⁵² Craig Silverman & Ryan Mac, *It Took Facebook More Than a Year—And a Whistleblower—To Remove Troll Farm Connected To Azerbaijan's Ruling Party*, BUZZFEED NEWS (Oct. 8, 2020, 9:43 AM), <https://www.buzzfeednews.com/article/craigsilverman/facebook-azerbaijan-troll-farm>; Craig Silverman et al., *'I Have Blood on My Hands': A Whistleblower Says Facebook Ignored Global Political Manipulation*, BUZZFEED NEWS (Sept. 14, 2020, 12:36 PM), <https://www.buzzfeednews.com/article/craigsilverman/facebook-ignore-political-manipulation-whistleblower-memo>.

⁵³ Julia Carrie Wong & Luke Harding, *'Facebook Isn't Interested In Countries Like Ours': Azerbaijan Troll Network Returns Months After Ban*, GUARDIAN (Apr. 13, 2021), <https://www.theguardian.com/technology/2021/apr/13/facebook-azerbaijan-ilham-aliyev>. These manipulative online practices are known as “astroturfing.” Astroturfing often entails using online identities, including fake groups and accounts, to “create an impression of widespread grassroots support for a policy, individual, or product, where little such supports exists.” Adam Bienkob, *Astroturfing: What is it and Why does it Matter?*, GUARDIAN (Feb. 8, 2012), <https://www.theguardian.com/commentisfree/2012/feb/08/what-is-astroturfing>. “Ephemeral astroturfing” is a quick and coordinated campaign in which an account is created for the purpose of creating a social media trend, while simultaneously quickly deleting content containing keywords relating to those same trends. See Tuğrulcan Elmas et al., *Ephemeral Astroturfing Attacks: The Case of Fake Twitter Trends*, in 2021 IEEE EUROPEAN SYMPOSIUM ON SECURITY AND PRIVACY (EUROS&P), 403, 403-05 (2021), <https://doi.ieeecomputersociety.org/10.1109/EuroSP51992.2021.00035>. Such measures leave little evidence behind once their goal of “trending” a hashtag or topic is successful. *Id.*

Azerbaijan and Turkey have been observed using such tactics, especially on Twitter. *Id.* Perhaps not coincidentally, Twitter expanded its hate speech policies in the fall of 2020, leading to over 1.1 million different accounts facing action and over 3.8 million tweets being removed. Kurt Wagner/Bloomberg, *Twitter Penalizes Record Number of Accounts for Posting Hate Speech*, TIME (July 14, 2021), <https://time.com/6080324/twitter-hate-speech-penalties/>. (Nonetheless, thousands of accounts dedicated to launching harassment campaigns, spreading propaganda and genocide denial, and promoting violence remained active.)

Discrimination-based atrocity crimes, including persecution as a crime against humanity and genocide, require the spread of hate speech and disinformation to lay the ideological groundwork of violence and destruction.⁵⁴ While disinformation and misinformation remain more nebulous concepts, they also work to normalize the dehumanization of a group, in order to validate the group's victimization.⁵⁵ Consequently, mass media plays an integral role in facilitating atrocity crimes by enabling the weaponization of language to engender fear and mobilize a destructive response.⁵⁶

Since the end of World War II, international criminal tribunals ("ICTs") have recognized this entanglement between the media and atrocities. Multiple ICTs have imputed liability to media company executives for the spread of hateful and inflammatory messages on their platforms that catalyzed the commission of atrocity crimes—particularly the crime that we now know as direct and public incitement to genocide. This Section reviews those precedents to identify the circumstances in which liability may be found.

A. THE NUREMBERG IMT FOUND LIABILITY WHERE A NEWSPAPER PUBLISHER CONTINUED TO PUBLISH ARTICLES INCITING GENOCIDAL VIOLENCE WHILE AWARE OF THE STATE'S GENOCIDAL VIOLENCE

Precedent from the International Military Tribunal at Nuremberg ("IMT"), the first ICT, lays the foundation for modern international criminal law. At the IMT, because neither the crime of incitement to genocide nor even genocide had yet been defined, incitement to "murder and extermination" was charged as a form of persecution under the umbrella of crimes against humanity. IMT jurisprudence also laid the path for what became the modern crime of direct and public incitement (of others) to commit genocide.⁵⁷

On October 18, 1945, the prosecutors at the IMT indicted 24 leading Nazi officials. Each defendant was charged with at least one

⁵⁴ Frank Chalk, *Intervening to Prevent Genocidal Violence: The Role of the Media*, in *THE MEDIA AND THE RWANDA GENOCIDE* 375, 375-80 (Allan Thompson ed., 2007).

⁵⁵ *Id.*

⁵⁶ *Id.* at 376.

⁵⁷ *See, e.g.*, Rome Statute of the International Criminal Court, art. 25(e), July 17, 1998, 2187 U.N.T.S. 90.

of the four possible crimes: (1) crimes against peace (the modern crime of aggression), (2) war crimes, (3) crimes against humanity, or (4) common plan or conspiracy to commit [crimes against peace, war crimes, or crimes against humanity].⁵⁸

One of the 24 individuals charged was Julius Streicher. Streicher was the publisher of *Der Stürmer*, “an anti-Semitic German weekly newspaper” published from 1923 to 1945; he was also the editor until 1933.⁵⁹ Widely known as the “Jew-Baiter Number One,” in his capacity at the publication, Streicher heralded a “call for the annihilation of the Jewish race.”⁶⁰ Twenty-three articles in *Der Stürmer* explicitly called for the “root and branch” extermination of Jewish people,⁶¹ urging that “only when world Jewry had been annihilated would the Jewish problem be solved.”⁶² Dehumanizing phrases used in reference to Jewish people, such as “germ,” “pest,” and “parasite . . . who must be destroyed in the interest of mankind,” were commonplace in *Der Stürmer* articles.⁶³

Though Streicher claimed he strived solely to ostracize Jews as “aliens” and facilitate their deportation rather than death and denied having knowledge of the mass extermination of Jews, the tribunal placed little weight on Streicher’s testimony.⁶⁴ Rather, according to the court, Streicher actually intensified his campaign against the Jewish people when he gained “knowledge of the extermination of the Jews in the Occupied Eastern Territory.”⁶⁵ The court noted evidence that made “it clear that he continually received current information on the progress of the ‘final solution.’”⁶⁶ For example, *Der Stürmer*’s press photographer was sent to visit the ghettos in the spring of 1943. Also, Streicher received and read another newspaper which “carried in each issue accounts of Jewish atrocities.”⁶⁷

⁵⁸ *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Vol. 1, at 28 (1946).

⁵⁹ *Id.* at 301.

⁶⁰ *Id.*

⁶¹ *Id.* at 302.

⁶² *Id.*

⁶³ *Id.* at 301.

⁶⁴ *Id.* at 304.

⁶⁵ *The Trial of German Major War Criminals: Proceedings of The International Military Tribunal Sitting at Nuremberg, Germany*, Part 22, at 301 (1946).

⁶⁶ *Id.*

⁶⁷ *Id.*

In light of this evidence, the court determined that Streicher “infected the German mind with the virus of anti-Semitism and incited the German people to active persecution” via the widespread publication of *Der Stürmer*.⁶⁸ Accordingly, the Court held that “Streicher’s incitement to murder and extermination at the time when Jews in the East were being killed . . . constitute[d] a crime against humanity.”⁶⁹

In contrast, the IMT acquitted another defendant, Hans Fritzsche, the Head of the Radio Section of the German Propaganda Ministry. Though Fritzsche shared Streicher’s rampant anti-Semitism, his broadcasts were found not to have “urge[d] persecution or extermination of Jews,” and there was “no evidence that he was aware of their extermination in the East.”⁷⁰ Moreover, Fritzsche appeared to have attempted to temper Streicher’s hateful diatribe as he “twice attempted to have publication of the anti-Semitic *Der Stürmer* suppressed, though unsuccessfully.”⁷¹ In acquitting Fritzsche, the court emphasized the significance of the lack of language impelling extermination and knowledge of the atrocities being committed.⁷²

The difference in outcomes between *Streicher* and *Fritzsche* establishes the idea that media executives may avoid liability if they are not directly advocating for the extermination of a particular group of people or genuinely (and reasonably) lack awareness of atrocities being committed against that group. It also serves as a warning that, in the context of a particularly volatile conflict environment, media executives must be careful to avoid adding fuel to the fire.

B. THE SUBSEQUENT NUREMBERG TRIALS FOUND SECONDARY CORPORATE LIABILITY WHERE A COMPANY KNOWINGLY SUPPLIED A COMMODITY TO THE STATE WHILE AWARE THE STATE WAS USING THE COMMODITY TO COMMIT SERIOUS CRIMES

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 338.

In addition to the IMT, a number of other trials were held focusing on determining the degree to which civil and military society aided and abetted the Nazis' Final Solution. One of these cases, *United Kingdom v. Tesch*, highlights the liability of owners of corporations that provide the means to the end of genocide or mass atrocities.

In *Tesch*, the main question centered on the liability of senior executives at a company that distributed Zyklon B,⁷³ the gas used to murder prisoners in extermination camps throughout the Third Reich. The first defendant in the case, Bruno Tesch, sold Zyklon B through his firm, Tesch and Stabenow.⁷⁴ Karl Weinbacher, the second defendant, was Tesch's second-in-command.⁷⁵ The third defendant, Joachim Drosihn, was the firm's gassing technician.⁷⁶ The British Military Court charged all three men with the war crime of "supply[ing] poison gas used for extermination of [individuals] interned in concentrations camps well knowing that the said gas was to be so used."⁷⁷

A core question in any such case is whether the defendant acted with the requisite mens rea or mental element.⁷⁸ In *Tesch*, according to

⁷³ Zyklon B is a highly poisonous insecticide originally intended for use against rats. When exposed to air, Zyklon B pellets convert into a lethal gas. Leaders of Nazi Germany determined this was the most efficient way to kill prisoners, which led to mass murder at many extermination camps. *At the Killing Centers*, U.S. HOLOCAUST MEM'L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/at-the-killing-centers> (last edited Mar. 3, 2023).

⁷⁴ *United Kingdom v. Tesch (The Zyklon B Case)*, Case No. 9, 1 Law Rep. Trials War Crim. 93 (Brit. Mil. Ct. Hamburg, Mar. 1-8, 1946).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Modernly, at the International Criminal Court, the Rome Statute requires that, unless otherwise provided, the material elements of a crime must be committed with intent and knowledge. Rome Statute of the International Criminal Court, art. 30(1), *supra* note 57, 2187 U.N.T.S. at 90. Intent is satisfied when "(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." *Id.* art. 30(2). Knowledge "means awareness that a circumstance exists or a consequence will occur in the ordinary course of events." *Id.* art. 30(3). At least one author has argued that the holding in *Tesch* can be applied to the senior executives of a social media company if the company provided a platform to individuals carrying out a propaganda campaign of incitement and the executive knew or should have known the platform directly

the prosecution, knowingly supplying “a commodity to . . . the State which was using that commodity for the mass extermination of [civilians] was a war crime,” and thus, liability attached to any individual who “put the means to commit the crime into the hands of those who actually carried it out.”⁷⁹

Prosecution witnesses, including bookkeepers and stenographers at the company, testified that Tesch and Weinbacher were aware of the lethal use of Zyklon B in the extermination camps and yet “continued to arrange supplies of gas to” the camps “in ever-increasing quantities.”⁸⁰ Therefore, Tesch and Weinbacher knew the SS was using Zyklon B to exterminate civilians in extermination camps. Tesch and Weinbacher, however, argued that since they were not present at the concentration camps nor did they personally place the Zyklon B pellets in the gas chambers, they were not liable for the crimes charged.⁸¹ They also highlighted Zyklon B’s non-lethal purpose of delousing the camps’ quarters, arguing that any increase in the SS purchase order was due to the increase of prisoners in the camps.⁸²

The Court concluded that both Tesch and Weinbacher were “competent business men.”⁸³ Given the German public knowledge by at least 1943 that Zyklon B was “being used for killing people,”⁸⁴ the Court concluded that Tesch and Weinbacher knew or should have known the SS was using extra shipments of Zyklon B to extermination camps not for delousing but rather as a weapon of mass murder.⁸⁵ Accordingly, the Court found Tesch and Weinbacher guilty and sentenced both to execution.⁸⁶

Drosihn, on the other hand, was acquitted due to his lack of influence over the transfer of gas to the camps and, therefore, his

assisted the incitement. Neema Hakim, Comment, *How Social Media Companies Could Be Complicit in Incitement to Genocide*, 21 CHI. J. INT’L L. 83, 111 (2020).

⁷⁹ *Tesch* (The Zyklon B Case), Case No. 9, 1 Law Rep. Trials War Crim. at 94.

⁸⁰ *Id.* at 94-95.

⁸¹ *Id.* at 97.

⁸² *Id.*

⁸³ *Id.* at 101.

⁸⁴ *Id.* at 96.

⁸⁵ *Id.* at 101.

⁸⁶ *Id.* at 102.

inability to prevent it.⁸⁷ Drosihn had a “subordinate position” in the company in relation to his limited knowledge and influence over the “firm’s business activities.”⁸⁸ Further, Drosihn spent a majority of the year traveling; when Tesch and Weinbacher were traveling and Drosihn was at company headquarters, he did not have “the power of attorney.”⁸⁹ Ultimately, the Court concluded Drosihn was not in a position at the firm “to influence the transfer of gas to Auschwitz or prevent it.”⁹⁰

C. THE ICTR’S MEDIA CASE HELD MEDIA COMPANIES EXECUTIVES LIABLE FOR INCITING GENOCIDE DUE TO THE MESSAGING DISSEMINATED ON THEIR PLATFORMS

Building upon the precedent set at the IMT and NMT, the International Criminal Tribunal for Rwanda (“ICTR”) was the first modern ICT to examine the role of mass media in facilitating atrocity crimes in what is known as the “Media Case.”⁹¹

1. *RTLM Radio Broadcasts Advocated for the Extermination of Tutsis*

Ferdinand Nahimana and Jean-Bosco Barayagwiza were founders of the Rwandan media organization Radio-Television Libre des Mille Collines (RTLM).⁹² Nahimana was viewed as the founder and director, while Barayagwiza was the second in command.⁹³ Both Nahimana and Barayagwiza remained in the top management of RTLM and represented the radio at the highest level in meetings with

⁸⁷ *Id.*

⁸⁸ *Id.* at 100.

⁸⁹ *Id.*

⁹⁰ *Id.* at 102.

⁹¹ Recent Case, Prosecutor v. Nahimana, Barayagwiza, and Ngeze (Media Case), Case No. ICTR-99-52-T (*Int’l Crim. Trib. for Rwanda Trial Chamber I Dec. 3, 2003*), 117 HARV. L. REV. 2769, 2769 (2004).

⁹² Prosecutor v. Nahimana (Media Case), Case No. ICTR-99-52-T, Trial Chamber Judgement, ¶ 567 (Dec. 3, 2003).

⁹³ *Id.*

the Rwandan Ministry of Information.⁹⁴ They also controlled the finances and were members of the board of directors of RTLM.⁹⁵

In the 1980s, the Rwandan government had subsidized the production of radios, which were then sold at a reduced price or given to those in the administrative structure of the party.⁹⁶ As a result, the radio became an increasingly important source of information to the Rwandan public, as well as an avenue for entertainment and a focus of social life.⁹⁷ RTLM started broadcasting in July 1993 and quickly gained popularity. Many people, particularly younger generations, were seen listening to RTLM on the streets and at work or playing it in bars, taxis, and markets.⁹⁸

Prior to April 1994, RTLM's broadcasts primarily discussed ethnicity in the context of the nation's history and the politics of Hutu-Tutsi relations, promoted as attempts to "raise awareness" about these issues.⁹⁹ However, these broadcasts soon devolved into "ethnic stereotyping in economic terms as well as political,"¹⁰⁰ such as distorting facts to portray the Tutsi as unjustifiably wealthy in a country of enormous poverty—a tactic also utilized by Nazi Germany to target Jews—as well as "ethnic stereotyping in reference to physical characteristics,"¹⁰¹ thus "contributing to increasing hostility against the Tutsi."¹⁰²

A month before the onset of the genocide in April 1994, the station began to arbitrarily identify various Tutsi individuals as "security risks" and warned listeners to "rise up."¹⁰³ The Trial Chamber found these depictions "heated up heads;"¹⁰⁴ they "promoted contempt and hatred for the Tutsi population and called listeners to seek out and take up arms against the enemy."¹⁰⁵ As one witness observed, "[w]hat RTLM did was almost to pour petrol – to spread

⁹⁴ *Id.* at ¶ 970.

⁹⁵ *Id.*

⁹⁶ *Id.* at ¶ 342.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at ¶ 345.

¹⁰⁰ *Id.* at ¶ 363.

¹⁰¹ *Id.* at ¶ 368.

¹⁰² *Id.* at ¶ 365.

¹⁰³ *Id.* at ¶ 371, 375.

¹⁰⁴ *Id.* at ¶ 371.

¹⁰⁵ *Id.* at ¶ 486.

petrol throughout the country little by little so that one day it would be able to set fire to the whole country.”¹⁰⁶

After April 6, 1994, with the country aflame with ethnic hostilities, the “virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence increased.”¹⁰⁷ RTLM’s programs escalated its anti-Tutsi rhetoric by unequivocally “defin[ing] the enemy as the Tutsi”¹⁰⁸ and “explicitly call[ing] for the extermination of the Tutsi ethnic group.”¹⁰⁹ One transmission even went so far as to “describe the physical characteristics of the ethnic group as a guide to selecting targets of violence,”¹¹⁰ explaining “the reason we will exterminate them is that they belong to one ethnic group”—the Tutsis.¹¹¹ Another lauded the idea of “exterminating the Tutsi from the surface of the earth . . . to make them disappear for good.”¹¹²

As a result of its prevalence throughout the region, the RTLM radio station was one of the main sources of mass media propaganda.¹¹³ More than merely stoking the flames of discord, RTLM was described as “constantly asking people to kill other people, to look for those who were in hiding, and to describe the hiding places of those who were described as being accomplices”¹¹⁴ and even effectuated targeted killings against specific individuals by “publishing lists of Tutsi names and asking for people to come forth and provide information on those listed.”¹¹⁵ RTLM broadcasts thus “relentlessly sen[t] the message that the Tutsi were the enemy and had to be eliminated once and for all.”¹¹⁶

As widescale bloodshed erupted, written complaints and notices of violations were sent to Ferdinand Nahimana and Jean-Bosco

¹⁰⁶ *Id.* at ¶ 436.

¹⁰⁷ *Id.* at ¶ 486 (April 6, 1994, marks the date Rwandan President Juvénal Habyarimana was assassinated, which served as the catalyst for the Rwandan Genocide).

¹⁰⁸ *Id.* at ¶ 392.

¹⁰⁹ *Id.* at ¶ 486.

¹¹⁰ *Id.* at ¶ 396.

¹¹¹ *Id.*

¹¹² *Id.* at ¶ 483.

¹¹³ *Id.* at ¶ 488 (“Radio was the medium of mass communication with the broadest reach in Rwanda”).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at ¶ 487.

¹¹⁶ *Id.* at ¶ 488.

Barayawiza; however, despite participating in meetings with the Ministry of Information and receiving injunctions, RTLM ignored the government's call to end broadcasts of this type and continued to promote violence.¹¹⁷

2. *Kangura Newspaper Articles Similarly Demonized Tutsis*

Hassan Ngeze was a journalist by trade and in 1990 founded the newspaper *Kangura*, where he was Editor-in-Chief for the entirety of its existence.¹¹⁸ As such, Ngeze was responsible for the “overall direction of the paper” and “all authority connected with the newspaper remained in his hands.”¹¹⁹ Depending on sales, about 1,500 to 3,000 copies of each issue were printed.¹²⁰ *Kangura* was the most well-known newspaper in Rwanda at the time.¹²¹

Ngeze often wrote articles for *Kangura* himself.¹²² Beginning in 1991, as per a requirement of the Kigali prosecutor, a notice was printed on the bottom of the cover page of every issue stating that “the content of the articles binds the author and the publisher.”¹²³ Though the editorial team met to discuss each issue, Ngeze was the ultimate authority and had the last word as to what was published.¹²⁴ Thus, Ngeze “controlled the publication and was responsible for its contents.”¹²⁵

Many articles in *Kangura* portrayed Tutsis as a group as “the enemy, as evil, dishonest and ambitious.”¹²⁶ One of the most infamous was the “Ten Commandments,” published in December 1990.¹²⁷ Addressed to what it called the Hutu majority, the article exhorted Hutus to “wake up!” and “[t]ake all necessary measures to deter [Tutsi] from launching a fresh attack” because “the enemy” was waiting for a

¹¹⁷ *Id.*

¹¹⁸ *Id.* at ¶ 122, 123.

¹¹⁹ *Id.* at ¶ 123.

¹²⁰ *Id.* at ¶ 122.

¹²¹ *Id.*

¹²² *Id.* at ¶ 129.

¹²³ *Id.* at ¶ 123.

¹²⁴ *Id.* at ¶ 129.

¹²⁵ *Id.* at ¶ 135.

¹²⁶ *Id.* at ¶ 152-59.

¹²⁷ *Id.* at ¶ 138.

“more propitious moment[] to decimate us.”¹²⁸ It described the Tutsi as “bloodthirsty” and raised the specter of “Tutsi domination over the Hutu.”¹²⁹ The article further claimed that Tutsi women were intentionally married or sold to Hutu intellectuals and high-placed Hutu officials in order to “serve as spies.”¹³⁰ The article then urged Hutus to “become aware of a new Hutu ideology,” “cease feeling pity for the Tutsi,” and follow the ten commandments.¹³¹ Those who did not were explicitly labeled as traitors.¹³²

3. *The ICTR Trial Chamber Found Individual Criminal Responsibility for Media Company Heads Who Fanned the Flames of Violence*

In 2003, ICTR Trial Chamber I found Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze each guilty of genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; and persecution and extermination as crimes against humanity.¹³³

The Trial Chamber held that, as the “number one” and “number two” of RTLM’s top management, Nahimana and Barayagwiza had a duty to “take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by the RTLM.”¹³⁴ Given that both defendants had been on notice about the alarming amplification of antagonism in the RTLM’s messaging, the Trial Chamber found they “knew what was happening at RTLM” and “failed to exercise the authority vested in them . . . to prevent the genocidal harm that was caused by RTLM programming.”¹³⁵ This omission factored into the Chamber’s decision to hold them criminally responsible.¹³⁶

With respect to *Kangura*, the Chamber found that, by publishing articles and editorials that “conveyed contempt and hatred for the Tutsi ethnic group, and for Tutsi women in particular as enemy

¹²⁸ *Id.*

¹²⁹ *Id.* at ¶ 139.

¹³⁰ *Id.* at ¶ 139.

¹³¹ *Id.* at ¶ 139.

¹³² *Id.*

¹³³ *Id.* at ¶¶ 1092, 1093, 1094.

¹³⁴ *Id.* at ¶ 973.

¹³⁵ *Id.* at ¶ 970.

¹³⁶ *Id.* at ¶¶ 973-74.

agents,” and specifically in publishing the “Ten Commandments,” *Kangura* “fan[ned] the flames of ethnic hatred, resentment and fear against the Tutsi population.”¹³⁷ Moreover, *Kangura* promoted violence against Tutsis through fear-mongering and hate propaganda, calling on readers to “take all necessary measures to stop the enemy.”¹³⁸ Thus, *Kangura* “paved the way for genocide in Rwanda” against the Tutsi population by “whipping the Hutu population into a killing frenzy.”¹³⁹

Importantly, the Trial Chamber recognized that “the power of the media to create and destroy fundamental human values comes with great responsibility,” and thus, “those who control such media are accountable for its consequences.”¹⁴⁰ The Trial Chamber concluded that the defendants bore individual criminal responsibility stemming from their “ownership and institutional control over the media”¹⁴¹ and their use of it “for the collective communications of ideas and for the mobilization of the population on a grand scale.”¹⁴²

Furthermore, the Chamber noted that even when parroting the messaging of others through their outlets, editors, and publishers have “generally been held responsible for media they control.”¹⁴³ Publishers and editors are “regarded as equally responsible” for the words of others that they distribute on their platforms on the grounds that they are providing a forum and that as owners they have “the power to share the editorial direction.”¹⁴⁴ A publisher’s or editor’s intent, specifically whether or not the purpose of publicly transmitting the material was in good faith or part of a campaign of malice, determined the scope of this responsibility.¹⁴⁵

Conversely, the key factor the Chamber identified in absolving publishers and editors of this liability was whether they maintained a critical distance from the published content, such as offering

¹³⁷ *Id.* at ¶ 950.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at ¶ 945.

¹⁴¹ *Id.* at ¶ 979.

¹⁴² *Id.*

¹⁴³ *Id.* at ¶ 1001.

¹⁴⁴ *Id.* at ¶ 1003.

¹⁴⁵ *Id.*

disclaimers or opposing points of view.¹⁴⁶ The Chamber held this “clear distancing” was crucial in cases where the “disseminated views constitute ethnic hatred and call to violence” to “avoid conveying an endorsement of the message.”¹⁴⁷ As such, the Chamber rejected the defendants’ claims that some of the statements published in the broadcast of RTLM or *Kangura* were simply facts and informational in their nature.¹⁴⁸

4. *The ICTR Appeals Chamber Affirmed Media Executives’ Responsibility to Prevent the Spread of Violent Content*

Each defendant appealed, and in 2007, the ICTR Appeals Chamber issued its final judgment in the Media Case.

Regarding the charge of genocide, the Chamber found that in some cases there was insufficient evidence to conclude that RTLM broadcasts listing names of certain Tutsis substantially contributed to their murder, either because the murders themselves were not sufficiently established or because there were intervening causes.¹⁴⁹ The Chamber found that it was not established beyond a reasonable doubt that Nahimana “played an active role in the [RTLM] broadcasts instigating the commission of genocide” after the genocide began on April 6, 1994, and that there was insufficient proof the editorials and other texts Nahimana allegedly asked to be read out on air instigated the killing of Tutsis.¹⁵⁰ The Chamber also found that there was insufficient evidence to demonstrate that Barayagwiza “continued to exercise effective control over RTLM after” April 6, 1994, particularly because he was only second in command.¹⁵¹ Finally, it had not been proven beyond a reasonable doubt that *Kangura* “substantially contributed to” the genocide, even though there was “probably a link”

¹⁴⁶ *Id.*; see also *id.* at ¶ 992 (citing *Jersild v. Denmark*, App. no. 15890/89 (Eur. Ct. Human Rts. Sept. 23, 1994), where the European Court of Human Rights overturned a journalist’s conviction under a Danish law prohibiting discrimination despite interviewing a racist youth group who propagated hate speech because the journalist “clearly disassociated himself from the persons interviewed”).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at ¶ 1024.

¹⁴⁹ Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeals Chamber Judgement, ¶¶ 507-13 (Nov. 28, 2007).

¹⁵⁰ *Id.* at ¶¶ 596-98.

¹⁵¹ *Id.* at ¶ 635.

between Ngeze's acts and the genocide "owing to the climate of violence to which the publication contributed and the incendiary discourse it contained," and thus Ngeze could not be found guilty of genocide.¹⁵²

Regarding the charge of direct and public incitement to genocide, the Appeals Chamber engaged in a lengthy discussion. The Chamber first distinguished *instigation* of genocide (a mode of responsibility applicable to any of the crimes chargeable under the tribunal's Statute, in which the accused incurred individual criminal responsibility if the instigation "in fact substantially contributed to the commission of" genocide, crimes against humanity, or war crimes) with *direct and public incitement to genocide* (a crime in and of itself, which was punishable as an inchoate offense even if no act of genocide occurred).¹⁵³

Additionally, while the meaning of "public" was fairly clear, the meaning of "direct" required greater explanation.¹⁵⁴ In the Chamber's view, there was a difference between "hate speech in general (or speech inciting discrimination or violence) and direct and public incitement to commit genocide."¹⁵⁵ Direct incitement "assume[d] that the speech [was] a direct appeal to commit" one of the *actus reus* of genocide, something "more than a mere vague or indirect suggestion."¹⁵⁶ Thus, hate speech that "[did] not directly call for the commission of genocide" would not rise to the level of direct and public incitement.¹⁵⁷ Moreover, the specific "acts constituting direct and public incitement to commit genocide must be clearly identified."¹⁵⁸

However, the Appeals Chamber did confirm that "the Trial Chamber did not alter the constituent elements of the crime of direct and public incitement to commit genocide in the media context," referencing the Trial Chamber's review of international precedent, including *Streicher* and *Fritzsche* (as well as various human rights tribunal opinions).¹⁵⁹ Thus, the Appeals Chamber approved of the

¹⁵² *Id.* at ¶ 519.

¹⁵³ *Id.* at ¶ 678.

¹⁵⁴ *Id.* at ¶ 691.

¹⁵⁵ *Id.* at ¶ 692.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at ¶¶ 692-93.

¹⁵⁸ *Id.* at ¶ 726.

¹⁵⁹ *Id.* at ¶¶ 693-95.

“broad guidelines for interpreting and characterizing media discourse” that the Trial Chamber articulated.¹⁶⁰

The Appeals Chamber also affirmed that “contextual elements” such as local culture and linguistic nuance, and the author’s political and community affiliation, were relevant in determining whether speech constituted direct and public incitement to genocide.¹⁶¹ Where speech was potentially ambiguous in meaning, its “true message” was determined by “how a speech was understood by its intended audience.”¹⁶² If the message remained ambiguous even in context, it could not constitute a direct and public incitement to genocide.¹⁶³ It was not necessary that the speech “explicitly call[] for extermination” or be “entirely unambiguous for all types of audiences.”¹⁶⁴

The Appeals Chamber noted that “the purpose of the speech is indisputably a factor in determining whether there is direct and public incitement to commit genocide.”¹⁶⁵ Thus, “the mere fact that genocide occurred” following the speech in question was not necessarily sufficient to demonstrate that “individuals in control of the media intended to incite the commission of genocide,” because the genocide “could have been the result of other factors.”¹⁶⁶ As a result, it could not be “the only evidence adduced to conclude that the purpose of the speech (and of its author) was to incite” genocide.¹⁶⁷

In light of these principles, the Appeals Chamber affirmed the Trial Chamber’s holding that RTLM broadcasts after April 6, 1994 “called for the extermination of Tutsi and amounted to direct and public incitement to commit genocide.”¹⁶⁸ Additionally, several articles published in *Kangura* after April 6, 1994 contained direct calls for Hutu to “stand united in order to exterminate the Tutsi,” and thus constituted direct and public incitement to commit genocide.¹⁶⁹

¹⁶⁰ *Id.* at ¶ 695.

¹⁶¹ *Id.* at ¶¶ 697-98.

¹⁶² *Id.* at ¶¶ 700-01.

¹⁶³ *Id.* at ¶ 701.

¹⁶⁴ *Id.* at ¶ 702.

¹⁶⁵ *Id.* at ¶ 706.

¹⁶⁶ *Id.* at ¶ 709.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at ¶¶ 757-58.

¹⁶⁹ *Id.* at ¶¶ 771-73.

Accordingly, the ICTR Appeals Chamber (1) affirmed Nahimana's convictions for direct and public incitement to genocide and persecution as a crime against humanity solely on the basis of superior responsibility and reversed all other convictions; (2) affirmed Barayagwiza's convictions for genocide, extermination as a crime against humanity, and persecution as a crime against humanity, all on the basis of individual criminal responsibility, and reversed all other charges; and (3) affirmed Ngeze's convictions for aiding and abetting genocide, direct and public incitement to genocide, and aiding and abetting extermination as a crime against humanity, all on the basis of individual criminal responsibility, and reversed all other convictions.¹⁷⁰

V. THE INTERNATIONAL COMMUNITY RECOGNIZED FACEBOOK'S ROLE IN EXACERBATING ETHNIC TENSIONS IN MYANMAR

While *Streicher*, *Fritzsche*, *Zyklon B*, and the ICTR Media Case set forth the leading international criminal precedents relating to media executives' primary and/or secondary liability for speech published on their platforms, more recent developments highlight the particular challenges for curtailing harmful speech that exist in the era of social media. Indeed, social media companies received a wake-up call when the Independent International Fact-Finding Mission on Myanmar (the "IIFFM") found in 2018 that Facebook played a key role in the incitement of violence against Rohingya Muslims.¹⁷¹

Rakhine state in northern Myanmar was historically comprised of two main groups: the Rakhine Buddhists and the Rohingya Muslims.¹⁷² Decades-long ethnic and religious tensions in Rakhine state had "often [been] ascribed to poor relations between the Rohingya and the Rakhine, reflective of deeply rooted grievances and prejudices."¹⁷³ Adding fuel to the fire, Myanmar military soldiers systematically oppressed and persecuted the Rohingya.¹⁷⁴

¹⁷⁰ *Id.* at ¶¶ 345-46.

¹⁷¹ Hum. Rts. Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/39/64, at 4 (Sept. 2018) (emphasis added).

¹⁷² Hum. Rts. Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/39/CRP.2, at 339, 22 (Sept. 2018).

¹⁷³ *Id.* at 174.

¹⁷⁴ *Id.*

Following a series of small-scale attacks carried out in August 2017 in Rakhine state by the Arakan Rohingya Salvation Army (“ARSA”),¹⁷⁵ the Myanmar military (referred to as the Tatmadaw), in coordination with local Rakhine police, initiated a brutal and widespread campaign targeting Rohingya civilians. The “hallmarks of Tatmadaw operations”¹⁷⁶ included sexual violence and “exclusionary and discriminatory rhetoric.”¹⁷⁷ The Rohingya were subject to “[l]arge-scale massacres” where “[m]en, women and children were killed.”¹⁷⁸ The violence included burning people alive in huts, resulting in “[e]ntire villages [being] wiped off the map.”¹⁷⁹ Reports of “[m]ultiple victims with single gunshot wounds to the head” indicated that victims were subjected to “execution style killings” and later buried in “mass grave[s].”¹⁸⁰ Torture techniques of the Tatmadaw included “performing sexual violence, including rape,” as well as “making victims dig their ‘own’ graves.”¹⁸¹ As a result, in a matter of weeks nearly one million Rohingya fled across the border to Bangladesh seeking safety, resulting in “large-scale . . . displacement.”¹⁸² “The nature, scale and organization of the operation suggest[ed] a level of preplanning and design by the Tatmadaw leadership that was consistent with the vision of the Commander-in-Chief, Senior General Min Aung Hlaing.”¹⁸³

A. FACEBOOK PLAYED A CRUCIAL ROLE IN FACILITATING VIOLENCE AGAINST THE ROHINGYA

As a result of the violence in Myanmar, the UN Human Rights Council authorized the IFFM to establish “the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State.”¹⁸⁴ The

¹⁷⁵ *Id.* at 180.

¹⁷⁶ *Id.* at 346.

¹⁷⁷ *Id.* at 350.

¹⁷⁸ *Id.* at 347.

¹⁷⁹ *Id.* at 347.

¹⁸⁰ *Id.* at 40.

¹⁸¹ *Id.* at 48.

¹⁸² *Id.* at 28.

¹⁸³ *Id.* at 180.

¹⁸⁴ *Id.* at 7.

IIFFM issued detailed findings in an interim report (the “2018 IIFFM Report”).

According to the 2018 IIFFM Report, Facebook was an ever-present part of life in Myanmar.¹⁸⁵ It was the “most common social media platform in use in Myanmar”¹⁸⁶ with approximately 20 million users, and became the “main mode of communication.”¹⁸⁷ Information posted on Facebook was further made available through “Facebook Flex,” a data-free service enabling “subscribers to have a text-only version of Facebook.”¹⁸⁸ Thus, Facebook had an immense online presence in Myanmar.¹⁸⁹

The IIFFM noted that Facebook’s platform contained inflammatory “[m]essages portraying Rohingya as violent, dishonest, anti-Bamar, anti-Buddhist, illegal immigrants and/or terrorists.”¹⁹⁰ Additionally, “[d]eath threats, incitement to violence and discrimination, and online harassment are common features . . . [both] against the Rohingya themselves [and] also against moderate commentators, human rights defenders and ordinary people who have views that differ.”¹⁹¹

For example, on October 12, 2016, “Dr. Tun Lwin, a well-known meteorologist with over 1.5 million followers on Facebook, called on the Myanmar people to be united to secure the ‘west gate’ and to be alert ‘now that there is a common enemy.’”¹⁹² Dr. Tun Lwin’s post, referring to the Rohingya, also “stated that Myanmar does not tolerate invaders.”¹⁹³ By August 2018, his post “had 47,000 reactions, over 830 comments and nearly 10,000 shares . . . [as comments also] called for immediate ‘uprooting’ and ‘eradication’ of the Rohingya, citing the situation in Rakhine State as a ‘Muslim invasion.’”¹⁹⁴

In 2018, the IIFFM declared that “[t]he role of social media [during the conflict was] significant. Facebook had been a “useful

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 341.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 268, 340.

¹⁹¹ *Id.*

¹⁹² *Id.* at 325.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

instrument for those seeking to spread hate, in a context where, for most users, *Facebook is the Internet* . . . [Additionally,] the response of Facebook has been slow and ineffective.”¹⁹⁵

Though Facebook maintained that its platform was merely an information-sharing vehicle, the 2018 IIFFM Report suggested otherwise. Indeed, Facebook’s influence was so strong that many in Myanmar confused Facebook with the Internet itself.¹⁹⁶ Thus, for “many people, Facebook [was] the main, if not only, platform for online news and for using the Internet more broadly,” which made the dissemination of hate speech amenable to Facebook users and their “perception of Facebook as a reliable source of information.”¹⁹⁷

Because of this ubiquity, Facebook was also “a regularly used tool for the Myanmar authorities to reach the public.”¹⁹⁸ Government officials such as the President, State Counsellor, Commander-in-Chief, the Ministry of Information, and the Tatmadaw “rel[ie]d on Facebook to release news and information,” which reinforced the idea that Facebook users could be trusted.¹⁹⁹ The “low digital and social media literacy”²⁰⁰ among the civilian population in Myanmar, in addition to the Government’s reliance on Facebook as a primary mode of communication to share “official announcements,”²⁰¹ led users in Myanmar to believe that Facebook was a source of well-founded information.²⁰²

Though Facebook’s stated goal was to “facilitate[] communication and access to information,” the 2018 IIFFM Report found that “the wide reach, relative user anonymity, and difficulty of monitoring or removing posts . . . [made Facebook] a suitable instrument to spread messages that may constitute hate speech.”²⁰³ As a result, it was “unsurprising that propagators of hate speech resort[ed]

¹⁹⁵ *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 171, at 4 (emphasis added).

¹⁹⁶ Paul Mozur, *A Genocide Incited on Facebook, With Posts From Myanmar’s Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

to Facebook to wage hate campaigns, amplify their message, and reach new audiences.”²⁰⁴ This hate speech advocated “national, racial or religious hatred that constitute[d] incitement to discrimination, hostility or violence.”²⁰⁵ For these reasons, the 2018 IFFM Report concluded that “posts and messages on Facebook have increased discrimination and violence in Myanmar.”²⁰⁶

B. FACEBOOK’S EFFORTS TO CURB USE OF ITS PLATFORM TO SPREAD VIOLENCE WERE SEVERELY LACKING

Crucially, the 2018 IFFM Report concluded that Facebook’s efforts to eliminate hate speech and halt the spread of misinformation in Myanmar fell far short of what was necessary.²⁰⁷

First, the community standards and user agreement policies that Facebook required users to agree to—including rules relating to hate speech and violence—did not actually do anything to halt the use of hate speech on the platform.²⁰⁸ The 2018 IFFM Report suggested that Facebook should further outline specific acts of intervention the company would take in the event the agreed-to policies were violated.²⁰⁹ Moreover, because of these shortcomings, the Report recommended that Facebook implement better data-monitoring systems.²¹⁰

²⁰⁴ *Id.*

²⁰⁵ *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 172 at 331(emphasis added).

²⁰⁶ *Id.* at 342.

²⁰⁷ Indeed, even while conducting its own mission, the IFFM “itself experienced a *slow and ineffective* response from Facebook when it used the standard reporting mechanism to alert the company to a post targeting a human rights defender for his alleged cooperation with the Mission.” *Id.* at 343(emphasis added). The post pertained to a “national traitor,” repeatedly used the term “Muslim,” and was shared and reposted over 1,000 times. *Id.* Comments on the post constituted hate speech as they “explicitly called for the person to be killed, in unequivocal terms.” *Id.* Since Facebook did not take actions, the Mission messaged a Facebook official’s email account; however, the Mission “did not receive a response. Weeks later, Facebook finally took down the reported post, but the Mission “found at least 16 re-posts of the original post still circulating on Facebook.” *Id.* Facebook’s passive efforts to take down flagged content affirms the 2018 IFFM Report’s findings. *Id.* at 341.

²⁰⁸ *Id.* at 342.

²⁰⁹ *Id.* at 341.

²¹⁰ *Id.* at 431-32.

Second, Facebook's method to address "fake accounts and false news" was limited to pre-emptive measures.²¹¹ This resulted in the IFFM report's recommendation that all social media platforms, including Facebook, "should establish early warning systems for emergency escalation, involving relevant stakeholders."²¹² This meant that "[a]ll death threats and threats of harm in Myanmar [should be] treated as serious and immediately removed when detected."²¹³ The IFFM report noted that "early warning systems should be developed and operated transparently and in consultation with key stakeholders, including civil society organizations . . . [and] should be supported by a formal stakeholder group to provide advice and to monitor performance."²¹⁴ According to the IFFM, Facebook and all other social media companies should implement acts of intervention to combat hate speech, as well as prevention.²¹⁵

Third, Facebook was "ineffective [in their] content moderation."²¹⁶ The company was over-reliant on third parties, ill-prepared with a "proper mechanism for emergency escalation, [and displayed] a reticence to engage local stakeholders around systemic solutions and a lack of transparency."²¹⁷ Specifically with respect to Myanmar, Facebook lacked enough content moderators that could interpret and contextually understand local language, and overlooked their "strong . . . unique focus on the Myanmar language and Burman culture."²¹⁸

Fourth, Facebook had failed to "undertake [a] comprehensive human rights impact assessment in Myanmar."²¹⁹ As a result of Facebook's limited efforts, the 2018 IFFM Report recommended that "[a]ll social media platforms active in Myanmar, including messenger systems, should apply international human rights law as a basis for content moderation on their platforms."²²⁰ The UN Guiding Principles

²¹¹ *Id.* at 342.

²¹² *Id.* at 432.

²¹³ *Id.*

²¹⁴ *Id.* at 432.

²¹⁵ *Id.*

²¹⁶ *Id.* at 342.

²¹⁷ *Id.* (citing an open letter to Facebook from six local Myanmar civil society organizations working on the issue of hate speech).

²¹⁸ *Id.* at 343.

²¹⁹ *Id.* at 344.

²²⁰ *Id.* at 431.

on Business and Human Rights “provide[d] a baseline approach” that Facebook should adopt.²²¹

Fifth, country-specific data regarding the spread of hate speech on Facebook’s platform was “imperative to assess the problem and the adequacy of [Facebook’s] response.”²²² However, “Facebook [was] unable to provide” such data, and thus the 2018 IFFM Report also stressed that the company should “develop and implement systems” that could collect and make this information available publicly.²²³

Following the publication of the 2018 IFFM Report, Facebook “publicly acknowledged that the company had been ‘too slow’ in reacting to the concerns raised by civil society organizations”²²⁴ while still refusing to accept any liability beyond its failure to take down posts in a timely manner. Facebook informed the IFFM that “it was trying to solve two specific problems in Myanmar”: hate speech and the spread of false information used for hate speech.²²⁵ Facebook claimed that “technical challenges” prevented it from doing more to address these problems, including “fonts used in Myanmar language,” “improving reporting flows . . . automation . . . and acting on fake accounts” to remove misinformation.²²⁶ As a result, Facebook stated that it had increased the number of local language reviewers and people in the company knowledgeable on Myanmar-specific issues and “put in place a special team working to better understand the specific local challenges and [will] build the right tools.”²²⁷

C. A HUMAN RIGHTS IMPACT ASSESSMENT REPORT
COMMISSIONED BY FACEBOOK DOWNPLAYED ITS
RESPONSIBILITY FOR THE VIOLENCE IN MYANMAR

Following the issuance of the 2018 IFFM Report, Facebook commissioned its own human rights impact assessment report (the

²²¹ *Id.* at 431.

²²² *Id.* at 344.

²²³ *Id.*

²²⁴ *Id.* at 343; see also Alexandra Stevenson, *Facebook Admits It Was Used to Incite Violence in Myanmar*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html>.

²²⁵ *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 172, at 342.

²²⁶ *Id.*

²²⁷ *Id.*

“HRIA Report”) from the management consulting firm Business for Social Responsibility. The HRIA Report based its methodology on the UN Guiding Principles on Business and Human Rights and identified both Facebook’s actual and potential human rights impacts and how to address them.²²⁸

As the 2018 IFFM Report recommended,²²⁹ the HRIA Report also noted that in response to the Myanmar conflict, “Facebook updated its public-facing Community Standards to include . . . more detail on where the company draws the line on content.”²³⁰ It also “altered its credible violence policies to more proactively delete inaccurate or misleading information created or shared with the purpose of contributing to, or exacerbating, violence or physical harm.”²³¹ The report suggested that as an additional step, Facebook could better implement its Community Standards with more “detailed written guidance about how to enforce the Community Standards in a local context, such as specific slurs, flagged words, and illustrative cases.”²³²

However, while some of its conclusions seemed to comport with those of the 2018 IFFM Report, others appeared designed to absolve Facebook of responsibility for the consequences of its failures in Myanmar and the need to take precautions elsewhere to prevent similar violence. For example, just as the 2018 IFFM Report advocated that Facebook “undertake [a] comprehensive human rights impact assessment in Myanmar,”²³³ the HRIA Report concluded that Facebook should engage in “human rights due diligence” in Myanmar as the country required system-wide change.²³⁴ But the HRIA Report framed its conclusion in the context of a general lack of government accountability and rule of law standards, laws that enabled “systemic

²²⁸ *Human Rights Impact Assessment: Facebook in Myanmar*, BSR 3 (October 2018), https://about.fb.com/wp-content/uploads/2018/11/bsr-facebook-myanmar-hria_final.pdf.

²²⁹ *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 172 at 341, 431-32.

²³⁰ *Human Rights Impact Assessment: Facebook in Myanmar*, *supra* note 228, at 21.

²³¹ *Id.*

²³² *Id.*

²³³ *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 172 at 344.

²³⁴ *Human Rights Impact Assessment: Facebook in Myanmar*, *supra* note 228, at 54.

gender, ethnic, and religious discrimination,”²³⁵ and “deep-rooted and pervasive cultural beliefs in Myanmar . . . [that] reinforce discrimination.”²³⁶

More disturbingly, the HRIA Report also appeared to paint Facebook as a helpless victim of both its own success in becoming the primary means of communication in Myanmar and so-called bad actors who sought to manipulate Facebook’s purportedly neutral communication tools for their own nefarious ends.²³⁷ For example, the report stated that the “implementation of Facebook’s Community Standards present[ed] challenges of a nature and scale never previously addressed by companies or governments.”²³⁸ This was because “with over 2 billion users, this [was] a task of immense complexity and intensity,”²³⁹ and this “challenge [was] even more testing in the Myanmar context”²⁴⁰ where “the majority of the population lack[ed] the digital literacy to effectively navigate the complex world of information-sharing online.”²⁴¹ The HRIA Report thus appeared to insinuate that Facebook could not be held responsible for the fact that its customers in Myanmar were not as experienced with digital tools such as social media as Facebook wanted or expected them to be, or used Facebook’s platform in ways that Facebook had not anticipated—and, even worse, that people in Myanmar simply did not have either the intelligence or sophistication to “correctly” use Facebook—while also seeming to give Facebook a free pass for failing to have had adequate systems in place to fully implement its own community standards.²⁴² It is difficult to read these parts of the HRIA

²³⁵ *Id.* at 18.

²³⁶ *Id.* at 3. According to the HRIA Report, these “deep-rooted and pervasive cultural beliefs in Myanmar . . . reinforce discrimination and . . . result in interfaith and communal conflict.” *Id.* Combined with the fact that there was a “sudden introduction of accessible mobile communication services and [a] rapid growth in access to Facebook,” this “resulted in a steep learning curve for users, policymakers, and civil society.” *Id.* at 24.

²³⁷ *Id.* at 24.

²³⁸ *Id.* at 25.

²³⁹ *Id.*

²⁴⁰ *Id.* at 3.

²⁴¹ *Id.* at 25.

²⁴² *Id.* at 24-25.

Report as anything but classic tech-bro hubris and naivete at its worst.²⁴³

Additionally, while the HRIA Report acknowledged that “Facebook [had become] a useful platform for those seeking to incite violence and cause offline harm,”²⁴⁴ it also minimized this fact by explaining that it was only a “minority of users”²⁴⁵ that sought “to use Facebook as a platform to undermine democracy and incite offline violence, including serious crimes under international law.”²⁴⁶ Specifically, the HRIA Report used the 2018 IFFM Report findings as an example to describe how “Facebook has been used by bad actors to spread anti-Muslim, anti-Rohingya, and anti-activist sentiment.”²⁴⁷

Yet even these weak justifications pale in comparison to what was perhaps the HRIA Report’s most shocking conclusion. Noting that Facebook had increased its number of Myanmar language experts to 60 as of August 2018²⁴⁸— a full year after the acts that prompted the IFFM to call for genocide, crimes against humanity, and war crimes prosecutions with respect to the Rohingya²⁴⁹ — the HRIA Report also cautioned that “[i]nvestment in local staff could raise expectations that Facebook will take a similar approach in other countries.”²⁵⁰ Incredibly, at a time when Facebook “generated \$18.7 billion in revenue, up from \$16.9 billion a year earlier and above analysts’ expectations of \$17.34 billion,”²⁵¹ this warning appears to suggest that Facebook should seriously consider whether implementing the

²⁴³ See Julia Carrie Wong & Matthew Cantor, *How to Speak Silicon Valley: 53 Essential Tech-Bro Terms Explained*, GUARDIAN (June 27, 2019, 1:00 A.M. EDT), <https://www.theguardian.com/us-news/2019/jun/26/how-to-speak-silicon-valley-decoding-tech-bros-from-microdosing-to-privacy>.

²⁴⁴ *Human Rights Impact Assessment: Facebook in Myanmar*, *supra* note 228, at 24.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 21.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 26 (emphasis added).

²⁵¹ Jeff Horwitz, *Facebook Posts Revenue Growth Despite Pandemic*, WALL ST. J. (July 30, 2020), https://www.wsj.com/articles/facebook-fb-2q-earnings-report-2020-11596138406?reflink=desktopwebshare_permalink (reporting on Facebook’s 2020 second-quarter results). Horwitz went on to note that even these astounding figures represented “a *deceleration* from the average gain of nearly 25% for the preceding four quarters” due to the global coronavirus pandemic. *Id.* (emphasis added).

IIFFM’s recommendations in Myanmar—and thereby reducing the potential for further serious human rights abuses—was actually a net positive given that it could result in increased expectations that Facebook would implement those recommendations in other places around the world that ran the risk of descending into violent conflict. Put another way, the HRIA Report seemed to be cautioning Facebook that if it implemented precautionary measures in Myanmar, it would be obligated to apply them globally. That such a conclusion constituted a warning rather than an acknowledgment of the responsibility that comes with having a user base of billions of people—and social media’s singular role in shaping the views and actions of entire societies—is a stark and chilling statement.

D. EVEN AFTER IT WAS ON NOTICE, FACEBOOK CONTINUED TO BE USED FOR HATE SPEECH IN MYANMAR

In 2019, the UN Fact-Finding Mission issued an update and detailed findings to its 2018 report (“2019 IIFFM Report”). The 2019 IIFFM Report found that hate speech directed at ethnic Rakhine had “increased considerably on social media.”²⁵² The Report declared that “Facebook is the leading platform for hate speech in Myanmar.”²⁵³ The 2019 IIFFM Report renewed its call to “Facebook and other social media to enhance their capacity to combat the use of their platforms for the spread and promotion of threats and of hate speech and for the incitement to violence, hostility and discrimination.”²⁵⁴

The 2019 IIFFM Report outlined Facebook’s efforts where it fell short. For example, Facebook removed the pages of 20 individuals and organizations in August 2018 and shut down the official pages of the Arakan Army, the Kachin Independence Army, the Myanmar Democratic Alliance Army, and the Ta’ang National Liberation Army, which Facebook identified as “dangerous organizations.”²⁵⁵ Yet, in a precursor to the ephemeral astroturfing seen in the 2020 Conflict, new

²⁵² Hum. Rts. Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/42/CRP.5, at 12 (September 2019).

²⁵³ *Id.*

²⁵⁴ *Id.* at 132.

²⁵⁵ *Id.* at 85-86.

pages with virtual identities quickly replaced those shutdown and they continued to post on Facebook.²⁵⁶

While Facebook responded “positively to removing content amounting to hate speech,” the IFFM declared that “much more is required, especially in preventing and removing hate speech far more quickly and in addressing the spread of removed content that has been reposted prior to removal.”²⁵⁷ The Mission held both the Myanmar government *and* Facebook responsible for “tackling hate speech.”²⁵⁸

VI. CONCLUSION

Social media companies could and certainly should have done more to prevent violence in Artsakh/Nagorno-Karabakh during the 2020 Conflict. Nearly 80 years of international precedent have shown, over and over, that mass media publication and distribution of violent rhetoric aimed at a particular group can provoke hatred and weaponize fear on a widespread scale, resulting in serious violence that amounts to international atrocity crimes. Over that time, international criminal tribunals have held senior media company leaders accountable for what is published on their platforms, and at least one UN-sponsored international fact-finding mission strongly recommended a number of detailed steps it deemed necessary for social media companies to follow in order to mitigate or end the use of their platforms by others to incite violence.

However, it is still the case that international criminal liability is restricted to the relatively narrow circumstances where media executives maintained primary overall editorial control of the publication, allowed the publication of speech that called for the commission of specific acts of violence (as opposed to more general hate speech), conveyed a clear message calling for violence to its intended audience within the particular cultural, linguistic, and political context, and intended to incite genocide or other forms of serious persecution.

Thus, even after 80 years of precedent, warnings, and investigations put all media companies on notice, it is unlikely that

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

social media companies and their leaders could incur international criminal liability for content posted on their platforms—especially when social media executives maintain public positions of neutrality with respect to posted content, typically maintain some form of content moderation policy that purports to regulate hate speech, violent propaganda, and/or misinformation and disinformation,²⁵⁹ and likely (hopefully) do not share the views of users calling for persecution and execution of groups of people. To date, no international prosecutor has charged any social media executive with international crimes. The repeated failure of social media companies to learn from the past and their own prior mistakes is reckless in the extreme, given the disastrous consequences.

²⁵⁹ Though some social media companies increased measures to combat the hateful and violent content targeting protected groups in response to the criticisms in the IFFM reports and elsewhere, following the primary completion of this Report in 2021, the trend in recent months has been for social media companies to roll back or relax enforcement of their content moderation rules. *See, e.g.*, Anika Collier Navaroli, *I Worked on Twitter’s Rules on Hate Speech. Social Media Platforms are Failing Us Right Now*, BOS. GLOBE (Oct. 18, 2023), <https://www.bostonglobe.com/2023/10/18/opinion/i-worked-twitters-rules-hate-speech-social-media-platforms-are-failing-us-right-now/>; John Herrman, *Why Wartime Social Media Is Hellish and Disorienting*, N.Y.: INTELLIGENCER (Oct. 14, 2023), <https://nymag.com/intelligencer/2023/10/why-wartime-social-media-is-hellish-and-disorienting.html>.

WEAPONIZATION OF SOCIAL MEDIA: A CASE OF THE CONFLICT BETWEEN AZERBAIJAN AND NAGORNO-KARABAKH

Robert Avetisyan

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I. INTRODUCTORY NOTE

As this article was being considered for publication, Azerbaijan had initiated a total blockade of Nagorno-Karabakh (Artsakh) that culminated in a full-scale military aggression against the fledgling democracy.

For months since December 12, 2022, Azerbaijan has blockaded the Lachin Corridor, the only roadway connecting Armenia and Nagorno-Karabakh, utilizing special forces personnel masquerading as “environmental activists.” In addition, the government of Azerbaijan shut down the pipeline carrying natural gas from Armenia to Nagorno-Karabakh and disrupted the electricity grid, causing hardships, and existential challenges for the entire population of one hundred and twenty thousand people.

In February 2023, the International Court of Justice (ICJ), the principal judicial organ of the United Nations, ordered legally binding measures to ensure that Azerbaijan ends the blockage of Nagorno-Karabakh. Major democracies, as well as numerous international political and human rights organizations, have criticized the blockade, calling on the regime in Azerbaijan to restore Nagorno-Karabakh’s unimpeded connection with the world. However, all legal documents and political calls have remained ignored.

Seeing no major implications for its actions against Nagorno-Karabakh, on September 19, 2023, Azerbaijan launched a full-scale military offensive against Artsakh resulting in the death and injury of innocent civilians and the forced displacement of its entire population of one hundred and twenty thousand people.

The 2023 war has forced Nagorno-Karabakh’s entire population out of their ancestral homeland. Most of them have resettled in Armenia. Political representatives strive for a proper condemnation of the second Armenian Genocide and the safe return of people to their homes in Artsakh.

As the following article considers the role of social media in the conflict between Azerbaijan and Nagorno-Karabakh, it is noteworthy that the events of the past two years have also seen the active application of the technologies and tactics called to shape a favorable public opinion around the respective agendas by the governments.

For decades, Azerbaijani and Armenian governments have been involved in conflict over Nagorno-Karabakh—an Armenian-populated entity that has been placed under Soviet Azerbaijan’s administration during the formation of the Soviet Union. The

confrontation is deeply rooted in the countries' political agendas and occupies a significant space in the collective national identity of the two peoples. Decades of international mediation did not lead to a political settlement, and several rounds of military hostilities have deepened the gap between the societies. Lack of trust between Armenians and Azerbaijanis, as well as the absence of a common vision for a mutually acceptable political solution has entrenched opposition within each Government to concessions.

With the development of online technology, Azerbaijani and Armenian governments have increased the application of the available tools, including social platforms, online media, and blogs to promote public narratives and mutual perceptions. These tools have also been used to concentrate the popular support around domestic and foreign political agendas that reinforce the government's position with regard to the conflict. The phenomenon is not unique to this situation and is often referred to as the *weaponization of social media*.

Azerbaijan, Armenia, and Nagorno-Karabakh are in the geopolitically significant region of the South Caucasus. [See <https://perma.cc/4294-U9WT> to Access Map].

Located between Russia, Iran, Turkey, and Central Asia, the region has rich oil and gas resources. It is at a crossroad of strategic political, economic, and security-related interests of the global powers, particularly the United States, the Russian Federation, the European Union, Turkey, and Iran.

II. BACKGROUND: KEY HISTORIC AND POLITICAL DEVELOPMENTS

A. EMERGENCE OF THE CONFLICT AND SOVIET ERA

The Nagorno-Karabakh (NK) issue started as an international conflict in 1918 with the emergence of Azerbaijan, Armenia, and Georgia as sovereign countries in the South Caucasus. The newly established Azerbaijan claimed administration over several regional entities, including predominantly Armenian-populated Nagorno-Karabakh.

The confrontation rapidly escalated into a military conflict and political stalemate. The indefinite political situation regarding Nagorno-Karabakh lasted until 1920 when the Soviet Russian troops forced the South Caucasus countries into the Soviet area. Joseph

Stalin, serving at that time as the People's Commissar of Nationalities, concluded that in view of the "necessity of establishing peace between the Muslims and Armenians," the area would be considered an autonomy within the Soviet Republic of Azerbaijan.¹

During the following seven decades within the Soviet Union, local Armenian authorities repeatedly petitioned central Communist authorities to return Nagorno-Karabakh to the Armenian administration. In 1946, 1963, 1965, 1977, and 1987, Nagorno-Karabakh's legislature adopted corresponding legal motions.² However, the Soviet authorities rejected the motions as contradicting the policy of declared brotherhood between the Soviet peoples. Fears that territorial change from the democratic process could spur similar aspirations across the USSR made any manifestation of national discord unacceptable. [See <https://perma.cc/ECE9-7P7X> to Access Map].

B. DISINTEGRATION OF THE USSR

The situation around Artsakh remained unchanged until the late 1980s when Soviet leader Gorbachev proclaimed the era of *perestroika* (transformation) and *glasnost* (freedom of speech). The two concepts lifted taboo from discussing political issues, such as human rights, democratization, and national sovereignty. In 1988, the NK's legislature adopted another resolution appealing to the Supreme Councils of the Azerbaijani Soviet Socialist Republic ("AzSSR") and the Armenian Soviet Socialist Republic ("ArSSR") to transfer the Nagorno-Karabakh Autonomous Oblast from the AzSSR to the ArSSR. An appeal was also sent to the central Communist authorities

¹ V.A. MIKAELYAN, NAGORNO KARABAKH IN 1918-1923: COLLECTION OF DOCUMENTS AND MATERIALS (1992).

² See S. ZOLYAN, NAGORNO KARABAKH: THE PROBLEM AND THE CONFLICT (2001).

in Moscow with a request to formally approve the deal.³ Simultaneous rallies in Stepanakert (capital of Artsakh), Baku (capital of AzSSR), and Yerevan (“ArmSSR”) instigated nationalistic moods in the two societies. Several days after the first rallies, anti-Armenian violence took place throughout Azerbaijan, thus escalating the situation into armed confrontation and causing flows of an estimated one million Armenian and Azerbaijani refugees. Most of them resettled in their native countries, while tens of thousands of families migrated outside the area, mostly to Russia, European countries and the United States.

By the late 1990s, similar self-determination movements had spread across the Soviet Union. The crumbling Communist system was unable to cope with the political and economic challenges making the disintegration of the USSR only a matter of time. The dissolution of the Soviet Union provided legal bases for national sovereignty movements in the former Soviet republics and other subnational entities.

Seeing no interference from the central authorities in Moscow to deal with the rapidly deteriorating situation in the NK conflict area, the local authorities in Karabakh decided to self-organize to counter the security threats and used the USSR legislature to declare sovereignty from Soviet Azerbaijan.⁴ The Nagorno-Karabakh Republic (NKR) was proclaimed on September 2, 1991. On December 10, 1991, a national referendum took place in the republic with 99.89 percent of the registered voters supporting the idea of state independence.⁵ Armenia supported the NKR’s self-determination calling it a case of remedial secession necessary to protect the human rights and other democratic aspiration of the indigenous Armenian population. Azerbaijan called the proclamation of the NKR illegal,

³ See *Karabakh in 1988: The Beginning of the Modern Stage of National-liberation Struggle*,

MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF ARTSAKH (2022),
<http://www.nkr.am/en/karabakh-national-liberation-movement>.

⁴ See generally Shahen Avakian, *Nagorno-Karabagh Legal Aspects* (2005),
<https://www.deutscharmenischegesellschaft.de/wp-content/uploads/2010/05/SHAHEN-AVAKIAN-Nagorno-Karabakh-Legal-Aspects-2005.pdf>.

⁵ *Initial Voluntary Report of the Republic of Artsakh on the Implementation of the International Covenant on Civil and Political Rights*, U.N. Doc. A/HRC/40/G/3, at 49 (Apr. 2, 2019), reissued for technical reasons May 9, 2019. .

accused Armenia of territorial aggression against Azerbaijan, and launched a war in 1991 to conquer the NKR territory by force.

C. INTERNATIONAL MEDIATION

Since 1992, the international community has been involved in conflict mediation efforts. The United States, Russia, and France are the co-chairs of the so-called Minsk Group of the Organization for Security and Co-operation in Europe (OSCE MG) that was established to help bring the conflicting sides to a negotiated political settlement.⁶

The first war ended with territorial gains for Armenians. In 1994, Azerbaijan, the NKR, and Armenia signed a ceasefire that opened opportunities for establishing lasting peace and stability in the South Caucasus. The ceasefire also allowed the realization of the economic potential, mostly for oil-rich Azerbaijan. Multibillion-dollar international investments and significant oil revenues have reinforced revanchist aspirations in Azerbaijan. Azerbaijani leadership has periodically stated that the ceasefire was temporary.

III. CURRENT SITUATION

A. POSITIONS OF THE SIDES

Currently, the Azerbaijani and Armenian sides remain far from resolving the problem. Much is at stake for each country, and each side has proclaimed the Karabakh conflict a vital aspect of their national security and long-term prosperity. The two countries do not have a common vision of a political settlement to the conflict. The positions remain largely maximalist and mutually exclusive. Relative peace in the region established with the 1994 ceasefire allowed the two countries to restore their economies and accumulate significant political and military resources that made the notion of a negotiated

⁶ Org. for Sec. & Co-op. in Eur., *Who We Are*, OSCE, <https://www.osce.org/who-we-are> (last visited Oct. 4, 2024).

settlement through mutual concessions seem irrelevant and politically unpopular.

Azerbaijan demands full administrative control over the entire territory of Artsakh, calling it “restoration of its territorial integrity.”⁷ The issue is of great domestic political significance and a matter of national pride. The position of Azerbaijani authorities regarding the conflict has always played a significant role in its legitimacy. The country sees increased economic opportunities from the settlement on its terms as it can allow the opening of new transit routes for exports of hydrocarbons and other goods to its ally Turkey and further to the European market.

Armenia is fighting for international recognition of Artsakh as a separate state, calling it the most effective and legitimate way to ensure long-term regional stability and security for the local population. For Armenians, the issue of Artsakh’s security also has a strong historical connection with the Armenian Genocide in Ottoman Turkey in 1915.⁸ The conflict has been a significant part of the domestic discourse and impacts the legitimacy of the ruling administration.

B. MILITARY PHASES

The conflict has seen three major military escalations: first in 1991, second in 2016, and, most recently, in September 2020⁹, claiming overall an estimated 45,000 Armenian and Azerbaijani lives.¹⁰ In September 2020, Azerbaijan launched a large-scale offensive. The second Azerbaijan-Karabakh war lasted 44 days.

⁷ Rayhan Demytrie, *Nagorno-Karabakh: 'People Are Fainting Queuing Up for Bread'*, BBC News (Aug. 30, 2023), <https://www.bbc.com/news/world-europe-66646677>.

⁸ See Roqua Montez, *Why Violence Has Re-Emerged In Armenia-Azerbaijan Conflict*, BERKELEY NEWS (Nov. 6, 2020), <https://news.berkeley.edu/2020/11/06/why-violence-has-re-emerged-in-armenia-azerbaijan-conflict/>.

⁹ *The Nagorno-Karabakh Conflict: A Visual Explainer*, INT’L CRISIS GRP. (2022), <https://www.crisisgroup.org/content/nagorno-karabakh-conflict-visual-explainer> (last updated Sept. 16, 2023)

¹⁰ Neil Hauer, *Armenia is Still Grieving*, FOREIGN POLICY, (Apr. 24, 2021, 6:00 AM), <https://foreignpolicy.com/2021/04/24/armenia-azerbaijan-war-nagorno-karabakh-aftermath/>.

Azerbaijan, with the support of Turkey, reclaimed territories lost in the 1991-1994 war and occupied parts of the Artsakh proper. The war ended in November 2020, when leaders of Azerbaijan and Armenia, with the mediation of Russia, signed a statement on the cessation of hostilities. The conflict remains unresolved, continues to cause casualties on both sides, and undermines stability in the South Caucasus.

IV. SOCIAL MEDIA

A. DIGITAL REVOLUTION

Social media is a form of electronic communication and networking platforms that allows sharing ideas, texts, photos, videos and other content within a network of online users.¹¹ Currently, Facebook, Twitter, SnapChat, Instagram, WhatsApp and LinkedIn are the most popular social media platforms. As of April 2023, there are around three billion active users on Facebook and over three hundred thirty million users on Twitter.¹²

For the past decades, technological progress and innovations have been powerful sources of new opportunities for more inclusive and better-organized societies and institutions. Often referred to as a *digital revolution*, technological progress has influenced global humanitarian, political, economic, and cultural landscape by offering new data-driven interventions and targeted messaging in communicating with various audiences. Social media platforms, search engines, and other online resources play an increasingly

¹¹ See Daniel Trottier & Christian Fuchs, *Theorising Social Media, Politics and the State* (2015), <https://www.dhi.ac.uk/san/waysofbeing/data/economy-crone-trottier-2015.pdf>.

¹² Simon Kemp, *Facebook Users, Stats, Data, & Trends*, DATAREPORTAL (May 11, 2023), <https://datareportal.com/essential-facebook-stats>; Simon Kemp, *Twitter Users, Stats, Data & Trends*, DATAREPORTAL (May 11, 2023), <https://datareportal.com/essential-twitter-stats>.

important role in various aspects of political and socio-economic life across the globe.

New technological opportunities have also become attractive for various state and non-state actors as powerful and affordable communication tools, action mobilizers, and social enablers of political agendas. Information technology (IT) serves as a positive social connector, but also often increasingly as a conduit of ideology, polarization, and violence. Disinformation campaigns use macro- and micro-targeting messages to intentionally disseminate mistrust and propagate hate speech, which has become an integral component of conflict dynamics around the globe.

B. COGNITIVE MANIPULATIONS

Elites, leaders, activists, and influencers use social media for strategic communication. The targeted, personalized nature of social media messaging is effective for influencing people's actions and cognitive processes, including thought, perception, and analysis, with the aim of political, military, or social recruitments, as well as for fundraisers, rallies, and other initiatives. For instance, the March 2017 Women's March in the United States became one of the largest protests in U.S. history with an estimated three to five million attendees actively recruited through social media and mass email campaigns.¹³ Social media also plays an important role during violent conflicts. Fighters in the Syrian civil war, for example, actively used social media to recruit individuals to fight ISIS¹⁴ and solicit financial donations¹⁵.

¹³ See Erica Chenoweth & Jeremy Pressman, *This is What We Learned by Counting the Women's Marches*, WASH. POST (Feb. 7, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/>; Eric Bradner and Sophia Tatum, *March Spurs Efforts to Get More Women to Run for Office*, CNN (Jan. 23, 2017, 9:39 PM), <https://www.cnn.com/2017/01/23/politics/democrats-march-female-candidates/>.

¹⁴ See Adi Cohen (Vocativ), *Volunteer Anti-ISIS Fighters Join Up On Facebook*, FACEBOOK (July 2, 2016), <https://www.vocativ.com/321997/volunteer-anti-isis-fighters-join-up-on-facebook/>.

¹⁵ See Miriam Berger, *Twitter Just Suspended Two Kuwaitis Accused By The U.S. Of Financing Terror in Syria*, BUZZFEED NEWS (Aug. 7, 2014), <https://www.buzzfeednews.com/article/miriamberger/twitter-just-suspended-two-kuwaitis-accused-by-the-us-of-fin>.

Cognitive manipulations of social media users often take place as part of larger *information operations*.¹⁶ Rhynard-Geil and Inks describe information operations as “the integrated employment . . . of information-related capabilities in concert with other lines of operations to influence, disrupt, corrupt or usurp the decision-making.”¹⁷

C. WEAPONIZATION OF SOCIAL MEDIA

The author of *LikeWar: The Weaponization of Social Media*, Peter W. Singer,¹⁸ defines the weaponization of social media as having “been manipulated to fuel popular uprisings and affect the course of military and political campaigns.”¹⁹ Even though social media is largely a 21st-century phenomenon, the notion of special propaganda (or *spets-propaganda*) techniques is well known and dates to the period of the Cold War between the Soviet Union and the Western world. The Soviet journalists studied *combat propaganda* or how to disseminate communist-approved information across the Soviet area and destabilize the enemy camps. Singer distinguishes the following *underlying principles of social media weaponization*²⁰:

In 2019, Guay et al. described *essential tactics of social media weaponization*. In the contemporary world, social media

¹⁶ Joseph Guay, Stephen Gray, Meghann Rhynard-Geil, Lisa Inks, *The Weaponization of Social Media: How Social Media Can Spark Violence And What Can Be Done About It*, 18 (2019), https://www.mercycorps.org/sites/default/files/2020-01/Weaponization_Social_Media_FINAL_Nov2019.pdf.

¹⁷ *Id.*

¹⁸ See EMERSON T. BROOKING & P.W. SINGER, *LIKEWAR: THE WEAPONIZATION OF SOCIAL MEDIA* (2018).

¹⁹ Dave Davies, *The 'Weaponization' of Social Media - and Its Real-World Consequences*, NPR (Oct. 9, 2018), <https://www.npr.org/2018/10/09/655824435/the-weaponization-of-social-media-and-its-real-world-consequences>.

²⁰ *Id.*

propaganda can be used against adversaries in the form of countries, political groups, competitor companies, individual persons, or cultural groups.²¹ The target audience is normally divided into two main sub-groups: *critical thinkers* and *non-critical thinkers*. Critical thinkers are subjected to *persuasion tactics*, while non-critical thinkers are subjected to *suggestion tactics*. Persuasion tactics target the intelligence of the audience by repeating mostly false information that may contain minor credible segments. Suggestion tactics aims to influence the subconscious of the target audience by developing so-called *authority aura*,²² for example, when recognized public or political leaders deliver emotionally charged speeches.

Bots and *trolls* (described later) then create the effect of *psychological contagion* (when someone's emotions and related behaviors lead to similar emotions and behaviors in others) and help consolidate audiences around the promoted ideas.²³ The tactics are based on emotional reactions and are especially effective with psychologically vulnerable people.

V. THE ROLE OF SOCIAL MEDIA IN THE NAGORNO-KARABAKH CONFLICT

A. COMMUNICATION

Social media has become a powerful tool for shaping and influencing public opinion in conflicting societies. Despite differences in access to technology and varied domestic administrative regulations, most of the population in both Armenia and Azerbaijan have access to the Internet.²⁴ Presidential offices, foreign ministries,

²¹ See Guay, *supra* note 14.

²² Zarina Zabrisky, *Big Lies and Rotten Herrings: 17 Kremlin Disinformation Techniques You Need to Know Now*, BYLINE TIMES (Mar. 4, 2020), <https://bylinetimes.com/2020/03/04/big-lies-and-rotten-herrings-17-kremlin-disinformation-techniques-you-need-to-know-now/>.

²³ Davies, *supra* note, at 17.

²⁴ THE WORLD BANK, *Individuals Using the Internet (% of Population) - ARMENIA* (2021), Individuals using the Internet (% of population) - Armenia | Data (worldbank.org); THE WORLD BANK, *Individuals Using the Internet (% of Population) - AZERBAIJAN* (2021), Individuals using the Internet (% of population) - Azerbaijan | Data (worldbank.org) .

defense ministries, state, state-controlled, and private media outlets use media outlets and popular social media platforms to promote public narrative.

B. THIRD COUNTRIES

The interests of regional and global powers expand the arena of the online information battle. For instance, social media accounts (both authentic and inauthentic) in Turkey and Pakistan actively support Azerbaijan's stance, while accounts in India mostly favor Armenia's.²⁵ In turn, positive or negative reactions by users to information clusters (through "likes," "dislikes," expressive emojis, etc.) gradually help develop a more sophisticated analysis of a given platform's users, their purpose for using the particular platform, and the most effective types of messages.

C. DEMOCRACY AND FREE MEDIA

Azerbaijan and Armenia differ in their levels of democratic development and economic opportunities. These differences influence access to authentic information and/or exposure to coordinated inauthentic informational activities.

The Government of Azerbaijan has been consistently criticized by major international human rights watchdogs for widespread human rights violations, periodic crackdowns on opposition, and ill-treatment of government critics. The country's authorities maintain firm domestic control by restricting essential civil freedoms.²⁶ However, Azerbaijan actively adapts to changes caused by digital

²⁵ Elise Thomas & Albert Zhang, *Snapshot of a Shadow War in the Azerbaijan–Armenia Conflict*, THE STRATEGIST (Oct. 9, 2020), <https://www.aspistrategist.org.au/snapshot-of-a-shadow-war-in-the-azerbaijan-armenia-conflict/>.

²⁶ Giorgi Gogia, *Harassed, Imprisoned, Exiled: Azerbaijan's Continuing Crackdown on Government Critics, Lawyers, and Civil Society*, HUMAN RIGHTS WATCH (Oct. 20, 2016), <https://www.hrw.org/report/2016/10/20/harassed-imprisoned-exiled/azerbajians-continuing-crackdown-government-critics#>.

communications, including engaging in what Katy E. Pearce characterized in 2015 as *networked authoritarianism*. The country's 2021 *Freedom on the Net* score was 35 out of 100, with 100 being the highest.²⁷ The lack of independent media in Azerbaijan also multiplies the effect of disinformation.²⁸

The Armenian government has been criticized, although on a smaller scale, for domestic problems, such as arbitrary detentions, harsh prison conditions, an ineffective judicial system, a crackdown on the civil society, and other shortcomings.²⁹ Freedom of the Net in Armenia is significantly higher compared to Azerbaijan, with a score of 71 out of 100.³⁰

D. CAUSATION

The NK issue has traditionally played a significant role in the domestic and foreign political agenda of the two countries. The conflict is also often used to solidify domestic power and to justify political and economic shortcomings.

Azerbaijan has called the unresolved Karabakh issue an impediment to democracy and protection of human rights in the country. Official Baku also uses the conflict pretext for suppressing political opposition to the ruling autocratic regime.³¹ Armenia has mostly used the NK conflict to justify criticism of the electoral

²⁷ *Freedom in the World 2021: Azerbaijan*, FREEDOM HOUSE, (2022), <https://freedomhouse.org/country/azerbaijan/freedom-world/2021>.

²⁸ See Katy Pearce, *While Armenia and Azerbaijan Fought over Nagorno-Karabakh, Their Citizens Battled on Social Media*, THE WASH POST (Dec. 4 2020), <https://www.washingtonpost.com/politics/2020/12/04/while-armenia-azerbaijan-fought-over-nagorno-karabakh-their-citizens-battled-social-media/>.

²⁹ See *Armenia: Events of 2019*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2020/country-chapters/armenia> (2020).

³⁰ *Freedom in the World 2021: Armenia*, FREEDOM HOUSE, <https://freedomhouse.org/country/armenia/freedom-world/2021> (2022).

³¹ See Rasim Musabayov, *The Karabakh Conflict and Democratization in Azerbaijan*, 17 ACCORD CONCILIATION RESOURCES, 60 (2005), https://rc-services-assets.s3.eu-west-1.amazonaws.com/s3fs-public/accord17_19TheKarabakhconflictanddemocratizationinAzerbaijan_2005_ENG_0.pdf.

processes and difficulties in socio-economic situations in the country.³²

E. RHETORIC

Throughout the conflict period, especially since the first war of 1991-1994 ended with territorial losses for Azerbaijan, the Azerbaijani and Armenian governments have utilized available means of communication to promote public narratives regarding the conflict.

Azerbaijan disseminates anti-Armenian rhetoric, including demeaning statements, notions that the war was not over, and stressing the necessity to accumulate all resources for the liberation of the homeland from the Armenian occupiers.³³ [See <https://perma.cc/B36Q-JRQF> to Access Image].

The Armenian government, in turn, used the Karabakh conflict to solidify power, and promote the narrative of the “invincibility of the Armenian Army” and the inevitable defeat of any revanchist aspirations in Azerbaijan.³⁴ Armenian officials, however, do not publicly use demeaning or openly aggressive rhetoric against the Azerbaijani people.

F. KEY PLATFORMS / STATE RESOURCES

According to the DataReportal Global Digital Insight resource, as of 2022, Armenia has 1.98m active internet users (66.5% of the

³² See Sergey Minasyan, *The Nagorno-Karabakh conflict in the Context of South Caucasus Regional security issues: An Armenian perspective*, 45 NATIONALITIES PAPERS (Jan. 2017).

³³ See The Human Rights Defender of Armenia & The Human Rights Ombudsman of Artsakh, *Ad Hoc Public Report: Organized Hate Speech and Animosity Towards Ethnic Armenians in Azerbaijan as Root Causes of Ethnically Based Torture and Inhuman Treatment by Azerbaijani Armed Forces* (Sept.-Nov. 2020), <https://www.ombuds.am/images/files/2bb83fd52ae0011eeaa6e77f42210cd3.pdf>.

³⁴ Maria Raquel Freire & Licinia Simão, *The Armenian Road to Democracy: Dimensions of a Tortuous Process*, CEPS WORKING DOCUMENT NO. 267 (May 2007), <http://aei.pitt.edu/11729/1/1492.pdf>.

country's population of 3 million).³⁵ There are 2.05 million social media users, i.e., 69% of the population.³⁶ The number of social media users is higher than overall Internet users for social media users do not necessarily represent unique individuals and there can be several accounts per authentic or inauthentic user.

In 2022, Azerbaijan had 8.32 million active Internet users (81.1% of the country's population of 10.26 million). There are 5.2 million users of social media, which represents 50.7% of the population.³⁷ The exact number of unique individuals and accounts per authentic user is not verified. [See <https://perma.cc/6H6C-YYC3> to Access Tables 1 and 2].

Facebook and Twitter are the two most popular social communication platforms in Azerbaijan and Armenia. The platforms are the primary choices for governments and government-affiliated structures to communicate political messages to domestic and foreign audiences. Heads of the executive power (President of Azerbaijan and Prime Minister in Armenia), defense ministries, and foreign ministries have a significant number of followers on those platforms. [See <https://perma.cc/6H6C-YYC3> to Access Table 3].

The situation with Twitter in Azerbaijan is the outlier here. Despite the low absolute ratio of Twitter accounts per total share of social media users in Azerbaijan (3.55% or 184,000 users), as of May, 2022 the page of the Azerbaijani President has 726,500 followers or 13.97% of total social media users. An additional 540,000 users (around 10% of discrepancy) can imply either a large number of follower accounts from outside the country or represent inauthentic accounts.

The discrepancy in the number of followers of the Armenian Prime Minister's page on Twitter is around one percent: 5.81% of Twitter's total share of social media accounts vs. 7% (or 145,000) of actual followers on the platform. Indicators on other social platforms do not demonstrate significant discrepancies.

G. SUPPLY CHAIN

³⁵ Simon Kemp, *Digital 2022: Armenia*, DATAREPORTAL (Feb. 15, 2022), <https://datareportal.com/reports/digital-2022-armenia>.

³⁶ *Id.*

³⁷ *Id.*

Numbers indicate that Facebook by far is the most popular social network in Azerbaijan and Armenia. As such, the platform is the natural choice for government and government-affiliated structures for communication. The communication chain involves authentic and inauthentic users and accounts.

Inauthentic accounts can be classified into three main subgroups: so-called “*trolls*”, “*automated bots*” and “*cyborgs*.”³⁸ [See <https://perma.cc/3MBE-VXRL> to Access Additional Information]. Using *hashtags*—a combination of letters, numbers, and/or emoji preceded by the “#” symbol allows categorization of the content making it more discoverable online.

VI. AZERBAIJAN

A. MEDIA

³⁹According to Freedom House, power in Azerbaijan remains heavily concentrated in the hands of the authoritarian regime of President Ilham Aliyev who has served as the head of state since inheriting the presidency from his late father Heydar Aliyev in 2003. Corruption is widespread and the formal political opposition has been weakened by years of persecution. The media and internet freedom in Azerbaijan remains heavily regulated. The state remains in control of the information and communication technology (ICT) sector and often voluntarily decides on public access to the internet, social media platforms, and other resources. Social media users who express any dissent or opposition to the ruling regime can expect prosecution if they reside in Azerbaijan and risk intimidation from the authorities and pro-government trolls if abroad. Independent and Western-backed

³⁸ David Klepper, *Cyborgs, Trolls and Bots: A Guide to Online Misinformation*, ASSOCIATED PRESS, (Feb. 7 2020), <https://apnews.com/article/us-news-ap-top-news-elections-social-media-technology-4086949d878336f8ea6daa4dee725d94>.

media are forced to either follow the official line or shut down operations in the country.⁴⁰

There are no factual confirmations that the Azerbaijani state structures undertake centralized efforts to use bots or other tools for online manipulations over large audiences. At the same time, the level of control of the media realm in the country minimizes the chances for independent uncoordinated online media activity by a non-state-affiliated actor.

B. ANTI-ARMENIAN RHETORIC

Political messages by the Azerbaijani officials with regard to the Nagorno-Karabakh conflict include general patriotic and militaristic statements, as well as derogatory anti-Armenian rhetoric. The issue of disseminating anti-Armenian hate speech by the Azerbaijani official structures was the focus of different official and non-governmental international monitoring bodies. In one example, the 2011 report by the Council of Europe's European Commission Against Racism and Intolerance mentions the "constant negative official and media discourse concerning the Republic of Armenia helps to sustain a negative climate of opinion regarding people of Armenian origin, who remain vulnerable to discrimination."⁴¹ Similarly, the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities stressed "a very persistent public narrative surrounding the Nagorno-Karabakh conflict that identifies variably 'Armenia' or 'Armenians' as "the enemy" and openly promulgates hate messages, in particular on the Internet."⁴² The Committee also expressed concern "by the levels of official involvement in endorsing and disseminating such views, as they are often directed also against Azerbaijani citizens of ethnic Armenian origin, as well as anybody else who may be seen as affiliated with

⁴⁰ David M. Herszenhorn, *Radio Station Backed by U.S. Is Raided in Azerbaijan*, N. Y. TIMES, Dec. 28 2014, <https://www.nytimes.com/2014/12/29/world/middleeast/radio-station-backed-by-us-is-raided-in-azerbaijan.html>.

⁴¹ THE EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, *ECRI Report on Azerbaijan* (2011), <https://rm.coe.int/third-report-on-azerbaijan/16808b557e>.

⁴² COUNCIL OF EUROPE, *Opinion on Azerbaijan* (2012), <https://rm.coe.int/168008c664>.

Armenia.”⁴³ The 2017 Opinion by The Advisory Committee further noted “that the ubiquitous use of inflammatory language by politicians and other public figures can have an adverse impact on society’s perception of persons belonging to the Armenian minority . . . The Advisory Committee regrets that an entire generation of Azerbaijanis has now been raised with a rhetoric of hate, hostility, and victimhood, which may have an impact on prospects of future reconciliation.”⁴⁴

The supply chain of information originates in the state and state-controlled media. As the first step, the official websites of the Azerbaijani President and popular state agencies (such as the Defense Ministry and Ministry of Foreign Affairs) publish speeches and statements by President Aliyev and other political leaders. State-controlled media then disseminate the information through their websites. Authentic and inauthentic social media accounts pick up the strongest quotes from the statement or article and disseminate them with the help of trolls, bots, and cyborgs to users across the most popular platforms. Hashtags like *#ArmenianAgression*, *#KarabakhIsAzerbaijan*, *#JusticeForAzerbaijan*, *#BabyKillerArmenia*, and *#DoNotBelieveArmenia* are some of the examples. Here are instances of anti-Armenian statements by President of Azerbaijan that have circulated via official websites, news outlets and social media:

- “*Our main enemies are the Armenians from all over the world*”.⁴⁵
- “*Armenia as a country is of no value. It is actually a colony, an outpost run from abroad*”;⁴⁶

⁴³ *Id.*

⁴⁴ COUNCIL OF EUROPE, Fourth Opinion on Azerbaijan (2017), <https://rm.coe.int/4th-acfc-opinion-on-azerbaijan-english-language-version/1680923201>.

⁴⁵ PRESIDENT of the REPUBLIC of AZERBAIJAN ILHAM ALIYEV, *Ilham Aliyev Took Part in Conferences*, (Feb. 28, 2012), <https://president.az/ru/articles/view/4400>.

⁴⁶ Ilham Aliyev, (@presidentaz), TWITTER (Nov. 20, 2012, 1:52 a.m.), <https://twitter.com/presidentaz/status/270827003521929216?lang=en>.

- *“We are not living in peace, we are living in a state of war. Everyone must know this...”*
- *“Just as we have beaten the Armenians on the political and economic fronts, we are able to defeat them on the battlefield.”⁴⁷*

In parallel, the state-controlled websites and social media accounts distribute public feedback on the policies of Azerbaijan’s President. Letters to President Aliyev mostly contain gratitude and unequivocal public support for the official policies with regard to the Armenian people.

Although the veracity of such letters cannot be confirmed or rejected, such initiatives have become part of the Azerbaijani government’s efforts on legitimization of the anti-Armenian policies domestically and internationally. Below are excerpts from such letters disseminated through official accounts or state-controlled media:

- *Asker Bayramov: “I am asking you to send me to battle, too... I will go to kill them rather than to die. Please do not turn down my request.”⁴⁸*
- *Ahmed Akoji: “The despicable Armenians will see the inextinguishable power of the Turkic people. May Allah protect you. May the Almighty be by your side.”⁴⁹*
- *Zamiga Akhadova: “The devious Armenians saw what the fed-up Azerbaijani soldiers are capable of.”⁵⁰*
- *Byulent Karagan: “We always support you in your just struggle against the hateful Armenians.”⁵¹*

Media and personal blogs also play an active role in shaping public perception of Armenians among Azerbaijanis. The main actors in the Azerbaijani media field are Vesti.az, 1news.az, Day.az and other state-controlled resources. Information mostly includes formal statements

⁴⁷ Ilham Aliyev, (@presidentaz), TWITTER (Aug. 7, 2014, 5:51 a.m.), <https://twitter.com/presidentaz/status/270827003521929216497364369986945024?lang=en>.

⁴⁸ ASIF GURBAN ET AL., *Letters to President Ilham Aliyev: We All Support Your Political Course and Our Army*, DAY.AZ, (Apr. 11, 2016), <https://news.day.az/politics/767018.html>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *From Bulent Karagan, PRESIDENT of the REPUBLIC of AZERBAIJAN*, (Apr. 6, 2016), <https://president.az/ru/articles/view/18570>.

by the top political leaders, as well as op-eds and other publications promoting stigmas and stereotypes.

Here are some examples of the wording in publications by the largest media:

- *“...we won't waste the time of our readers by describing the filth, unscrupulousness, greed, cowardice, baseness, treachery, cruelty, envy, cynicism and all the abomination that fills the inner world of Armenians.”*⁵²
- *The Armenianhood is like a variety of flu. There is the swine flu, and there is the Armenian flu...killing this virus is possible only by understanding its nature, becoming immune to it and destroying it without mercy.”*⁵³
- *“jackal is a typical rubbish animal, the carrier of infection and parasite and in the Orient, it is associated with petty flattery, sycophancy and bootlicking. It is also the embodiment of cowardice and meanness...Doesn't the description of this animal look familiar? You are right; this is a one-to-one description that matches the lifestyle and behavior of Armenians. Just like Armenians, the jackals are cowardly, base, cheeky and crafty.”*⁵⁴
- *“depraved and ill-mannered women can be found in any nation. However, the perversity of the Armenian women, representatives of the oldest profession, is known worldwide.”*⁵⁵

The coordination of social media activity becomes particularly obvious during periods of military escalations. For instance, the July 2020 clashes along the Armenian-Azerbaijani state border have also

⁵² Namik Ibragimov, *The Order “For Courage” is necessary for the Armenians who will come to the Eurovision Song Contest in Baku*, VESTI.AZ (May 31, 2011), <https://vesti.az/news/78758>.

⁵³ Namik Ibragimov, *Unlike Azerbaijan, Georgia should declare quarantine against Armenian infection*, VESTI.AZ (Aug. 1, 2011), <http://vesti.az/news/84919>.

⁵⁴ B.B, *The “Government” of Karabakh Allocated 46,000 Dollars to Fight Against Their Own Kind*, VESTI.AZ (Feb. 9, 2012), <https://vesti.az/news/78758>.

⁵⁵ Armine Adibekyan, *Armenophobia in Azerbaijan* (2013), https://kupdf.net/download/-_59d33a5608bbc5745a687199_pdf.

seen intensified engagement in the social media realm. The sides launched hashtag campaigns on Twitter using strong phrases, such as *#AzerbaijanAggression*, *#ArmenianAggression*, etc..

The Atlantic Council's Digital Forensic Research Lab (DFRLab) analyzed pro-Armenian and pro-Azerbaijani hashtags from July 12 to July 18, 2020, to compare the traffic flows on Twitter.⁵⁶ [See <https://perma.cc/PF7Q-FPPU> to Access Graph].

The DFRLab concluded that pro-Azerbaijan hashtags were heavily manipulated and several high-volume accounts were responsible for a major portion of the reactions and retweets.⁵⁷

The pro-Azerbaijan hashtags significantly surpassed the pro-Armenia hashtags in number of mentions, approximately with a proportion of 33 to 1. They demonstrated sharp peaks of retweets daily at around 2:00 pm. The pro-Armenian hashtags displayed scales and patterns more characteristic of organic traffic.

The DFRLab did not find solid evidence that the pro-Azerbaijani accounts were fully automated bots and concluded that they had been curated by “highly dedicated human users, many of them college students or belonging to the pro-regime youth groups.”⁵⁸

The specialists found other evidence of coordinated online manipulation by the state-controlled youth organizations. For example, the account the General Union to Youth for Support (GUYS)—a youth organization established to support President Aliyev’s youth development policy—received “like” reactions by the exact same accounts and in the same order under two consequent posts on Twitter.⁵⁹ [See <https://perma.cc/83QS-F4KK> to Access Image].

C. LEGISLATIVE FRAMEWORK

The Article 283 of Azerbaijan’s Criminal Code prohibits the “incitement of national, racial, social or religious hatred and enmity.”⁶⁰ The crime is defined as “actions aimed at the incitement of national,

⁵⁶ DFRLab, *Patriotic Astroturfing in the Azerbaijan-Armenia Twitter War*, MEDIUM (July 21, 2020), <https://medium.com/dfrlab/patriotic-astroturfing-in-the-azerbaijan-armenia-twitter-war-9d234206cdd7>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ UNITED NATIONS, *Criminal Code of the Azerbaijan Republic*, 90 https://adsdatabase.ohchr.org/IssueLibrary/AZERBAIJAN_Criminal%20Code.pdf.

racial, social or religious hatred and enmity, the humiliation of national dignity, as well as actions aimed at restricting the rights of citizens, or establishing the superiority of citizens on the basis of their national, racial, or religious belonging if such acts are committed in public or through the use of mass media."⁶¹ The existence of the regulation, however, does not prevent wide public distribution of derogatory rhetoric. Official structures and law enforcement use social media also to target activists,⁶² journalists, and the NGO representatives who express opposition to the ruling regime or publicly support reconciliation with Armenians.⁶³

D. PUBLIC OPINION

Unsophisticated but highly effective coordinated state policies using new technologies and online resources had their effect on public opinion among Azerbaijanis. A majority of the country's population expresses a negative attitude towards the Armenian people. Public attacks towards Armenians have become tolerable and welcome, while messages for reconciliation and mutual tolerance become targets of condemnation and accusations of state treason.⁶⁴

According to the latest available public opinion data by Swiss-based Center for Security Studies, by 2011 94% of Azerbaijani respondents mentioned Armenia as the biggest enemy of Azerbaijan.⁶⁵ Manifestations of intolerance towards Armenians took various forms

⁶¹ *Id.*

⁶² *Azerbaijan: Activists Targeted by 'Government-Sponsored' Cyber Attack*, AMNESTY INT'L (Mar. 10, 2017), <https://www.amnesty.org/en/latest/news/2017/03/azerbaijan-activists-targeted-by-government-sponsored-cyber-attack-2/>.

⁶³ *Azerbaijan: Lengthy Jail Sentences for Prominent Human Rights Defenders Are Shockingly Unjust*, AMNESTY INT'L (Aug. 13, 2015), <https://bit.ly/3Q00t3i>.

⁶⁴ Idrak Abbasov, *Azerbaijani Journalist Accused of Spying for Armenia*, INST. for WAR and PEACE REPORTING (Apr. 25, 2014), <https://iwpr.net/global-voices/azerbaijani-journalist-accused-spying-armenia>.

⁶⁵ Iris Kempe, *The South Caucasus Between the EU and the Eurasian Union*, CAUCASUS ANALYTICAL DIG. #51-52, 21 (June 17, 2013), <https://www.files.ethz.ch/isn/166585/CAD-51-52.pdf>.

embracing wider circles of Azerbaijani society, including representatives of religious structures, sports⁶⁶, and intelligentsia.

Among the most vivid examples is the case of Azerbaijani officer Ramil Safarov. In 2004, during a NATO-sponsored seminar in Budapest, Hungary, Safarov used an axe to decapitate a sleeping Armenian fellow participant of the course—officer Gurgen Margaryan. Safarov confessed to the ethnically motivated murder and expressed no remorse to justify his action on the grounds that the victim was Armenian.⁶⁷ He was sentenced to life imprisonment in Hungary. In 2012, Safarov was extradited to Azerbaijan to continue serving his sentence. Upon arrival in Azerbaijan, he was greeted as a national hero, pardoned by Azerbaijani President Ilham Aliyev, promoted to the rank of Major, given an apartment in the capital city Baku and eight years of back pay.⁶⁸ Azerbaijan's Human Rights Defender E.Suleymanova issued a statement thanking President Aliyev for liberating Safarov from Hungarian prison, stressing that "Ramil Safarov must become the example of patriotism for the Azerbaijani youth."⁶⁹ A special website dedicated to Safarov is collecting appreciation letters being sent to his email axe@safarov.org.⁷⁰

During the military hostilities in 2020, the weaponization of social media in Azerbaijan has also seen attention from Facebook. The platform removed around 8,000 Facebook and Instagram troll accounts and pages linked to the Youth Union of Azerbaijan's ruling New Azerbaijan Party for "violating its policy against coordinated

⁶⁶ *UEFA Bans Azeri Soccer Officer Who Said 'We Must Kill All Armenians*, ASBAREZ (Nov. 4, 2020), <https://asbarez.com/uefa-bans-azeri-soccer-officer-who-said-we-must-kill-all-armenians/>.

⁶⁷ Shaun Walker, *Relatives of Armenian Axed to Death by Azeri Officer Call for Justice*, THE GUARDIAN (May 25, 2020), <https://www.theguardian.com/law/2020/may/25/relatives-armenian-axed-death-by-azeri-officer-call-justice-ramil-safarov>.

⁶⁸ Sarah Kendzior, *The Axe Murderer Who Became a Facebook Hero*, ALJAZEERA (Sept. 5, 2012), <https://www.aljazeera.com/opinions/2012/9/5/the-axe-murderer-who-became-a-facebook-hero>.

⁶⁹ ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, *Anti-Armenian Propaganda and Hate Dissemination Carried Out by Azerbaijan as a Serious Obstacle to the Negotiation Process* (Oct. 7 2008), <https://www.osce.org/files/f/documents/e/b/34195.pdf>.

⁷⁰ RAMIL SAFAROV, <http://www.safarov.org/en/contacts.html>.

inauthentic behavior.”⁷¹ Several months later, the trolling operation by state-backed structures returned to the social media platforms.

VII. ARMENIA

A. MEDIA

Freedom House assesses Armenia as a partly free country and a fledgling democracy. As of 2022, Armenia remains in the transitional period that followed mass anti-government protests and elections in 2018, which changed the political elite in the country. Lack of transparency in policymaking, troubled electoral system, and weak rule of law are among the government’s biggest priorities.⁷² Internet access in Armenia is free and competitive. Online journalists, commentators, and regular internet users do not engage in self-censorship. The Public Services Regulatory Commission (PSRC) regulates the telecommunications sphere. Private internet companies plan and develop their own networks independently from interference from the government or the PCRC.

The media environment in Armenia is decentralized but often influenced politically, financially and/or ideologically by various domestic and foreign stakeholders. The media in the country operates in accordance with the corresponding legislation. In general, the media content that complies with international human rights standards is unregulated. There were several cases of certain limitations in internet flows during phases of active hostilities with Azerbaijan and during the outbreak of the COVID-19 pandemic when the government

⁷¹ CRAIG SILVERMAN & RYAN MAC, *It Took Facebook More Than A Year—And A Whistleblower To Remove An Azerbaijan Troll Farm Connected to Azerbaijan’s Ruling Party*, BUZZFEED NEWS (Oct. 8, 2020), <https://www.buzzfeednews.com/article/craigsilverman/facebook-azerbaijan-troll-farm>.

⁷² *Freedom in the World 2021: Armenia*, FREEDOM HOUSE (2022), <https://freedomhouse.org/country/armenia/freedom-world/2021>.

enacted emergency measures that empowered the state to ban or delete the pandemic-related unofficial content.

Armenian legislation allows filtering of Internet content, but under a certain set of circumstances and with a corresponding court order.⁷³

B. ANTI-AZERBAIJANI RHETORIC

Anti-Azerbaijani rhetoric is neither centralized nor coordinated on a political level. The Office of the President or Prime Minister does not disseminate statements targeting the Azerbaijani people collectively. Criticism usually targets separate political figures, such as President Aliyev, the Minister of Defense, and other high-ranking Azerbaijani officials. The media outlets and social platforms mostly disseminate patriotic sentiments and cover political and socio-economic developments in the country.

The difference between Azerbaijan's and Armenia's rhetoric in public statements regarding the adversary can be explained by the outcome of the 1991-1994 war. Armenia's military successes and territorial gains in the first war with Azerbaijan have set comparatively pacifist rhetoric, framing the necessity of a peaceful final resolution of the conflict. Dissemination of anti-Azerbaijani sentiments takes place mostly on social media and blogs in a non-state coordinated manner by separate accounts or groups.

Second to National Television, online sources, and social media are the most frequently used sources of information in Armenia. According to the 2019 study of media consumption by the Caucasus Research Resource Center–Armenia Foundation, 57 percent of the population uses social media every day.⁷⁴ 83 percent of those who read online news reported doing so on social media, while 17 percent access news directly from the website.⁷⁵

Compared to Azerbaijan, the weaponization of social media in Armenia is a more sophisticated process and involves a more diverse group of stakeholders and tactics. In March 2021 the Media Initiatives

⁷³ *Id.*

⁷⁴ CRRC-ARMENIA, *Media Consumption and Media Coverage of Reforms in Armenia* (Aug. 2019), [://www.crrc.am/wp-content/uploads/2019/03/MICE-Report-2019_.pdf](http://www.crrc.am/wp-content/uploads/2019/03/MICE-Report-2019_.pdf).

⁷⁵ *Id.*

Center of Armenia (MCA) published the report *The Patterns of Disseminating Disinformation in the Armenian Online Media*.⁷⁶ The report examined the sources and strategies for spreading disinformation in Armenia, and concluded that the false narratives disseminate mostly through:

- *media outlets affiliated with the political opposition;*
- *separate ideological groups;*
- *foreign websites;*
- *social media influencers;*
- *trolls, bots and cyborgs;*
- *so-called “mushroom media” - semi-entertaining and semi-informative websites; and*
- *“clickbait” - websites that target commercial goal by encouraging visitors to click on particular links.*⁷⁷

Tactics for disseminating false narratives and disinformation also include mimicking credible independent fact-checking platforms. Several such platforms often promote unsupported claims or false information criticizing the government. They operate a network of outlets and social media accounts to amplify the coverage and effect.⁷⁸ Such tactics can be especially damaging since in the long run they can jeopardize public trust in professional and trustworthy resources.

Media experts in Armenia have outlined the main patterns of disinformation by analyzing three components: sender of the information (who?), its message (what and how?), and context (why?):

⁷⁹

⁷⁶ Hayk Smbatyan, *The Patterns of Disseminating Disinformation in the Armenian Online Media*, MEDIA INITIATIVES CENTER (Mar. 21, 2021), <https://media.am/en/laboratory/2021/03/12/26670/>.

⁷⁷ *Id.*

⁷⁸ Zarine Kharazian, *Armenia Assailed by Deceptive ‘Fact-Checking’ Groups, Part I: The Players*, MEDIUM (May 2, 2019), <https://medium.com/dfrlab/armenia-assailed-by-deceptive-fact-checking-groups-part-i-the-players-2ce03daf2d28>.

⁷⁹ Hayk Smbatyan, *The Patterns of Disseminating Disinformation in the Armenian Online Media*, MEDIA INITIATIVES CENTER, (Mar. 21, 2021), <https://media.am/en/laboratory/2021/03/12/26670/>.

- *Sender of the Information: disinformation is often present in articles that do not mention the author, the primary source or the link to the primary source and instead refer to unknown or undetermined sources (often mentioned as “our sources”);*
- *Message: mostly observed in the article’s title and contains wording that adds interest (e.g. “Urgent!”, “Exclusive!” etc.);*
- *Context: has a special significance since it focuses on the core purpose of the posting highlighting the transferring of specific contents (e.g. political propaganda, conspiracy theories, defamatory rhetoric etc.)⁸⁰*

According to the study, media materials in Armenia are likely to contain disinformation if they have one or more of the following features:

- *violation of the reporter’s professionalism, literacy or ethics;*
- *various stylistics in the text;*
- *emotional or intuitive connotations;*
- *subjective assessments, characteristics, or connotations;*
- *exclamation marks;*
- *eye-capturing visuals.⁸¹*

The Karabakh conflict is among the most covered topics in the Armenian media. As such, the issue often becomes subject to disinformation and propaganda.

The 2020 study by the Media Initiatives Center analyzed the pattern of media reporting related to the Armenian-Azerbaijani conflict in three popular online outlets: News.am, Tert.am and 168.am. In the period from April 1 to May 31, 2020, the three newspapers published 2464 articles on the issue. The three media republished almost half of the articles from another source, while 21 percent of the articles did not mention the author or primary source.⁸² [See <https://perma.cc/AH64-65SN> to Access Graph].

Social media contained primary sources in 70 percent of the content. It is a major difference from the tactics in Azerbaijan, where information flow originates from state-affiliated sources and is disseminated through online outlets and social media. Almost half of the reviewed publications contained specific political statements,

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

mostly criticizing the Armenian government's stance regarding the NK conflict, domestic policies, and foreign relations.

The most common accusations in the articles relate to the ineffectiveness of the policies in negotiations with Azerbaijan, lack of transparency in the talks, and accusations of "handing over the lands" to Azerbaijan.⁸³ [See <https://perma.cc/B2FC-8JR7> to Access Graph].

According to the 2022 research by the International Republican Institute, around 51 percent of respondents in Armenia use Facebook as a daily source of political news. Almost 70 percent use the platform at least once a week.⁸⁴ [See <https://perma.cc/VZ6N-Q83D> to Access Graph].

C. LEGISLATIVE FRAMEWORK

In April 2020, the Armenian parliament adopted amendments to the criminal code that criminalize violent hate speech and public incitement of justification of violence based on gender, race, skin color, ethnic or social origin, or other characteristics.⁸⁵ Punishment for such actions ranges from monetary penalties to imprisonment for up to three years. The administration in power proclaimed freedom of speech as a value more important than "protecting the government from fake news."⁸⁶ In February 2021, however, the Armenian government introduced a bill proposing to forbid any media from citing "unidentifiable social media sources" to minimize the risk of

⁸³ *Id.*

⁸⁴ INT'L REPUBLICAN INST., *Public Opinion Survey: Residents of Armenia* (May 2021), https://www.iri.org/wp-content/uploads/legacy/iri.org/armenia_ppt_final.pdf.

⁸⁵ *Armenia Criminalises Public Calls to Violence*, CSO METER (May 13, 2020), <https://csometer.info/updates/armenia-criminalises-public-calls-violence>.

⁸⁶ Aneta Harutyunyan, *Pashinyan Considers Freedom of Speech More Important than Protecting Government from Fake News*, ARMENPRESS (Jan. 31, 2019), <https://armenpress.am/eng/news/962640.html>.

disinformation through social media channels.⁸⁷ As of the writing of this paper, the draft bill was still under consideration.

D. PUBLIC OPINION

The mostly liberal media and the presence of diverse domestic and international actors in Armenia's media realm have influenced the scope of the public perception of priorities. The main concerns include security, economy, political stability, and national unity.

The public perception of freedom of expression is average. The 2022 public opinion survey by the International Republican Institute indicated that 64 percent of respondents were "definitely or somewhat not afraid" to openly express their opinions.⁸⁸ The existing conflict with Azerbaijan and national security in general continue to dominate as primary concerns—28 percent and 15 percent respectively. 86 percent of participants named resolution of the NK conflict as very or somewhat important for the future of Armenia.⁸⁹ Most of the country's population consider Azerbaijan and Turkey (Turkey openly supports Azerbaijan in the conflict with Armenia) as the greatest political and economic threats to Armenia—90 percent and 77 percent respectively.⁹⁰

As of 2022, the most notable public instances of anti-Azerbaijani sentiments in Armenia were the cancellations of an Azerbaijani film festival in Armenia in 2010 and 2012 due to large-scale public opposition.⁹¹

⁸⁷ Chairman Of The National Assembly Of The Republic Of Armenia, *The Law Of The Republic Of Armenia On Amendments And Amendments To The Law Of The Republic Of Armenia "On Mass Media"* (Feb. 2, 2021) <http://www.parliament.am/drafts.php?sel=showdraft&DraftID=60991>.

⁸⁸ *Public opinion survey: Residents of Armenia*, INT'L REPUBLICAN INST. (Feb. 9, 2022), <https://www.iri.org/resources/public-opinion-surveyresidents-of-armenia/>.

⁸⁹ *Id.* at 46.

⁹⁰ *Id.* at 37.

⁹¹ *Azerbaijani Film Festival Canceled In Armenia After Protests*, RADIOFREEEUROPE, RADIOLIBERTY (Apr. 13, 2012), https://www.rferl.org/a/azerbaijan_armenia_film_festival_canceled_protests/24547207.html.

VIII. RECOMMENDATIONS

A. GENERAL APPROACH

The weaponization of social media is a constantly developing phenomenon. The role of social media as an actor in conflict and peacebuilding continues to increase. Disinformation campaigns and targeted messaging can promote mistrust, reinforce the disconnection between conflicting societies, and undermine peace capacities by propagating hate speech, stigma, and stereotypes.

Minimizing the disruptive effect of social media weaponization requires coordinated intervention by governments, NGOs, media outlets, IT companies, and human rights watchdogs. Although there is still no unique set of actions that can effectively counter disinformation and other types of public manipulations, the issues that need to be addressed and possible response mechanisms are largely known. They range from supporting free and financially independent media to promoting the online resilience of the public through information literacy.

P. W. Singer describes in his “LikeWar: The Weaponization of Social Media” several factors that can help understand opportunities to counteract the phenomenon:

- *Contemporary information environment is stabilizing. Internet exists as the number one means of communication and will remain as such for the foreseeable future. Social media will likely continue to expand in size and scope, but the essential core of it and key players will remain unchanged;*⁹²
- *Internet will remain a “battlefield” and every user is part of it. From initial application as a positive and constructive phenomenon, the role of internet rapidly changes and develops into a tool for different types of manipulation and weaponization;*⁹³

⁹² See generally EMERSON T. BROOKING & P.W. SINGER, LIKEWAR: THE WEAPONIZATION OF SOCIAL MEDIA (2018).

⁹³ *Id.* at 264.

- *Weaponization of internet and social media in particular raises the necessity of reevaluating the information per se. Event or opinion contain power on the internet when information consumers believe in their veracity. Disinformation can be powerful, while true events can be judged as staged or irrelevant. Political, psychological and increasingly algorithmic manipulations significantly influence the outcome;*⁹⁴
- *Interconnection of war and politics is not helping. Politics increasingly applies information warfare, while armed hostilities more often rely on winning online public opinion.*⁹⁵

B. POSSIBLE STEPS

Although there are different baseline conditions in the two countries with regard to the level of democratization, freedom of speech, administrative transparency, and other aspects, the recommended interventions would promote a more favorable online media environment for peace narratives in the two countries:

- *Promote online resilience through information literacy: as social media becomes increasingly popular, information literacy becomes an important educational issue. The problem is especially present among the younger generations of Armenians and Azerbaijanis. Information literacy needs to be covered as a discipline in Armenian and Azerbaijani schools and universities. Younger generations must learn how to protect themselves from online manipulations, as well as to gain the necessary skills for responsible online behavior;*
- *Cross-generational open courses in online literacy for young professionals/adults in the two societies. These can include certificate programs, summer universities, interagency partnership project requirements, public lectures, and other initiatives;*
- *Demand adherence to the criminalization of dissemination of stigma, prejudices, and other types of dangerous speech that prompt hate or violence inside or between communities. Dangerous speech normally includes dehumanizing rhetoric (comparing humans to animals or otherwise subhuman, etc.),*

⁹⁴ *Id.*

⁹⁵ *Id.*

coded language (using memes or terms popular within groups of online haters), suggestions of impurity (characterizing the target group as non-deserving of equal rights), and so-called accusation in a mirror (when the audience is falsely manipulated into believing in an imminent attack. It is done as means to justify preemptive violence against the target group);

- *Promote legislative reforms and regulations that would outline the framework for social media platforms' functioning in the countries;*
- *Delegitimization of favoring conflict over consensus and dissemination of periodic messages in support of objective journalists advocating for peace between Armenians and Azerbaijanis through credible channels;*
- *Public criticism of the cases of harassment of objective journalism and targeting by nationalist groups and the authorities;*
- *Offer financial support to existing reliable local media and engage with the countries' media on the issues of human rights, media responsibility, and reconciliation interventions;*
- *Promote "parity of resources" between civil society and reliable media on the one side and propaganda outlets on the other in order to help fill the lack of sound and peaceful public rhetoric;*
- *Sponsor periodic fact-checking initiatives and investigative journalism projects to unveil cases of information influence operations where necessary - without compromising the identity of sources; and*
- *Periodically organize joint discussions among the Armenian and Azerbaijani journalists and intelligentsia who vary in perceptions towards the opposite side.*

IX. CONCLUSION

The emergence of social media inspired optimism that a better-interconnected world would promote a better, safer, and more stable

global environment. Yet the phenomenon has quickly become the place for various manipulations.

The weaponization of social media is especially effective in vulnerable or war-affected societies during conflicts. Increased global access to technology contributes to a significant increase in the scale and scope of manipulative disinformation and hate speech efforts.

Cognitive space will most likely remain a target for manipulations. Governments and domestic and foreign stakeholders will continue to apply available technological means to influence public opinion and manage the perception of the targeted groups. In the case of the Nagorno-Karabakh conflict, the weaponization of social media by governments and other influencers has had its effect on mutual perception between the peoples and radicalization of stances. In parallel, social media has become a factor in domestic political and social developments. It is hard to imagine a complete eradication of the problem of weaponization of social media. At the same time, however, there are measures that will help mitigate the consequences of manipulations.

SOCIAL MEDIA, PROPAGANDA, AND THE UKRAINIAN CONFLICT

Russell L. Weaver*

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I. INTRODUCTION

Wartime propaganda is hardly a new phenomenon.¹ During World War II, the U.S. government established the Office of War Information “to disseminate political propaganda,”² and the Nazis disseminated propaganda designed to denigrate Jews and foster pride in the German nation.³ The U.S. also engaged in propaganda during World War I and undoubtedly in earlier wars.⁴ However, wartime propaganda is different today because governments have more sophisticated communications technologies at their disposal.⁵ Instead of relying solely on print or broadcast media, modern governments can use the internet and social media to more widely and effectively

* Professor of Law & Distinguished University Scholar, Louis D. Brandeis School of Law, University of Louisville. Professor Weaver wishes to thank the University of Louisville’s Distinguished Scholar Program for its ongoing support for his scholarship.

¹ See Charles A. Siepmann, *Propaganda and Information in International Affairs*, 55 YALE L.J. 1258, 1260-1261 (1946).

² See Frank Mankiewicz, *Crisis Mode*, 29 HUMAN RIGHTS 23 (2002).

³ See Gregory S. Gordon, *The Propaganda Prosecutions at Nuremberg: The Origin of Atrocity Speech Law and the Touchstone for Normative Evolution*, 39 LOY. L.A. INT’L & COMP. L. REV. 211-213 (2017).

⁴ See Richard B. Collins, *Propaganda for War and Transparency*, 87 DENV. U. L. REV. 819 (2010).

⁵ See RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY (Carolina Academic Press, 2nd ed., 2019). Parts of this manuscript are derived from this book.

disseminate their propaganda, not only in their own countries,⁶ but worldwide.⁷ In addition, they can use the internet to try to influence or affect the outcome of elections in other countries.⁸

The propaganda environment is also different today because the ability to message and propagandize is no longer a one-way street. For centuries, while print and broadcast media constituted the primary means of mass communication, “gatekeepers” (meaning either the government or rich and powerful individuals) controlled access to those technologies.⁹ Private individuals could access those technologies only with the permission of the gatekeepers.¹⁰ With the advent of the internet, the dynamics are much different.¹¹ Those who wish to oppose or challenge the governmental narrative have effective communication devices at their disposal.¹² In modern times, the Internet has been used by dissidents, and political movements, all over the world to challenge governmental conduct and propaganda.¹³

This article examines how the internet, particularly social media, has been used in the Russia-Ukraine conflict. The first part of the article examines how Russia has tried to use social media to affect public opinion, not only in Ukraine but all over the world. The remainder of the article examines how Ukraine is using the internet to respond to Russian messaging, as well as to create its own narrative, and how individuals (especially within Russia) are using the internet to challenge Russia’s propaganda and messaging.

I. RUSSIAN MESSAGING DURING THE UKRAINE WAR

Numerous commentators contend that Russia has used the internet to try to manipulate and control public opinion regarding the Ukraine War.¹⁴ If these reports are accurate, they parallel reports

⁶ *Id.* at 78.

⁷ *Id.* at 163-164.

⁸ *Id.*, at 159-166.

⁹ *Id.* at 21-38.

¹⁰ *Id.*

¹¹ *Id.* at 67-114.

¹² *Id.*

¹³ *See id.*

¹⁴ *See, e.g.,* Weilong Kong & Timothy Marler, *Ukraine's Lessons for the Future of*

regarding Russia's prior use of internet messaging which commentators viewed as highly effective,¹⁵ and which involved a variety of different messaging methods.¹⁶ One commentator described the pre-war Russian messaging as "unstoppable," and characterized President Vladimir Putin as "a master of information warfare."¹⁷ Commentators claim that Russia was able to plant falsehoods on official news outlets as a way of obfuscating facts, defining false narratives, and manipulating audiences.¹⁸

There is strong evidence that Russia effectively used social media prior to the war to convey its messages in an effort to manipulate public opinion.¹⁹ For example, some claim that Russia interfered in the U.S.'s 2016 presidential election in an effort to secure Donald Trump's election,²⁰ and to undermine Democratic candidate, Hillary Clinton.²¹ Russia allegedly did so by disseminating hashtags such as "#Trump2016" "#TrumpTrain" and

Hybrid Warfare, The Rand Blog (Nov. 28, 2022), <https://www.rand.org/blog/2022/11/ukraines-lessons-for-the-future-of-hybrid-warfare.html>.

¹⁵ See P.W. Singer, *How Ukraine Won the #Like War*, *Politico* (Mar. 12, 2022) ("In the arena of information warfare, there was arguably no one more feared over the last decade than Vladimir Putin. Russia's information warriors ran wild for years, hacking democracies by intervening in more than 30 national elections from Hungary and Poland to Brexit and the 2016 U.S. presidential race. They elevated conspiracy theories that ranged from Q-Anon to coronavirus vaccine lies and provided justification for Russian military action everywhere from Georgia to Syria."), <https://www.politico.com/news/magazine/2022/03/12/ukraine-russia-information-warfare-likewar-00016562>.

¹⁶ See Jamie Dettmer, *Russia's Disinformation Playbook Ripped Apart*, VOA News (Mar. 15, 2022) ("They have often expressed frustration at how Russian disinformation has gained traction, managing to roil the 2016 race for the U.S. presidency, worsen political divisions in Europe during the 2015-16 refugee crisis and in Syria shaping a narrative linking opponents of Syrian leader Bashar al-Assad, as well as the first-responders the White Helmets, with jihadists and the Islamic State terror group."), <https://www.voanews.com/a/russia-disinformation-playbook-ripped-apart/6486203.html>; Kong & Marler, *supra* note 13.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Dustin Volz, *Pence Points Finger at Russia for 2016 Election Meddling*, *The Wall Street Journal* A7 (Aug. 1, 2018).

²¹ See Neil MacFarquhar, *Inside Russia's Troll Factory: Turning Out Fake Content at a Breakneck Pace*, N.Y. TIMES A11 (Feb. 19, 2018).

“Hillary4Prison.”²² One blog post allegedly referred to Hillary as “pure evil,” and one media outlet reported that a Russian operative was reprimanded for not producing enough posts critical of Clinton.²³ These claims find support in the findings of special counsel Robert Mueller who indicted 12 Russians for masterminding computer attacks designed to undermine the Democratic Party,²⁴ as well as for paying for online advertisements that encouraged voters to favor then-presidential candidate, Donald Trump, or perhaps to vote for presidential candidate Jill Stein.²⁵ The assumption is that Stein voters would otherwise have voted for presidential candidate Hillary Clinton and that a vote for Stein would harm Clinton’s electoral possibilities. Although some Clinton supporters believe that the Russian efforts tipped the election in Trump’s favor,²⁶ it is not clear how much impact the posts had.²⁷ There were lots of problems with Clinton’s presidential campaign, including Clinton’s general unpopularity.²⁸

Commentators also claimed that Russia tried to destabilize the U.S. political system and “remove faith” in America prior to the Ukraine War.²⁹ One of the tactics allegedly used by the Russians during the 2016 presidential campaign was to sow discord “among

²² See Scott Shane, *How Unwitting Americans Encountered Russian Operatives Online*, *The New York Times* A10 (Feb. 18, 2018).

²³ *Id.*

²⁴ See Tom Schoenberg & Greg Farrell, *U.S. Indicts 12 Russians Before Trump’s Meeting with Putin*, *The United States Law Week* (July 13, 2018); Scott Shane & Mark Mazzetti, *Indictment Bares Russian Network to Twist 2016 Vote: Mueller Chronicles a Social Media War*, *N.Y. TIMES* A1 (Feb. 17, 2018).

²⁵ See Jonathan Martin & Maggie Haberman, *Moscow’s Hand Swirled in U.S., but Whether It Tipped Election is Unclear* *N.Y. TIMES* A11 (Feb. 19, 2018) (As Clinton’s campaign communications director alleged, “Russia succeeded in weakening her [Clinton] enough so that the Comey letter could knock her off.”).

²⁶ *Id.* (As Clinton’s campaign communications director alleged, “Russia succeeded in weakening her [Clinton] enough so that the Comey letter could knock her off.”).

²⁷ See *id.* (“And the nation’s intelligence agencies say they do not have any way to calculate whether the Russian effort swung the election.”).

²⁸ *Id.*; see also MacFarquhar, *supra* note 21.

²⁹ See David W. Hawpe, *Book Review: Hacking America; Counter-terrorism expert argues Putin intends, with the help of cybersecurity forces and President Trump’s demagoguery, to “remove faith in America itself,”* *The Courier-Journal* 11 (Apr. 1, 2018).

U.S. voters through social media. Russia purportedly achieved that objective by impersonating Americans, as well as by coordinating with unwitting U.S. activists, and even planning protest rallies.³⁰ Russians also allegedly tried to weigh in on debates regarding the Affordable Care Act (ACA).³¹ In a four-year period, Russia allegedly sent out some 600 posts related to the ACA, and some of the accounts on which these messages were posted had more than 100,000 followers.³² Although there were tweets on both sides of the ACA issue, approximately 80% of the ACA-related tweets offered a conservative perspective.³³

Some media observers believe that Russian officials conducted these campaigns through the so-called Internet Research Agency (IRA)³⁴ which was alleged to have created hundreds of fake accounts and pages on social media,³⁵ and spent large amounts on social media advertising.³⁶ Some election observers believe that the IRA also arranged Facebook advertisements, and used Facebook to organize protest rallies beginning in 2015.³⁷ However, the IRA also allegedly used Twitter, PayPal, and YouTube.³⁸

Media reports claim that the IRA used “trolls” (essentially, Russian individuals who posed as Americans) to weigh in on controversial issues.³⁹ These “trolls,” purportedly numbering in the thousands, worked 12-hour shifts, and were prepped regarding what

³⁰ See Schoenberg & Farrell, *supra* note 24.

³¹ See Stephanie Armour & Paul Overberg, *Russian Tweets Target ACA: Nearly 10,000 Twitter posts disparaged—or praised health law, new analysis shows*, WALL ST. J. A4 (Sept. 13, 2018).

³² *Id.*

³³ *Id.*

³⁴ See Georgia Wells & Deepa Seetharaman, *Campaign Ads to Flood Facebook*, *The Wall Street Journal* A4 (Sept. 1-2, 2018).

³⁵ *Id.*

³⁶ See Kenneth Osgood, *The C.I.A.'s Fake News*, N.Y. TIMES A19 (Oct. 14, 2017).

³⁷ See Sheera Frenkel & Katie Benner, *To Stir Discord, Russians Liked Facebook Most: Indictment Singles Out a Social Network*, N.Y. TIMES A1 (Feb. 18, 2018).

³⁸ *Id.*

³⁹ See Mike Issac, *For Social Media, an Election Day Test*, *The New York Times*, The Week in Tech B3 (Nov. 12, 2018); Anton Troianovski, *A former Russian troll speaks: “It was like being in Orwell’s World*, *The Washington Post* (Feb. 18, 2018).

to say on U.S. social media.⁴⁰ Each troll was expected to produce at least 80 comments per day and to make at least 20 shares per day.⁴¹ Trolls allegedly forwarded posts to a “countless” number of fake accounts in an effort to create large numbers of “page views.”⁴² Russia probably used bots as well. One commentator concluded that, at one point, “YouTube had as much traffic from bots masquerading as people as it did from real human visitors.”⁴³ In 2018, Google removed some 42 YouTube channels that it alleged were connected to the IRA,⁴⁴ some of which purportedly discouraged minorities from voting in the midterm elections.⁴⁵ One of the sites was “Woke Blacks” which urged African-Americans to stay home from the polls rather than support “the lesser of two devils.”⁴⁶

Given Russia’s alleged prior successes, one would have expected it to be very successful in its messaging regarding the Ukraine war.⁴⁷ At the onset of the war, Russia allegedly used a variety of tactics, including espionage, cyberattacks, and internet-based disinformation, to soften Ukraine’s defenses and groom Ukraine for the invasion.⁴⁸ This approach was similar to the approach it used when it annexed Crimea (2014) and during the Russo-Georgian War (2008).⁴⁹ For example, a Rand Corporation report concluded that Russia has used both technology and media in ways

⁴⁰ See MacFarquhar, *supra* note 21.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Michael H. Keller, *The Business of Serving Up YouTube Views: Streams Are for Sale, Eyes Not Included*, *The New York Times* A18 (Aug. 12, 2018); see also See Brian X. Chen, *The Internet Trolls Have Won. Get Used to It*, N.Y. TIMES B-7 (Aug. 9, 2018).

⁴⁴ See Brian X. Chen, *The Internet Trolls Have Won. Get Used to It*, N.Y. TIMES B-7 (Aug. 9, 2018).

⁴⁵ See Martin & Haberman, *supra* note 25.

⁴⁶ *Id.*; see also Scott Shane, *Some of the Popular Images and Themes the Russians Posted on Social Media*, *The New York Times* (Dec. 17, 2018), <https://www.nytimes.com/2018/12/17/us/russian-social-media-posts.html>

⁴⁷ See Christian Paul & Miriam Matthews, *The Russian “Firehose of Falsehood” Propaganda Model*, Rand Corporation (2016), <https://www.rand.org/pubs/perspectives/PE198.html>.

⁴⁸ Kong & Marler, *supra* note 13.

⁴⁹ *Id.*

that would have been “inconceivable during the Cold War.”⁵⁰ Its arsenal of weapons included “the Internet, social media, and the evolving landscape of professional and amateur journalism and media outlets.”⁵¹ The Rand report describes Russian messaging as “rapid, continuous and repetitive,”⁵² and claims that it was being distributed through “high numbers of channels and messages and a shameless willingness to disseminate partial truths or outright fictions.”⁵³ Allegedly, some Russian videos sought to link Ukraine more generally to Nazism, discredit specific Ukrainian leaders, or blame Europe’s energy woes and inflation on its support of Ukraine.⁵⁴

The Rand reports allege that Russia continued to use internet trolls in the Ukraine War, and they posted in “online chat rooms, discussion forums, and comments sections on news and other websites.”⁵⁵ Indeed, Radio Free Europe/Radio Liberty claimed that Russia maintained “thousands of fake accounts on Twitter, Facebook, LiveJournal, and vKontakte”⁵⁶ using internet trolls who were on duty 24 hours a day, working 12-hour shifts, and producing a daily quota of 135 posted comments of at least 200 characters.⁵⁷

In addition to using internet trolls, some claim that Russia used RT (formerly Russia Today), a multimedia news provider, to disseminate its message.⁵⁸ RT had a budget of more than \$300 million per year and was able to broadcast in multiple languages (English, French, German, Spanish, Russian, and some Eastern

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (“Russian propaganda is produced in incredibly large volumes and is broadcast or otherwise distributed via a large number of channels. This propaganda includes text, video, audio, and still imagery propagated via the Internet, social media, satellite television, and traditional radio and television broadcasting.”).

⁵³ *Id.*

⁵⁴ Loveday Morris & Will Oremus, *Russian disinformation is demonizing Ukrainian refugees*, *The Washington Post* (Dec. 8, 2022), <https://www.washingtonpost.com/technology/2022/12/08/russian-disinfo-ukrainian-refugees-germany/>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

European languages).⁵⁹ Some claim that RT has broad influence with more than a billion page views, a view level which would make it the most-watched site on the internet.⁶⁰ There are also allegations that Russia has dozens of news sites designed to disseminate Russian messaging although the Russian affiliation may be “disguised or downplayed” on some sites.⁶¹ In some instances, the Russian messaging is “picked up and rebroadcast by legitimate news outlets.”⁶² “For example, German news sources have rebroadcast Russian disinformation about atrocities in Ukraine in early 2014.”⁶³

Some commentators allege that Russian messaging makes “little or no commitment to the truth.”⁶⁴ Even though false claims sometimes contain elements of truth,⁶⁵ some of the narratives are allegedly simply untrue. For example, some commentators claim that “Russian propagandists” hire “actors to portray victims of manufactured atrocities or crimes for news reports, or to fake “on-scene news reporting.”⁶⁶ In one case, a Russian “reporter” Maria Katasonova was depicted as being on a battlefield in Donetsk, but a media report claims that she was actually in a darkened room with fake explosion sounds playing in the background” (a fact that was purportedly revealed when a light was switched on in the room during the recording).⁶⁷

The U.S. Department of State claims that Russia’s Ukraine messaging contains several different narratives,⁶⁸ all designed to portray Ukraine as the culprit in the war.⁶⁹ The first narrative portrays

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Office of the Spokesperson, U.S. Department of State, *Fact Sheet: Russia’s Top Five Persistent Disinformation Narratives* (Jan. 20, 2022) (hereafter “State Department Fact Sheet”), <https://www.state.gov/russias-top-five-persistent-disinformation-narratives/>.

⁶⁹ *Id.*: Russian military and intelligence entities are engaging in this activity across Russia’s disinformation and propaganda ecosystem, to include malign social media

Russia as “a besieged fortress surrounded by malevolent outsiders.”⁷⁰ Purportedly, “Russian government officials falsely portray Russia as a perpetual victim and its aggressive actions as a forced response to the alleged actions of the United States and our democratic allies and partners.”⁷¹ Indeed, the State Department claims that Russia tries to perpetuate the idea that “the international community’s negative reaction to its invasion of an independent country was simply because people feared and hated Russia.”⁷² The report goes on to claim that: “‘Russophobia’ persist across a range of topics and are employed whenever the Russian government wants to play the victim when it is the aggressor.”⁷³

The State Department suggests that Russia’s second narrative involves “historical revisionism.”⁷⁴ In other words, when “history does not align with the Kremlin’s political objectives,” Russia denies “historical events or distort[s] historical narratives to try to cast Russia in a more favorable light and serve its domestic and geopolitical agenda.”⁷⁵

A third narrative is the idea that “the collapse of Western civilization is imminent.”⁷⁶ Russia claims that “Western civilization is collapsing because it has departed from “traditional values.”⁷⁷ Thus, Russia’s narrative indicts Western societies for working to “ensure the safety and equality of LGBTQI+ people” and promoting “concepts such as female equality and multiculturalism.”⁷⁸ As part of this narrative, Russia tries to portray itself as “a counterweight to the

operations, the use of overt and covert online proxy media outlets, the injection of disinformation into television and radio programming, the hosting of conferences designed to influence attendees into falsely believing that Ukraine, not Russia, is at fault for heightened tensions in the region, and the leveraging of cyber operations to deface media outlets and conduct hack and release operations.

⁷⁰ See Paul & Matthews, *supra* note 48 (quoting book author Edward Lucas).

⁷¹ State Department Fact Sheet, *supra* note 69.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

‘decadence’ of the United States and Western countries.”⁷⁹ “For example, President Putin has claimed that the West has practically canceled the concepts of ‘mother’ and ‘father,’ and instead has replaced them with ‘parent 1 and 2,’ while Foreign Minister Lavrov purportedly wrote that Western students ‘learn at school that Jesus Christ was bisexual.’”⁸⁰

The State Department claims that the fourth narrative is the idea that the United States sponsors popular anti-government movements within Russia.⁸¹ In other words, when a popular movement is pro-democracy or pro-reform, but is not necessarily in Russia’s geopolitical interests, “the Kremlin will often attack its legitimacy and claim that the United States is secretly behind it.”⁸² As part of this effort, Russia attacks “local and international civil society organizations, as well as independent media that expose human rights abuses and corruption.”⁸³

The U.S. Department of State claims that Russia creates “false realities” and tries to create confusion when the “truth is not in its interests,”⁸⁴ and it asserts that the recipients do not always recognize that the information is false.⁸⁵ The State Department claims that falsehoods are more likely to be accepted “when the disinformation is consistent with narratives or preconceptions held by various audiences.”⁸⁶ Moreover, “Russian faux-news propaganda channels, such as RT and Sputnik, . . . look like news programs, and the persons appearing on them are represented as journalists and experts,” making listeners “more likely to ascribe credibility to the misinformation these sources are disseminating.”⁸⁷

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Paul & Matthews, *supra* note 48.

⁸⁷ *Id.*

II. THE EFFECTIVENESS OF RUSSIAN MESSAGING

Despite the sophistication of Russia's propaganda campaign, many commentators believe that Russia has not been as successful in pushing its narratives regarding the Ukrainian invasion as it was in its pre-war messaging,⁸⁸ and indeed that Ukraine has outmaneuvered Russia.⁸⁹ Despite Russia's messaging, the international community has expressed overwhelming support for Ukraine and has imposed unprecedented economic sanctions on Russia.⁹⁰ In addition, many major companies have severed their ties with Russia, and humanitarian organizations have contributed large amounts to Ukrainian relief.⁹¹ Additionally, "Sprawling sanctions from Western governments have sought to isolate the Russian economy and punish the regime."⁹² Some corporations have gone further still, suspending business in ways that go far beyond what the law requires or what governments intended.⁹³

Russia's messaging has also been less effective because Ukrainian President Volodymyr Zelenskyy is regarded as "social-media savvy" and he does "daily video addresses which have become viral sensations and have helped rally support for his embattled nation."⁹⁴ One commentator suggested that Zelenskyy has "demonstrated a deft ability to pivot and improvise as the circumstances of the crisis shift," and he is viewed as "communicating brilliantly with his own people and citizens across the world."⁹⁵ As a result he has purportedly been "inspiring to millions."⁹⁶

There are various other reasons why Russia's messaging

⁸⁸ See Dettmer, *supra* note 16.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Albert Fox Cahn, *Tech Bans Hurt Russian Dissidents More Than They Help Ukraine*, Wired (Apr. 11, 2022), <https://www.wired.com/story/tech-bans-hurt-russian-dissidents-more-than-they-help-ukraine/>.

⁹³ *Id.*

⁹⁴ Dettmer, *supra* note 16.

⁹⁵ *Id.*

⁹⁶ *Id.*

might not have been as effective during the Ukraine War. First, there is a large international press corps in Ukraine, which constantly reports about the events there. Second, Ukrainians have used their cell phones to document the war, depicting bombardments and the destructive consequences of the Russian invasion.⁹⁷ Third, both Facebook and Twitter have removed Russian and Belarusian disinformation from their platforms and dismantled networks designed to manipulate algorithms and bolster pro-Russian narratives.⁹⁸ Fourth, “Russia’s disinformation campaign has been severely hampered by the European Union’s ban on Russian state-controlled media outlets RT and Sputnik broadcasting to the 27-nation bloc.”⁹⁹ The EU’s top diplomat Josep Borrell told EU lawmakers after the ban was announced: “They are not independent media, they are assets, they are weapons, in the Kremlin’s manipulation ecosystem.”¹⁰⁰ He added: “We are not trying to decide what is true and what is false. We don’t have ministers of the Truth. But we have to focus on foreign actors who intentionally, in a coordinated manner, try to manipulate our information environment.”¹⁰¹

Another important factor is that Ukraine has been quite successful in promoting its narratives.¹⁰² Indeed, some commentators claim that Ukraine has outmaneuvered Russia on the social media front.¹⁰³ For one thing, Ukraine “prebunked” Russia’s alleged justifications for invading Ukraine,¹⁰⁴ and it “managed to boost domestic morale with social media campaigns that exposed Russian war atrocities, rallied international support, and even helped crowdfund for defensive armaments.”¹⁰⁵

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Singer, *supra* note 14 (“Yet, when it came time for one of Putin’s most ambitious and important operations of all, the invasion of Ukraine, Russia failed at the information side of the fight as much as it failed at its plan for a quick seizure of Kyiv. And the stakes could not have been higher.”).

¹⁰³ Kong & Marler, *supra* note 13.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

Ukraine's messaging seems to have several different components. First, rather than simply responding to Russian narratives, Ukraine has attempted to refute Russian messages even before they are delivered (prebunking).¹⁰⁶ Second, Ukraine has gone to great lengths to highlight the heroism of its soldiers and people.¹⁰⁷ It has mythologized Ukrainian martyrs, portrayed Volodomor Zelensky as a "man of the people," amplified civilian harm, magnified civilian resistance, and humanized the Ukrainian story.¹⁰⁸

In some instances, Ukraine has been able to push its narratives more quickly or effectively than Russia has been able to promote its narratives.¹⁰⁹ Indeed, Ukraine frequently offers rapid responses to Russian narratives.¹¹⁰ As a result, one commentator believes that: "Ukraine isn't just winning the battle for hearts and minds online, it has already won."¹¹¹

In some cases, Russian narratives have been challenged with scientific data. For example, after Russia purportedly fired shells at a maternity hospital in Mariupol, killing and injuring people, Russia contended that the hospital had previously been converted into a military base, indicating that it was a legitimate target.¹¹² Some commentators alleged that Russia aggressively supported this narrative through information disseminated by "Kremlin-controlled troll factories" as well as by Russian embassies.¹¹³ However, the narrative was purportedly undercut when a photograph posted by Russian embassies was geolocated as being ten kilometers from the maternity hospital.¹¹⁴ "RT, the Kremlin-controlled television channel, disputed the geolocation data."¹¹⁵

The German public television network, ZDF, alleged that

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Dettmer, *supra* note 16.

¹¹⁰ *Id.*

¹¹¹ Singer, *supra* note 15.

¹¹² Dettmer, *supra* note 16.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Russia disseminated several fake news videos.¹¹⁶ Meta purportedly “identified dozens of fake news sites and examples of disinformation targeting European audiences, primarily in Germany, and attributed the campaign to Russian origins.”¹¹⁷ Meta took down all the fake sites that it could find.¹¹⁸ As content moderation has increased on the major U.S.-based social platforms, propagandists and extremists have found new outlets.¹¹⁹ These include Telegram, the stateless messaging app that has become a leading communications channel in much of Eastern Europe, including Russia and Ukraine.¹²⁰

Even though the Russian narrative may not have been as successful as Russian leaders might have wished, some commentators argue that Russian disinformation is having some impact in Western countries. For example, some commentators contend that Russia has tried to undercut European support for Ukrainian refugees who have swarmed (7.8 million) into Western Europe.¹²¹ These commentators contend that Russia has tried to create fear and division within Western European populations, and argue that these Russian efforts have had a measure of success.¹²² For example, one commentator alleges that Russia has fostered a strong anti-Ukrainian refugee message through “a sprawling, coordinated, Russia-based network of fake news websites, Telegram channels, YouTube and Instagram channels, and even Change.org petitions.”¹²³ This message has allegedly been “amplified by armies of fake social media accounts, real pro-Kremlin influencers, and Russian state media accounts across virtually every major social platform.”¹²⁴ For example, of 219 videos posted in *Deutsche Wahrheit* in a four-month period, 40 percent mentioned Ukrainian refugees.¹²⁵ The posts, many of which feature faked or doctored videos that are designed to look

¹¹⁶ Morris & Oremus, *supra* note 55.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

like mainstream media reports, implicate Ukrainian refugees in everything from plotting terrorist attacks to bringing monkeypox to Germany.¹²⁶ One commentator argues that a fake news clip shows Ukrainian refugees burning down their German hosts' house.¹²⁷

Thus, while most Europeans welcome Ukrainian refugees, one poll suggests that European support for accepting Ukrainians has slipped from 86 percent approval to 74 percent.¹²⁸ In addition, there has been anti-refugee pushback in Belarus and Poland which some ascribe to the propaganda.¹²⁹ As a result, a "bad vibe" toward refugees has been created in some countries.¹³⁰ For example, a German politician accused Ukrainian refugees of "social tourism" in the sense that they were taking advantage of Germany's welfare system while going back and forth to Ukraine.¹³¹ In Germany, where more than 1 million Ukrainians have fled, some immigrants have been subjected to arson attacks and threatening graffiti on their accommodations and schools.¹³² In many cases, Russia purportedly disseminated its messages via the messaging app Telegram, which does far less content moderation than established giants such as Meta's Facebook and Google's YouTube.¹³³

III. RUSSIA'S INTERNAL MESSAGING

Several commentators have suggested that Russia has specifically tried to control public opinion within its borders. These commentators claim that, while Russia has tried to exploit the openness of Western liberal democracies, it has relied on the closed nature of its society as a way of defending against challenges.¹³⁴ Thus, there are allegations that Russia has embarked on a massive misinformation campaign within its own country to spread fiction

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Kong & Marler, *supra* note 13.

about Neo-Nazis in Ukraine and aggressions by the Ukrainian government (and China is lending a hand by repeating Russian propaganda through its state media and Foreign Ministry).¹³⁵ Thus, the war is portrayed as a “preemptive blow,” “an unavoidable measure,” or a form of “defense against [the North Atlantic Treaty Organization (NATO)].”¹³⁶ Russia’s information campaign claims that the West is allied against it, and that, in Ukraine, Russia is taking on the combined might of America, Britain, the EU, and NATO. You name it, Russia’s fighting it. In other words, setbacks on the battlefield are not the Kremlin’s fault, but the handiwork of external enemies.¹³⁷

Russia’s internal propaganda seems to have had some success in that a majority of Russians support the actions of the Russian Armed Forces in Ukraine.¹³⁸ “In June 2022, 47 percent of Russians “definitely supported” the actions of the Russian military, while another 28 percent said they ‘mostly supported’ them.”¹³⁹ Nevertheless, there are signs of disagreement within Russia. One commentator alleges that “old friends have fallen out; parents and children are no longer on speaking terms; long-married couples no longer trust each another; and teachers and students are denouncing each other.”¹⁴⁰ Thus, there appears to be “growing conflict within Russian society.”¹⁴¹

In addition to disseminating its own narrative, Russia has tried to control and stifle internal dissent regarding the war. Russia has purportedly taken a number of different actions, including

¹³⁵ Robert C. Thornett, *Open and Closed: From Russia to China to America, the Largest Societies Are Pushing Their Limits*, *moderndiplomacy* (May 28, 2022), <https://moderndiplomacy.eu/2022/05/28/open-and-closed-from-russia-to-china-to-america-the-largest-societies-are-pushing-their-limits/>.

¹³⁶ Dennis Volkov & Andrei Kolesnikov, *My Country, Right or Wrong: Russian Public Opinion on Ukraine* (Sept. 7, 2022), <https://carnegieendowment.org/2022/09/07/my-country-right-or-wrong-russian-public-opinion-on-ukraine-pub-87803>.

¹³⁷ Steve Rosenberg, *Putin Can’t Escape Fallout from Russian Retreat in Ukraine*, British Broadcasting Corp. (Nov. 11, 2022), <https://www.bbc.com/news/world-europe-63601426>.

¹³⁸ Volkov & Kolenikov, *supra* note 137.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

restricting more than 1,000 internet sites since the beginning of the war, including Facebook, Instagram, and BBC News.¹⁴² In addition, Russia has criminalized dissent, including the spreading of so-called “fake news” within the country.”¹⁴³ Dissemination of disinformation is punishable by 15 years in jail, or a fine of 1.5 million rubles (roughly \$11,500).¹⁴⁴ A British lecturer claimed that Putin’s objective was to scare the population into submission.¹⁴⁵ A number of dissenters have been arrested,¹⁴⁶ and others have purportedly been detained, judicially harassed, raided, and subjected to smear campaigns.¹⁴⁷ For example, a prominent Russian opposition figure was sentenced to 8 ½ years in prison after being convicted on charges stemming from his criticism of the Kremlin’s action in Ukraine.¹⁴⁸ In addition, criminal cases were opened against two journalists for their reporting on alleged attacks against civilians in Ukraine.¹⁴⁹ Russian authorities also filed similar charges against at least three other people who were not journalists.¹⁵⁰

Essentially, Russia seems to have warned its people not to criticize the Russian army or Russia's president for the difficulties in Ukraine. The message is “do your duty and rally around the flag.”¹⁵¹ The government has also denounced protestors, labeling them as

¹⁴² *VPN Use Skyrockets in Russia During Ukraine Invasion*, Aljazeera (May 7, 2022), <https://www.aljazeera.com/news/2022/5/7/vpn-use-skyrockets-in-russia-during-ukraine-invasion>

¹⁴³ Chris Stokel-Walker, *How Russians are Dealing with an Internet That’s Gone Dark*, *Time* (Mar. 10, 2022) <https://time.com/6156639/russia-internet-dissent/>

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (quoting a woman who claimed that “she was arrested earlier this month (along with more than 13,000 others) and bussed to a police station where she was held in a cramped cell.”).

¹⁴⁷ *Russia: Arrests, Harassment of Ukraine War Dissidents*, Human Rights Watch (March 24, 2022) (hereafter “Human Rights Watch”), <https://www.hrw.org/news/2022/03/24/russia-arrests-harassment-ukraine-war-dissidents#>.

¹⁴⁸ *Russian politician sentenced for Ukraine action criticism*, AP News (Dec. 9, 2022), <https://apnews.com/article/putin-moscow-ukraine-government-ilya-yashin-russia-2967e1e91816f74eaab8cb7cd661eec6>.

¹⁴⁹ *Human Rights Watch*, *supra* note 148.

¹⁵⁰ *Id.*

¹⁵¹ Rosenberg, *supra* note 138.

“national traitors.”¹⁵² Indeed, Europe and Central Asia’s Director of Human Rights Watch claims that the Russian government regards independent journalists “as traitors and treats them as a threat to the state.”¹⁵³ and argues that “unidentified assailants . . . physically attacked activists and damaged human rights organizations’ offices.”¹⁵⁴ In March 2022, Russia’s criminal investigation service, established interagency rapid response groups to deal with “extremist and terrorist activities, unsanctioned protests and provocations,” and other “destabilizing” activities.¹⁵⁵ Human Rights Watch claims that Russian authorities have “detained activists across the country and raided their homes, apparently in response to their participation in the peaceful anti-war movement.”¹⁵⁶ In addition, some claim that Russian police regularly detain independent journalists reporting on anti-war protests, and have allegedly gone to their homes to harass and threaten journalists not to take part in protests.¹⁵⁷

The net effect is that the War has allegedly turned Russians against each other.¹⁵⁸ Individual protestors have reportedly been attacked by Russian individuals: “[U]nidentified assailants [have] physically attacked activists and damaged human rights organizations’ offices.”¹⁵⁹ Human Rights Watch claims that activists and journalists have reported that anonymous vandals painted the letter “Z,” a symbol of the Russian armed forces in Ukraine, on the doors of their apartments as well as the warning “Don’t betray your motherland” and the slur “A traitor lives here.”¹⁶⁰ Human Rights Watch also claims that a coordinator for Vesna (Spring), which openly speaks out against the war, was attacked and kicked in the face in Moscow.¹⁶¹ “Russian celebrities who spoke out against the

¹⁵² *Human Rights Watch, supra* note 148.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See Andy Hayward & Alec Luhn, *Russians Are Snitching On Friends and Family Who Oppose the War in Ukraine*, VICE (Aug. 8, 2022).

<https://www.vice.com/en/article/xgyyed/russians-snitching-on-russians-ukraine>

¹⁵⁹ *Human Rights Watch, supra* note 148.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

invasion suddenly found their TV shows had vanished from state channel listings.”¹⁶² Some claim that, even Russians who live in other countries are afraid to speak out fearing retaliation against their loved ones who still live in Russia.¹⁶³

Because of the increasing lack of tolerance for political dissent, some claim that Russian citizens are afraid to express dissenting opinions regarding the war.¹⁶⁴ As one commentator observed, “It is frightening, especially if your whole life, property, family connections, work and everything is in Russia.”¹⁶⁵ Some claim that even the conduct of Russian social influencers, who make their living off social media platforms has been affected. For example, influencer Niki Proshin deleted “any videos that could potentially be caught up in Putin’s dragnet,” including videos from protests in Saint Petersburg.”¹⁶⁶ He did so because he was unsure regarding how Russian authorities might view the posts.¹⁶⁷ Commentators claim that big tech platforms like TikTok have ceased operations in the country because of the new law, while others like Instagram have added labels to Russian state-sponsored content and begun demoting its distribution within the app.¹⁶⁸

Despite the threat of sanctions, in the weeks following the beginning of the Ukrainian war, hundreds of thousands of Russians protested against the war and expressed their discontent with the invasion.¹⁶⁹ Human Rights Watch claims that thousands of these protestors were detained.¹⁷⁰ In addition to the protests, an employee of Russian state-run Channel One interrupted a live broadcast of a nightly news program shouting “Stop the war! No to war!” News staffer Marina Ovsyannikova, whose father is Ukrainian, held up a placard in Russian, saying, “Don’t believe the propaganda. They’re

¹⁶² Stokel-Walker, *supra* note 144.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See Human Rights Watch, *supra* note 148.

¹⁷⁰ *Id.*

lying to you here.” Studio producers rushed to cut her off.¹⁷¹ In addition, some websites and apps have continued to function. Clubhouse, which functions in Ukrainian, Russian, and English, “gives updates on the invasion, discusses the ramifications for the world, and acts as an under-the-radar place to vent for Russians opposed to the war as they speak to the rest of the world about their disgust.”¹⁷² Dissent has also been posted to Telegram, where Russian dissidents and opponents of Vladimir Putin have gravitated.¹⁷³ Indeed, Telegram’s CEO assured, “users that he wouldn’t submit to Russian government demands to breach users’ privacy by handing over their personal details.”¹⁷⁴ The same cannot be said of pro-war Russian military bloggers. They’ve been busy writing angry messages about the retreat.¹⁷⁵

Several factors have undercut Russia’s efforts to control the flow of information to its people. Russians who emigrated to other countries can inform Russians who have not emigrated regarding the facts and can undercut governmental propaganda.¹⁷⁶ In addition, some Russians have tried to avoid retaliation by installing VPN (virtual private networks) software on their computers.¹⁷⁷ VPNs, which allow users to hide their identities and locations, have been downloaded by Russians at the rate of hundreds of downloads per day.¹⁷⁸ VPN use accelerated after Russia began asserting greater control over media outlets, forcing them to “tow the official line” regarding the war.¹⁷⁹ Daily downloads in Russia of the ten most popular VPNs surged from about 15,000 before the war to 475,000 in March, and continued at a rate of nearly 300,000 a day in April.¹⁸⁰ Indeed, one report suggests that interest in VPNs within Russia has

¹⁷¹ Dettmer, *supra* note 16.

¹⁷² Stokel-Walker, *supra* note 144.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Rosenberg, *supra* note 138.

¹⁷⁶ Thornett, *supra* note 136.

¹⁷⁷ Aljazeera, *supra* note 143; Stokel-Walker, *supra* note 144.

¹⁷⁸ Thornett, *supra* note 136.

¹⁷⁹ Aljazeera, *supra* note 143.

¹⁸⁰ *Id.*

soared nearly 1,000 percent.¹⁸¹

VPNs are not a foolproof solution for Russian dissidents because it is still possible for Russian officials to track down individuals who use VPNs,¹⁸² and therefore Russians who use VPNs may be at risk.¹⁸³ Indeed, some worry that “VPNs may have backdoor access for Russian authorities” and that “Russia may have advanced techniques for examining how internet traffic flows through a VPN, which could put users at risk.”¹⁸⁴ In addition, some Russians find it challenging to access VPNs as Google has suspended all ad sales and Play Store billing, Visa and MasterCard have shut down international transactions for Russian account holders, and consumer brands ranging from Coke to McDonald’s to Starbucks have been closing up shop in Russia.¹⁸⁵ In addition, Russia has purportedly blocked several VPN services.¹⁸⁶

An interesting aspect of Russia’s crackdown is that pro-Russian bloggers have begun attacking Putin for his failures on the battlefield.¹⁸⁷ At the outset of the war, those bloggers purportedly cheered Russia’s battlefield successes and pushed narratives consistent with Russia’s messaging.¹⁸⁸ However, as Russia began to suffer battlefield defeats, the bloggers purportedly turned on Putin for his failures.¹⁸⁹ One blogger attacked Putin for celebrating City Day (which celebrates the founding of Moscow) despite the losses in Ukraine where Russian soldiers were doing without: “NO thermal imagers, NO bulletproof vests, NO reconnaissance equipment, NO secure communications, NO enough copters, NO first aid kits.”¹⁹⁰ Another pro-Russia blogger purportedly lamented that Russian losses

¹⁸¹ Stokel-Walker, *supra* note 144.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Cahn, *supra* note 93.

¹⁸⁶ *Id.*

¹⁸⁷ See Aljazeera, *supra* note 143; Andrew Stanton, *Putin Faces Backlash from Russian Bloggers Amid Retreat: ‘Horrible Failure,’ Newsweek* (Sept. 11, 2022), <https://www.newsweek.com/putin-faces-backlash-russian-bloggers-amid-retreat-horrible-failure-1741872>

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

were "large" and "cannot be ignored."¹⁹¹ One blog purportedly criticized the defense ministry for its "deathly silence."¹⁹²

IV. CONCLUSION

The Ukraine War is being fought in a modern communications environment where the combatants have access to the internet and social media to push their narratives and propaganda. In the decade or so before the Ukraine War, Russia had become quite adept at pushing its messages on the internet, and some claim that its messaging was so potent that it affected the outcome of the 2016 U.S. presidential election. Russia had purportedly used "internet trolls" who worked for the Internet Research Agency (IRA) to push its message on social media.¹⁹³ These trolls, purportedly numbering in the thousands, worked 12-hour shifts, and were expected to have a large and continuous impact on social media.¹⁹⁴ Trolls allegedly created posts that they forwarded to "countless" numbers of fake accounts to create large numbers of "page views."¹⁹⁵

Given Russia's propaganda successes in the decade leading up to the Ukraine War, commentators expected Russia to have messaging success during the War. That has not turned out to be the case. Ukraine has been quite effective in its counter-messaging, and Ukraine's President has been highly successful in refuting Russia's narrative. In addition, Russian messaging has been undercut by the presence of a large international press corps., and social media posts by Ukrainians. The net effect is that Russian messaging has been less effective than in the prior decade and has generally failed to produce the desired effect.

Messaging during the Ukrainian War has also highlighted the role of Russian dissidents and their use of the internet to counter Russian messaging. In general, Russian support for the war remains high. However, there is evidence that dissidents have undercut Russia's messaging. In some cases, those dissidents use VPNs to hide

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See MacFarquhar, *supra* note 21.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

their identities. In other instances, pro-Russian bloggers, dissatisfied with Russian setbacks in the War, have attacked Putin and the Russian military for their handling of the war. Of course, the ability of individuals to comment on the War through social media is another unique aspect of the conflict.

MEDIA COVERAGE AND STATE PROPAGANDA IN ARMED CONFLICTS: AN INTERNATIONAL LAW PERSPECTIVE AT THE ARMENIA-AZERBAIJAN “PROPAGANDA WAR”

Ines Gillich*

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I. INTRODUCTION: PROPAGANDA IN MULTI-DIMENSIONAL WARFARE

In the shadow of armed conflict, another, usually subliminal, conflict occurs. Instead of being fought with arms, this conflict takes on words and pictures. Warring parties have

employed control over media coverage and the flow of information to achieve various goals: To keep their citizens' spirits high, to vilify the enemy, to demoralize enemy morale, and to influence public opinion. With the emergence of professional armies in the 19th century, new methods and weapons of warfare, and the accumulation of capital and economic support, often by third states, armed conflicts can be fought on a large scale and for long periods. Thus, warfare has become multi-dimensional. It combines military, political, economic, and psychological pressure, mostly through propaganda¹ directed at the enemy. It is not surprising that by the 1930s, propaganda was being used by most of the states that became a party to World War II and has continued to play a role during the Cold War and beyond. However, propaganda has become a formidable weapon against the enemy and a tool for promoting a national war effort and maintaining unity and goodwill among allies. For example, pictures showing the victim's use of chemical weapons during the Syrian armed conflict in 2015² have contributed to the willingness of the United States, the United Kingdom, and France to execute air strikes against the Syrian army. The mass killing of civilians in the Ukrainian city of Bucha in March 2022 motivated Western States to implement economic sanctions against the Russian Federation and Russian citizens in addition to the sanctions already in force.

For these reasons, it is clear that the parties to an armed conflict have a vital interest in controlling and censoring media coverage of armed conflicts as well as actively spreading their

* Dr. Ines Gillich, LL.M. (UCLA) is Associate Professor of Public Law, European Law and Public International Law, University of Cologne. This Article is based on a presentation held at Southwestern Law School, Los Angeles on Feb. 4, 2023.

¹ Note that there is no uniform definition of propaganda. In this article, the term propaganda is used according to a common definition to describe a method of communication, by State organs or individuals, aimed at influencing and manipulating the behavior of people in a predefined way. Thus, it is the element of influence and manipulation that is at the center of the concept. And it is used broadly, covering all forms of communications - fake news, disinformation, propaganda. See Eric De Brabandere, *Propaganda*, OXFORD INT'L LAW (2019), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e978?rskey=9tlgw9&result=1&prd=MPIL>.

² *Report of the OPCW-Fact Finding Mission in Syria Regarding the Incidents of the Alleged use of Chemicals as a Weapon in Marea, Syrian Arab Republic*, ORG. FOR THE PROHIBITION OF CHEM, WEAPONS, 1-3 (2015), www.opcw.org/sites/default/files/documents/2022/01/s-2017-2022%2B%28e%29.pdf.

views of the events, which can be incomplete and misleading. “In war, truth is the first casualty,” coined by the Greek dramatist Aeschylus in the fifth century B.C. around 550 BC., has become an often quoted expression.

A prominent scene of a fiery media and propaganda battle in the shadow of an international armed conflict unfolded between the Republic of Armenia and the Republic of Azerbaijan over the territory of Artsakh (Nagorno-Karabakh). In the 20th century, this conflict took place over many decades under the shield of the Union of Soviet Socialist Republics (USSR), with Armenia and Azerbaijan being Soviet Socialist Republics, i.e. administrative units within the USSR, and Nagorno-Karabakh being an autonomous Oblast within Azerbaijan during Soviet times. Armenia declared independence on 21 September 1991 and Azerbaijan on 18 October 1991. Amid the gradual dissolution of the Soviet Union in 1988–89, longstanding and wide-ranging tensions between Armenians and Azerbaijanis exploded, and competing claims over that region resulted in hostilities that ended with a ceasefire in May 1994. Further hostilities erupted in September 2020 and lasted 44 days. On November 9, 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia, and the President of the Russian Federation signed a statement referred to by the Parties as the “Trilateral Statement”. Under the terms of this statement, “[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared” as of 10 November 2020. The main legal argument from the Azerbaijani side centers around historically and territorially founded claims to Artsakh, whereas the Armenian narrative points to the right to self-determination of the people of Artsakh. While the armed conflict over Artsakh gives rise to a host of questions of international law, such as the legality of the use of force and violations of international humanitarian and criminal law, to name just a few sub-fields. this article focuses on the legality of the "Propaganda War" from an international law perspective.

Following a brief description of the role of traditional and social media platforms in the outlining of the conflict and the measures of information warfare that the warring parties have taken, this article will follow a public international law perspective on the legality of media coverage and state propaganda in armed conflicts. For these purposes, this article will revisit the relevant rules of international law, including international treaties and

customary rules governing free speech, the right to freedom of information, the legality of state propaganda, and the protection of media workers during wartime. In particular, the following analysis will answer a series of questions: Does international law offer protection against misinformation, propaganda, and media repression? What are the legal rules regarding the treatment of foreign journalists and foreign press institutions? And how can these standards be applied with respect to the Armenia-Azerbaijan “Propaganda War” and other post-soviet-era conflict zones? The central argument is that rules of international law are binding for the parties to a conflict and must be obeyed even in a state of war. The bodies of law relevant to answer these questions are general International Law, particularly the principle of non-intervention, International Humanitarian Law as *lex specialist* applicable in an armed conflict, and International Human Rights Law. It will explore possible remedies against the backdrop of fake news and disinformation and conclude with lessons learned.

II. THE ARMENIAN-AZERBAIJAN “PROPAGANDA WAR”

Both traditional and social media are not immune to manipulation and the spread of propaganda. In the Armenian-Azerbaijan “Propaganda War,” the stark contrast between news coverage by international or global media on one hand and local and regional media on the other becomes particularly obvious. A geopolitical narrative is dominant in the international media coverage about the Artsakh conflict, according to which Armenia and Azerbaijan appear as pieces in a larger geostrategic game, torn between regional powers, the Russian Federation on one side and the Republic of Türkiye on the other, who are perceived as pursuing their own geo-strategic goals through the conflict.

This section focuses on media coverage on a local and regional level as well as the measures undertaken by the warring parties. It will demonstrate that the local media outlets and social media content surrounding the Armenian-Azerbaijan conflict is particularly susceptible to propaganda and, therefore, can be a barrier on the road to soothing the armed conflict and contributing to a peaceful solution.

A. DISINFORMATION AND MEDIA PRACTICES DURING THE KARABAKH-WAR

1. *Traditional media*

Information warfare has always been an important part of the Nagorno-Karabakh conflict. This is the main message of a report published by the Service for Foreign Policy Instruments (FPI), a department (Directorate-General) of the European Commission in 2020. The report also analyzed the role of social media platforms and trends in media consumption and the use of social networks over the course of the conflict to determine their influence on shaping the opinions of Armenian and Azerbaijani society on the conflict.³ The report concluded that, while media coverage of the conflict during the First Karabakh War was mediated by a small number of Armenian and Azerbaijani journalists who maintained contacts and networks with each other, the situation in the Second Karabakh War changed dramatically. Traditional media outlets played a significantly greater role in mediating news about the conflict during the First Karabakh War in the 1990s. In the Second Karabakh War, starting in 2020, official authorities spread disinformation and bypassed traditional media outlets. The result was a reinforcement of enemy images and increased polarization between Armenian and Azerbaijani societies, even among previously moderate persons since the 1990s.⁴ The report further states that most Armenian and Azerbaijani-language media reduced their war coverage to the information their respective country's Ministry of Defense provided. There had been little difference between state, independent, or Russian-funded media. War coverage was rather one-sided, uncritically replicating official statements, and lacked pro-peace messages, calls for dialogue, or critical self-reflection.⁵

2. *Social Media*

In addition, it can also be observed that both Armenia and Azerbaijan have launched large-scale campaigns in legacy media

³ *ERMES III—Event Report Media and Disinformation in the Nagorno-Karabakh Conflict*, COLL. OF EUR. (Jan, 2021), [https://www2.coleurope.eu/system/tdf/uploads/news/event_report_-_media_and_disinformation_in_the_nagorno-karabakh_conflict.pdf?&file=1&type=node&id=draft&force=.](https://www2.coleurope.eu/system/tdf/uploads/news/event_report_-_media_and_disinformation_in_the_nagorno-karabakh_conflict.pdf?&file=1&type=node&id=draft&force=)

⁴ *Id.* at 4.

⁵ *Id.* at 9.

and on social media platforms, using these platforms as narrative-generating tools to promote their own policy agenda. They marshaled celebrities, such as musicians, social media influencers, and others, to draw attention to their cause. While Armenian and Azerbaijan soldiers fought over Nagorno-Karabakh, their citizens battled on social media. Some observe that the legacy media has lost power and influence to social media. It is reported that digital media platforms and social networks reinforced enemy images over the course of the Second Karabakh War and furthered the already extreme polarization between Armenian and Azerbaijani societies, which confirmed existing beliefs and prejudices.⁶ In this respect, the rise of social media has helped to poison historical accounts and templates already established in the Soviet period to reach much wider audiences through new media technology and platforms. Journalists have complained that social networks fragment the media environment. One observer noted: “In terms of information sharing, our society is like an archipelago. It is broken up into islands that communicate inside themselves and with those nearest to them, but never with other islands.”⁷ Another expert noted: “In Karabakh, I realized that the minds of ordinary people were in confusion. The information they got from Facebook was mixed with information from TV stations and their own perceptions. As a result, they could believe at the same time that we are so strong that we can take Baku and that the authorities of Armenia have sold Karabakh for 2 billion dollars.”⁸ As the conflict progressed, the fiery atmosphere on social networks incited even moderate voices on both sides to take up radical pro-war positions.⁹

⁶ Elise Thomas & Albert Zhang, *Snapshot of a Shadow War in the Azerbaijan-Armenia Conflict*, AUSTL. STRATEGIC POL’Y INST. (Oct. 9 2020), <https://www.aspistrategist.org.au/snapshot-of-a-shadow-war-in-the-azerbaijan-armenia-conflict/>.

⁷ Nina Iskandaryan & Hrant Mikaelian, *Media Coverage of the Nagorno-Karabakh conflict in Armenia and Nagorno-Karabakh*, CAUCASUS INST. POL’Y BRIEF 1, 1 (Mar. 2018), https://c-i.am/wp-content/uploads/Policy-brief-media_en_final-1.pdf.

⁸ *Id.* at 1-2.

⁹ Katy Pearce, *While Armenia and Azerbaijan Fought Over Nagorno-Karabakh, Their Citizens Battled on Social Media*, WASH. POST (Dec. 4, 2020 at 7:45 AM), <https://www.washingtonpost.com/politics/2020/12/04/while-armenia-azerbaijan-fought-over-nagorno-karabakh-their-citizens-battled-social-media>.

Social media, on one hand, helped to spread old narratives and, on the other, promoted new, exceedingly simplistic narratives.¹⁰ In addition, conspiracy theories and false sensationalist claims spread by actors seeking to disrupt an alleged peace process also spread across social media like wildfire, aided by the reposting by public intellectuals and well-known journalists. Particularly, young people were targeted via short, easily digestible, and effective content, such as memes and short videos, through applications such as Twitter, Instagram, TikTok, and Telegram. They were called to action (e.g., to attend a protest, donate funds, or sign a petition), an effective tactic widely used by marketers to activate individuals and make them feel part of a movement. Political leaders on both sides have wised up to these formats, regularly communicating directly with the public via Facebook Live streaming or increasing communication via Twitter. Through these strategies, heightened and accelerated at times of violent conflict, political leaders in Armenia and Azerbaijan were able to emulate wider global trends of bypassing traditional media. Regime-friendly disinformation and narratives can spread through the population much faster than critical investigative reporting, opinion pieces, or expert analysis, thereby depriving media of its traditional role of mediating and, in some cases, regulating information.

3. Limitations to Freedom of Speech under Martial Law of Armenia and Azerbaijan

At the outbreak of the Second Karabakh War, the Republic of Armenia and the Republic of Azerbaijan enacted martial law, permitting restrictions on media freedom. A temporary government decree issued in Armenia prohibited the publication of reports criticizing or questioning the effectiveness of state actions concerning the conflict, leading to the forced takedown of hundreds of articles and fines being imposed upon news outlets.¹¹ Authorities also blocked websites with Azerbaijani and Turkish

¹⁰ See *ERMES III—Event report media and disinformation in the Nagorno-Karabakh conflict*, *supra* note 3, at 9.

¹¹ 2021 Country Reports on Human Rights Practices: Armenia, U.S. DEP'T OF STATE, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/armenia/>.

domain names and the social media app TikTok.¹² Armenian martial law allows authorities to confiscate media outlet equipment and to establish special procedures for journalists' accreditation.¹³

Azerbaijan's parliament also introduced martial law. Internet restrictions and censorship have since increased. Social media platforms, such as Twitter and Facebook, as well as opposition and independent news websites, are blocked. In February 2022, President Aliyev signed a new media law compelling online media outlets to obtain government permission before publishing news articles.¹⁴ In addition to the restriction of speech, observers note that reporting on the Nagorno-Karabakh war is becoming increasingly dangerous for reporters. Even reporters wearing bullet-proof vests clearly marked with the word "Press" were allegedly targeted.¹⁵

In conclusion, in the Artsakh conflict, we can observe the entire range of propaganda, disinformation, and fake news, in addition to governmental restrictions on media freedom.

III. PROPAGANDA UNDER PUBLIC INTERNATIONAL LAW

This section will examine the regulation of propaganda under public international law. The questions are: Are there any legally binding principles governing the speech of states, such as propaganda, disinformation, or fake news? What exactly do these rules prescribe? How do they set limits to the states' conduct in their international relations?

A. STATE RESPONSIBILITY AND RULES OF ATTRIBUTION

Public International Law is the body of law that governs the relations between sovereign states by establishing certain rights

¹² Anahit Hakobyan, *Armenian Digital Communications in Karabakh War of 2020: Critical Discourse Analysis*, Vol. 12 No. 1 J. OF SOCIO. 1, 35 (2021).

¹³ ՕՐԵՆՔԸ ՌԱԶՄԱԿԱՆ ԴՐՈՒԹՅԱՆ ԻՐԱՎԱԿԱՆ ՌԵԺԻՄԻ ՄԱՍԻՆ [Law on the Legal Regime of Martial Law], Republic of Arm., No. ՀՕ-42-Ն (Dec. 5, 2006), <https://www.arlis.am/documentview.aspx?docid=67147>.

¹⁴ Fresh media reforms raise concern [updated], Azerbaijan Internet Watch, January 14, 2021, <https://www.az-netwatch.org/news/fresh-media-reforms-raise-concern/>

¹⁵ REPORTERS WITHOUT BORDERS, *Covering Nagorno-Karabakh War is Getting Increasingly Dangerous and Complex for Reporters* (Nov. 6, 2020), <https://rsf.org/en/covering-nagorno-karabakh-war-getting-increasingly-dangerous-and-complex-reporters>.

and obligations of states vis-a-vis other states. Public International Law has distinct features that differentiate it from domestic law. In particular, there is no hierarchical lawmaker. States create public international law by concluding treaties and by creating customary law. Private individuals or private media institutions (not owned or controlled by the government), such as independent legacy media and Social Media platforms or their users, are—as a general rule¹⁶—not bound by Public International Law; they must only respect the national law of the state on which territory they act or of which they are citizens. In particular, the liability of media platforms and users is governed by national criminal law and media law.

How do we know if an individual acts in a private capacity or on behalf of a state as part of the state? Customary International Law provides for rules of attribution: A state is legally responsible for conduct undertaken by its organs, such as state officials and employees in media institutions directly run by the state. Under certain conditions, state responsibility is also triggered for the conduct of private persons. If private actors, such as private media companies, individual journalists, and bloggers, act in a private capacity, the state can be held responsible if this conduct is attributable to the state. However, attributing reports of private media companies or individuals to states often proves difficult due to strict customary international law rules of attribution. Under the international customary rule reflected in Article 8 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)¹⁷, the conduct of private actors can only be attributed to a state if the state directed or controlled the company's actions, by giving instructions. The "Friendly Relations Declaration," a UN General Assembly resolution that reflects customary international law, stipulates that "no State shall organize, assist, foment, finance, incite or tolerate, subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State."¹⁸ These requirements were further specified by the International Court of Justice (ICJ) in the case of Nicaragua and have since been generally accepted as a necessary requirement of

¹⁶ An exception is international criminal law establishing the direct individual criminal responsibility of individuals for certain "core crimes."

¹⁷ G.A. Res. 56/83, ¶ 8 (Jan. 28, 2002).

¹⁸ G.A. Res. 2625 (XXV), at 123 (Oct. 24, 1970).

attribution.¹⁹ Since this is a high threshold, reports by private news corporations and individuals only trigger state responsibility under international law when it can be shown that the state has actively fostered, encouraged, and influenced reporting to such an extent as to control the contents and the editorial process. In contrast, for example, heavy state funding of the news agency would be per se insufficient for attributing conduct.

Second, Article 11 ARSIWA provides a basis for the attribution of conduct if it is acknowledged and subsequently accepted by a state as its own. However, these requirements are strict, too. The mere approval and endorsement, as well as congratulations, would be insufficient. These requirements have been specified by the International Court of Justice's Judgement in the Teheran Hostages Case.²⁰ The case was brought before the ICJ by the United States following the occupation of its Embassy in Tehran by a group of Iranian militant students in 1979 and the capture and holding of its diplomatic and consular staff hostage.²¹ The ICJ affirmed that Iran had violated obligations owed to the United States under conventions in force between the two countries and rules of general international law and that the violation of these obligations engaged the international responsibility of Iran. The ICJ pointed out that, while the conduct of militants could not be directly attributed to the Iranian State due to the lack of sufficient information, Iran, however, had done nothing to prevent the attack, stop it before it reached its completion, or oblige the militants to withdraw from the premises and release the hostages. The ICJ also noted that after the hostage-taking, certain organs of the Iranian State had endorsed the acts in question and decided to perpetuate them, thus becoming acts of the Iranian State.

¹⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, at 15 (June 27).

²⁰ *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. Rep. 14, at 3 (May 24).

²¹ The case took place in the wake of the takeover of power by radical islamists under Ayatollah Khomeini. Iran's revolution deeply altered that country's relationship with the United States. The deposed Iranian ruler, Mohammad Reza Shah Pahlavi, had been friendly to the U.S. administrations, and this had produced deep suspicion and hostility among Iran's revolutionary leaders. United States diplomats and citizens were held hostage after a group of militarized Iranian college students belonging, who supported the Iranian Revolution, took over the U.S. Embassy in Tehran and took them as hostages. A diplomatic standoff ensued. The hostages were held for 444 days, being released on January 20, 1981.

Due to this high threshold for state responsibility, fake news and disinformation spread by private media companies will, in most cases, not be attributable to a state. However, the spread of information by private individuals or groups of individuals will lead to the responsibility of the state if the state has not acted with due diligence, failing a duty to prevent harmful acts by private individuals. Here, we may look again into customary international law. In the Corfu Channel case, the ICJ affirmed that under customary international law, every State is under an “obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”²² This no-harm principle has since been further developed in international environmental law, that states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. It is a duty to regulate by national law. In the cyber context, the UN General Assembly urged states to “ensure that their laws and practice eliminate safe havens for those who criminally misuse information technologies.”²³ It is controversial whether the principle of due diligence reflects a binding obligation applicable to reports by private media companies and individuals. It is questionable whether the state has a general duty to regulate or prevent all private acts on its territory or, in the case of media activities, a duty to censor private speech and propaganda. Such an obligation can only be derived from special treaties in which the state explicitly undertakes such duties, such as Article 20 ICCPR and Article 4 CERD, as will be explained below. However, there is no general principle of due diligence in international law. Therefore, a state cannot be held legally responsible for all activities of privates within its territory.

B. FREEDOM OF ACTION UNDER PUBLIC INTERNATIONAL LAW (LOTUS PRINCIPLE)

Even though the term propaganda is used by some international treaties, such as the International Covenant on Civil and Political Rights (ICCPR), which provides in Article 20 that “[a]ny propaganda for war shall be prohibited by law” and Article

²² The Corfu Channel Case (Gr. Brit. and Northern Ir. v. Alb.), Judgment, 1949 I.C.J. Rep., at 4 (Apr. 9).

²³ G.A. Res. 55/63, at 2 (Dec. 4, 2000); G.A. Res. 2106 (XX), ¶ 4 (Dec. 1965).

4 of the International Convention on the Elimination of All Forms of Racial Discrimination, they do not define "propaganda". While some international organs and organizations have proposed some clarifications, there is no uniform understanding of the term. This is not surprising, considering that even domestic legislators struggle to find definitions when introducing anti-"fake news" legislation.²⁴

This article argues that the lack of definition does not bar from assessing the legality of such forms of state speech under public international law. This is because sovereign states enjoy a general freedom of action under public international law. This principle has been formulated by the Permanent Court of International Justice (PCIJ) in the Case of the S.S. "Lotus" of 1927.²⁵ The PCIJ held that states had a wide measure of discretion, which is only limited by the prohibitive rules of international law, and "[r]estrictions on the independence of States cannot... be presumed."²⁶ It has since become known as the "Lotus principle" and is used as a general departure point for legal arguments under public international law: Sovereign states may act in any manner they wish as long as they do not contravene an explicit prohibition or violate the sovereign rights of other states. It follows from this fundamental assumption that the legality of a certain conduct is primarily measured by the effects of this conduct on the legal rights and interests of other sovereign states. In other words, states enjoy freedom of action unless a conduct infringes the sovereign rights of another sovereign. Applying the Lotus principle to state speech, it can be assumed that offensive speech is permissible as long as it does not violate the legal rights of other states. The following sections will analyze the rules of international law that protect the sovereign rights and legally protected interests of other states and, therefore, set limits to offensive and harmful state speech.

²⁴ C.f. Ines Gillich, Udo Fink, *Fake news as a Challenge for Journalistic Standards*, 58 U. Louisville L. Rev. 263 (2019-2020).

²⁵ In that case, a collision had occurred in the high seas between a French vessel and a Turkish vessel. Victims were Turkish nationals and the alleged offender was French. The question before the ICJ arose whether Turkey violated international law when Turkish courts exercised jurisdiction over a crime committed by a French national, outside Turkey? Does Turkey need to support its assertion of jurisdiction using an existing rule of international law or is the mere absence of a prohibition preventing the exercise of jurisdiction enough?

²⁶ The S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 ¶ 44 (Sept. 7).

C. LIMITS TO STATE SPEECH UNDER INTERNATIONAL LAW

As will be shown below, international law limits state speech. Such general rules are derived from the customary law principle of non-intervention, which restricts subversive speech and aims at destabilizing state institutions by influencing nationals of another state towards insurrection, revolt, or civil strife. However, as the non-intervention principle only sets vague standards, recourse must be taken to more precise rules formulated in treaties. Then again, these treaties only cover specific areas of state speech, such as:

- The Law of Diplomatic Relations: limiting verbal defamatory attacks directed against foreign states and their public officials, such as heads of state and diplomats.
- International Broadcasting Law: limiting propaganda spread through radio and television
- International Human Rights Law: limiting propaganda for war, incitement to genocide, and incitement to racial discrimination
- International Humanitarian Law: limiting state conduct in armed conflicts

1. *The Principle of Non-Intervention*

Non-intervention in the domestic affairs of another state is one of the fundamental principles of customary international law. It is also derived from Article 2 (1) of the UN Charter, which incorporates the principle of sovereign equality of all member states. The basic assumption is that if all states are by law considered to be sovereign and equal, no state may intervene or interfere in the domestic affairs of the other. In 1970, the UN General Assembly adopted Resolution 2625, “The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States” (so-called Friendly-Relations-Declaration).²⁷ The Declaration specifies that no state has the right

²⁷ Although resolutions passed by the UN General Assembly do not have legally binding force, this resolution was cast among all UN Member States without any negative vote (in consensus) and therefore indicates *opinio iuris*, an element required to prove the existence of a rule of customary international law.

“to intervene, directly or indirectly, for any reason whatever, in the international or external affairs of any other State . . . armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.” In addition to the prohibition of interventions through military means, it also forbids subversive intervention using propaganda by one state to destabilize another state, its nationals, and institutions. To qualify as prohibited intervention, the conduct must pass the threshold of coercion. While for example, economic pressure is regarded as a legitimate means of international relations and thus considered lawful, whereas state practice concerning propaganda is ambivalent.²⁸ Mere criticism of the internal politics of another state, be it biased or not, does not amount to an illegal intervention into the internal affairs. It has been suggested that disinformation and false news, planted covertly by a state without revealing the official and original source, would indicate a violation of the principles of non-intervention. However, the line between permissible political pressure and impermissible coercion is blurry, as neither state practice nor doctrine has yet developed convincing criteria for proper assessment. Rather, a cautious stance should be taken: The threshold of illegal intervention should not be set too low if this prohibition is to be taken seriously at all.

2. Protection of the Dignity of Heads of State and Diplomatic Relations

Customary international law not only requires states to refrain from offensive or defamatory speech directed toward foreign heads of state but also imposes positive obligations of prevention regarding possible acts by individuals.²⁹ The state against which the attacks are directed has a right to protest and to demand appropriate reparation, which may include a formal apology. It is not clear whether this positive obligation would also amount to an obligation to provide for criminal sanctions for

²⁸ Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT’L LAW 345, at 374 (2009).

²⁹ Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djib. v Fr.), Judgment, 2008 I.C.J. Rep. 177, ¶ 174 (June 4).

defamatory attacks on foreign representatives.³⁰ While some states, such as Germany, provide for a special offense of the insult or defamation of the head of state under their domestic criminal law,³¹ other states have abolished similar provisions.³²

International law protects diplomatic relations as well. These rules are codified in the Vienna Convention on Diplomatic Relations (1961).³³ Article 29 of the Vienna Convention requires the receiving state to treat diplomatic agents "with due respect and [to] take all appropriate steps to prevent any attack on his person, freedom or dignity." Article 1 (1) (b) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents³⁴, includes the "dignity" of a state representative or official as a protected asset.

However, two aspects impeding the effectiveness of such rules remain: First, there is a lack of definitive criteria as to when the dignity is violated and second, the permissible countermeasures are limited to the field of diplomatic relations.

3. *International Broadcasting Law*

One area in which early attempts have been made further to specify the principle of non-intervention by an international agreement is broadcasting. Radio broadcasting emerged in the early 20th century for military purposes. After WWI, commercial radio broadcasting began in the 1920s and became an important mass medium for entertainment and news. Since radio transmissions and frequencies do not stop at borders, broadcasting content could be highly problematic for other states. For these reasons, the International Convention Concerning the Use of

³⁰ Cf. Alexander Heinze, *The defamation of foreign state leaders in times of globalized media and growing nationalism*, 9 J. Int'l Media & Ent. Law 33, 35 (2020) (discussing the existence of a Customary International Law norm to criminalize defamatory attacks on foreign representatives); De Brabandere, *supra* note 1 (arguing that "There is no obligation for States to take positive action to prevent or punish defamatory conduct and acts of individuals other than State officials or representatives").

³¹ See e.g. Germany, Article 103 Criminal Code.

³² Since the 1990s, Hungary (1994), the Czech Republic (1998) Belgium 2005, France (2004) and Romania (2014) have removed the offence from their domestic law.

³³ 500 U.N.T.S. 95.

³⁴ 1035 U.N.T.S. 167.

Broadcasting in the Cause of Peace (Broadcasting Convention) was concluded in 1936 among the member states of the League of Nations.³⁵ According to Article 1, states are required to undertake methods that prohibit the broadcasting of any transmission which incites the population of another territory to commit acts incompatible with the internal order or the security of that territory. The obligation to control propaganda concerns propaganda originating from within the state's territory, regardless of the private or public origin of the message. Under Article 3 of the Convention, the Parties "mutually undertake to prohibit and, if occasion arises, to stop without delay within their respective territories any transmission likely to harm good international understanding by statements the incorrectness of which is or ought to be known to the persons responsible for the broadcast." The Convention also establishes a duty to fact-check information before broadcasting. Article 4 establishes a due diligence obligation by stating that the Parties "mutually undertake to ensure . . . that stations within their respective territories shall broadcast information concerning international relations, the accuracy of which shall have been verified—and that by all means within their power—by the persons responsible for broadcasting the information." With respect to private broadcasters, under Article 6, the member states "mutually undertake to include appropriate clauses for the guidance of any autonomous broadcasting organizations, either in the constitutive charter of a national institution, or in the conditions imposed upon a concessionary company, or in the rules applicable to other private concerns, and to take the necessary measures to ensure the application of these clauses."

While the Broadcasting Convention is still in force today, and there has since been no comparable attempt to regulate other modern forms of communication by a multilateral treaty, its practical effects are limited. Many Western states, such as the Netherlands, France, Australia, and the United Kingdom, denounced the Convention during the Cold War. As the self-declared legal continuator to the Union of Soviet Socialist Republics (USSR), the Russian Federation is a party to the

³⁵ *see* 186 LNTS 301. *see also* SUPPLEMENT: OFFICIAL DOCUMENTS, 32 No. 3 AM J. INT'L LAW 1, 113-120 (1938).

Broadcasting Convention. At the same time, e.g., Armenia and Azerbaijan, both successor states of the former Soviet Union, have not notified the depository of their intention to be bound, and therefore are not parties to the Convention.³⁶

The accession to the Convention by the Soviet Union and its call on other socialist states to follow suit (such as the former Czechoslovakia, the German Democratic Republic, and Hungary) had a symbolic character. The accession to the Broadcast Conventions was motivated by the Soviet Union's intent to improve its legal position against Western broadcasts. In particular, the Soviet Union aimed to ward off outside interference by Western radio stations broadcasting in Russian, such as Radio Free Europe, interpreting the principle of non-intervention broadly and accusing Western states of interfering in the internal affairs of socialist states.³⁷ It was also driven against the backdrop of Western policy, promoting the principle of free flow of information.

There is good reason to believe that Russia's disinformation campaign and war propaganda relating to the war in Ukraine violate the Broadcasting Convention. Although Ukraine is not a party to the Convention, several states that have condemned Russia's military actions in Ukraine are parties thereto, such as Norway, Finland, Estonia, Denmark, Luxembourg, Latvia, and Bulgaria, and therefore could be regarded as harmed by Russian disinformation. However, they cannot bring a claim before the ICJ. Even though Article 7 of the Convention includes a compromissory clause granting the Permanent Court of International Justice (PCIJ) and now the ICJ (see Article 37 of the ICJ Statute) jurisdiction over disputes concerning the interpretation or application of the Convention, the USSR had entered a reservation to the jurisdiction clause.

4. The Clash of Principles: Freedom of Information vs. Prior Consent

The controversies over the Broadcasting Convention display that the transmission of ideas and information across

³⁶ See generally: Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force*, 23 DENV. J. INT'L & POL'Y 1 (1994).

³⁷ Simo Mikkonen, *To Control the World's Information Flows: Soviet Cold War Broadcasting*, in A. BADENOCH, A. FICKERS, & C. HENRICH-FRANKE (EDS.), *AIRY CURTAINS IN THE EUROPEAN ETHER: BROADCASTING AND THE COLD WAR* 241, 242-43 (2013).

borders is an area where the interests of Western and Eastern states clashed during the Cold War and continue to clash. From our Western perspective, we are easily inclined to believe that the free flow of information and the exchange of opinions is a necessary corollary to democracy and the universality of human rights. Yet, the conception of a free flow of information has become a dilemma for Eastern states, pursuing a Marxist-Leninist policy with a trend to monopolize information at the state level. They claimed that Western broadcasting across borders would be an illegal intervention into their domestic affairs and they aimed to make the entry of wireless signals into their territory dependent on their prior consent.

This intrinsic tension between freedom of information and concerns for national sovereignty is manifested in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). While Article 19 (2) ICCPR provides for freedom of expression in a broad sense, para. 3 allows for far-reaching restrictions, such as security interests, which leave a wide margin of appreciation to the states when restricting this right.

One instrument, that aims to strike the balance between these opposing interests, is the Constitution of the International Telecommunication Union (ITU), an international treaty to coordinate international cross-border telecommunications, which has been signed and ratified almost universally. Article 33 provides that "Member States recognize the right of the public to correspond by means of the international service of public correspondence." In contrast, article 34 provides the opposite principle by stating that "Member States reserve the right to stop, in accordance with their national law, the transmission of any private telegram which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency, provided that they immediately notify the office of origin of the stoppage of any such telegram or any part thereof, except when such notification may appear dangerous to the security of the State." According to Article 35, "Each Member State reserves the right to suspend the international telecommunication service, either generally or only for certain relations and/or for certain kinds of correspondence, outgoing, incoming or in transit, provided that it immediately notifies such action to each of the other Member States through the Secretary-General." Under Article 36 "Member States accept no responsibility towards users of the international telecommunication services, particularly as regards claims for damages." This shows that there is no consensus on the range of

the principle of non-intervention when it comes to dissemination of information and opinions across state borders.

It must be recalled that while it was mainly Western broadcasting stations, that aimed at influencing public opinion in socialist states during the Cold War³⁸, it is vice versa today. In light of the massive disinformation campaign by the Russian Federation, it is the Western states that now, in turn, attempt to restrict the transmission of information into their territory, thus restricting the free flow of information pointing to the principle of non-intervention and the deteriorating effects of fake news and disinformation campaigns on national security.

5. *International Human Rights Law*

Since early attempts to regulate state speech have failed, states have taken a human rights-centered approach to provide at least some clarifications. This approach differs from the traditional, state-centered approach based on reciprocity because human rights set out obligations owned not vis-a-vis a specific state, but they affect the interests of all parties to a human rights treaty (*erga omnes inter partes*).

Human rights obligations do not generally cease to apply in situations of an (international or non-international) armed conflict, but can only be temporarily suspended under the derogation clauses in some human rights treaties.³⁹ These derogation clauses also permit the temporary restriction of media freedoms, provided that they do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin' (Article 4 (1) ICCPR) and "provided that such measures are not inconsistent with its other obligations under international law" (Article 15 (1) ECHR).

Armenia has made use of derogation clauses twice. On 1 March 2008, a 20-day state of emergency was declared. Among other measures, restrictions were imposed on the media in the context of the 2008 massive post-election protests. On 20 March

³⁸ Nicholas J. Schlosser, *Cold War on the Airwaves: The Radio Propaganda War against East Germany* 1, 57–58, 73–105.

³⁹ See Article 15 para. 1 ECHR providing that in "time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." A similar derogation clause is provided for in article 4 ICCPR.

2020, Armenia again derogated from certain human rights obligations, including the right of assembly under Article 21 ICCPR and Article 11 ECHR), on grounds of a response to the global outbreak and spread of COVID-19 virus. On 16 September 2020, Armenia withdrew all derogations and returned to full implementation of the Covenant.

6. Freedom of Expression and Information

For Armenia and Azerbaijan, human rights obligations stem from the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Article 19 (2) ICCPR declares that “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.” Similarly, Article 10 (1) ECHR states that “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.” The ECtHR has explained that all member states of the ECHR have the duty to grant conditions under which democratic processes conform with the Convention. Their obligation to enable a free flow of information makes it imperative for member states to create legal and factual conditions to freely enjoy these rights and to minimize interference by public officials and privates.⁴⁰ The ECtHR has also emphasized that freedom of information 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 the State or any sector of the population.”⁴¹

The human rights regime established under the ECHR is more effective than the ICCPR, since it provides for the obligatory and legally binding jurisdiction of the European Court of Human Rights, whereas the implementations of the obligations under the ICCPR is monitored by the Human Rights Committee for parties of AP I, whose decisions are not legally binding.

The ECtHR has been concerned with various individual complaints against Armenia. Decisions include findings that Armenia has

⁴⁰ Cf. Matthias Klatt, *Positive Obligations under the European Convention on Human Rights*, 71 ZAÖRV 691 (2011).

⁴¹ *Handyside v. United Kingdom* (1979-80) 1 EHRR 737, para. 49; *Lingens v. Austria* (1986) 8 EHRR 407, para. 41.

violated the right to freedom of expression under Article 10 ECHR. For example, in *Dareskizb Ltd v. Armenia*⁴² actions by state authorities taken during a state of emergency following a presidential election in 2008 were challenged by the applicant, a media company, that was prevented from publishing its newspaper. The ECtHR found that the restriction on publication had had no purpose other than to limit criticism of the Government and had thus gone against the core of the right to freedom of expression as protected under the Convention. In *Meltex Ltd and Mesrop Movsesyan v. Armenia*⁴³, an independent broadcasting company was repeatedly refused broadcasting licenses without giving any reasons. The ECtHR found that the interference with Meltex's freedom to impart information and ideas, namely having been refused a broadcasting license on seven separate occasions, had not met the requirement of lawfulness under the European Convention, in violation of Article 10 ECHR.

The ECtHR also found Azerbaijan to have violated the right to freedom of expression in numerous cases.⁴⁴ However, it must be considered that freedom of expression and freedom of information are no absolute human rights guarantees but are subject to limitations. Article 19 (3) ICCPR authorizes certain restrictions, which are provided by law and are necessary. According to Article 10 (2) ECHR, freedom of expression can be restricted when it is "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". These broadly worded exception clauses aim to strike a balance between the free flow of information and ideas and, the legitimate security interests and other interests of the states.

⁴² *Dareskizb Ltd v. Armenia*, Appl. No. 61737/08 (Eur. Ct. H.R. Sept. 21, 2021)

⁴³ *Meltex Ltd & Movsesyan v Armenia*, Appl. No. 32283/04 (Eur. Ct. H.R. June 17, 2008).

⁴⁴ *See e.g. Khadija Ismayilova v. Azerbaijan*, Appl. Nos. 65286/13 and 57270/14 (Eur. Ct. H.R. April 10, 2019) concerning an alleged smear campaign against a well-known journalist, who was being accused of an anti-government bias and immoral behavior); *Mahmudov and Agazade v. Azerbaijan*, Appl. No. 35877/04 (Eur. Ct. H.R. March 18, 2009) (concerning a criminal conviction of a journalist in an unfair trial for several of his published statements).

7. *Propaganda for War and Hate Speech*

In addition to the individual guarantee of freedom of expression and information, the ICCPR states in Article 20 para. 1 that “Any propaganda for war shall be prohibited by law” and in para. 2 that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” This provision, which has no counterpart in the ECHR, seems rather odd at first sight, as it contains not a subjective human right, but formulates an objective requirement directed at the states. The concept of “war propaganda” was introduced to the debates on the drafting of the ICCPR by the Soviet Union as a ground for permissible restriction on the right to freedom of expression under Article 19 (3) (as well as justifying restriction under Articles 18(3), 21 or 22(2)).⁴⁵ Thus, by virtue of Article 20, states are under an obligation to prohibit war propaganda under domestic law. The prohibition of propaganda for war should not only cover direct incitement to war but also the antecedent form of speech that enabled such incitement to be effective, in particular “the repeated and insistent expression of an opinion for the purpose of creating a climate of hatred and lack of understanding between the peoples of two or more countries, in order to bring them eventually to armed conflict.”⁴⁶ Therefore, Article 20(2) mandates that any “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

At first, some Western states opposed this provision, because they feared that the Soviet Bloc states would exploit Article 20 ICCPR to undermine the right to free speech. They had good reason, because, as explained above, the term “propaganda for war” is rather vague and no definition or uniform use in other international norms had been developed.⁴⁷ Despite that, the

⁴⁵Paul M. Taylor, *A Commentary On The International Covenants Of Civil And Political Rights Comment on Article 20*, at 580.

⁴⁶ UN GAOR, 16th Sess., 1079th mtg, 3rd Comm., at 97, U.N. Doc. E/2573 (Oct. 20, 1961).

⁴⁷ See G.A. Res 2106 (XX), at 3 (Dec. 21 1965). (condemning “all propaganda and all organizations...which attempt to justify or promote racial hatred and discrimination in any form” asks States Parties to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”), and Article 13 (5) American Convention on Human Rights providing that “Any propaganda for war and any advocacy of national, racial,

provision was finally included in the ICCPR to meet the interests of newly independent states associated with the Non-Aligned Movement (NAM) that such a provision was necessary to ensure their protection from the superior military, economic, and cultural capabilities of the Cold War superpowers.⁴⁸ However, upon ratifying the ICCPR, fifteen states declared reservations to Article 20 ICCPR.⁴⁹ The common thread to these reservations is that the provision is unnecessary given pre-existing legislation on public order offenses and that it constitutes an undue restraint on freedom of expression. These reservations impede the effective implementation of the prohibition of war propaganda.

The effectiveness of this provision is also diminished because the drafting history of the provision calls for a restrictive interpretation of propaganda. This provision was included in the ICCPR due to the experiences of World War II, where such propaganda was widely acknowledged as having played a fundamental role in the consolidation of Nazi power in Germany, the subsequent wars of aggression, and the Holocaust.⁵⁰ In light of this, it has been suggested that the term “propaganda” has a particular meaning, implying an “intentional, well-aimed influencing of individuals by employing various channels of communication to disseminate, above all, incorrect or exaggerated allegations of fact . . . negative or simplistic value judgments whose intensity is at least comparable with that of provocation, instigation or incitement.”⁵¹

The Human Rights Committee's General Comment 11 distinguishes between acts of aggression, permissible defensive conflict, and other assertions of legitimate rights under the Covenant. It explains that Article 20(1) “extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations,” but does “not prohibit advocacy of the sovereign right of self-

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.”

⁴⁸ See generally Paul M. Taylor, *supra* note 50

⁴⁹ United Nations Human Rights Office of the High Commissioner, *Status of Ratification Interactive Dashboard – International Covenant on Civil and Political rights*, <https://indicators.ohchr.org/>

⁵⁰ Michael G Kearney, *Propaganda for War, Prohibition of*, in Max Planck Encyclopedias of Int'l Law (Anne Peters & Rüdiger Wolfrum eds., 2009).

⁵¹ Manfred Nowak, U.N. Covenant On Civil And Political Rights - CCPR COMMENTARY 205, at 472–3

defense or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations.”⁵² It follows from this, that the spread of propaganda in the sense of Article 20, must be linked with an act of aggression or a breach of the peace in violation of the principles of the UN Charter. Only such a strict interpretation explains that the Human Rights Committee has been reluctant to invoke Article 20, even in such a clear instance as in the case of Holocaust denial in *Faurisson v. France*, where the Human Rights Committee confined its consideration only to Article 19 (3) without engaging with the state’s argument that the restriction was mandated by Article 20.⁵³ With Russia's war of aggression against Ukraine, which is accompanied by an aggressive propaganda and misinformation campaign, aggressive rhetoric against Ukraine, and Western states supporting Ukraine in its self-defense, this provision may become relevant again.

8. *Incitement to Genocide*

One extreme form of hate speech is incitement to genocide. One of the many effects of words is not only to cause psychological harm, but they can also directly or indirectly incite physical violence. Empirical studies suggest that propaganda before and during armed conflicts is likely to have deteriorating effects on society, as it may lead to the vilification of certain groups and even encourage violence against them.⁵⁴ The history of hate propaganda and violent speech in international conflicts begins with the Nuremberg Trials of German Major War Criminals in 1946.⁵⁵

⁵² Human Rights Committee, General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred, at 1 (July 29, 1983).

⁵³ *Faurisson v. France*, CCPR/C/58/D/550/1993, Judgement, 9.6 (Nov. 8 1996).

⁵⁴ Special Rapporteur on freedom of opinion and expression, U.N. Doc A/77/288, at 4 (2022).

⁵⁵ *Trial of German Major War Criminals*, 41 AJIL 172, Judgment, 122 (30 Sept. and Oct. 1946). (The Tribunal convicted Julius Streicher, the editor of a weekly newspaper called *Der Stürmer*, in which he had advocated the destruction of the Jewish people, for ‘incitement to murder and extermination’, which in the Tribunal’s view constituted a crime against humanity. Another trial was lead against Hans Fritzsche, the head of the German Radio Division of the Ministry of Propaganda. The accused, however, was acquitted, because in the Tribunal’s view his anti-Semitic propaganda did not urge persecution or extermination of Jews.).

Historically, the crime of incitement to genocide has also played a significant role in the commission of genocide against the Armenian people. Many parliaments, such as the German *Bundestag*, have passed a resolution explicitly recognizing and condemning the Armenian genocide that took place in 1915 in the Ottoman Empire, a move that has been criticized by the Republic of Türkiye and the Republic of Azerbaijan.⁵⁶ Drawing on these historical experiences, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948.⁵⁷ Article III of the Convention makes "direct and public incitement to commit genocide" a crime under this Convention. Article III also condemns "complicity in genocide", which can also cover incitement to genocide.

Incitement to genocide also leads to individual criminal responsibility under international criminal law. It was included in the Statute of the International Criminal Tribunal for the Former Yugoslavia (Article 4 (3) (c)), the Statute of the International Criminal Tribunal for Rwanda (Article 2 (3) c)) and in the Statute of the International Criminal Court.⁵⁸ Article 25 (3) (e) of the ICC Statute provides that ". . . a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . directly and publicly incites others to commit genocide." Most importantly, incitement to commit genocide is punishable as a separate crime, irrelevant of whether such propaganda is followed by the actual commission of genocide, punishable as such if the author had the intent to directly and publicly incite others to commit genocide, even if no act of genocide has resulted from the act(s) of incitement.⁵⁹ The ICTR Appeals Chamber noted that "there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to

⁵⁶ The Bundestag declared that "the annihilation of the Armenians in the Ottoman Empire during the First World War was the largest and most momentous catastrophe in the multi-thousand-year history of the Armenian people." and acknowledged that the "German Reich, as the main military ally of the Ottoman Empire, was also deeply involved in these processes", <https://dserver.bundestag.de/btd/18/086/1808613.pdf> (Ger.).

⁵⁷ Convention On The Prevention And Punishment Of The Crime Of Genocide, Jan. 12 1951, 78 U.N.T.S. 277.

⁵⁸ 2187 U.N.T.S. 90.

⁵⁹ Prosecutor v. Nahimana, ICTR-99-52-A, Judgement, ¶ 677–78 (28 November 2007).

commit an act [of genocide]; it has to be more than a mere vague or indirect suggestion.”⁶⁰

Sadly, such extreme hate speech has not remained a phenomenon of a long-bygone era. The revival of international awareness began in the 1990s when during the Rwandan civil war (1990 to 1994), a Rwandan radio station, Radio Télévision Libre des Mille Collines (RTLM), acted as a source for racially motivated propaganda and incitement of hatred and violence against parts of the civilian population, allowing the genocide against Tutsis in Rwanda to occur.

The case of Rwanda shows that modern forms of propaganda are not necessarily cross-border or directed against a foreign state or its officials, but also occur within a state against its citizens. These cases exemplify the dangers propaganda and disinformation campaigns, especially when they are state-orchestrated, can lead to. The common theme of such forms of speech is that some kind of utopia is projected that would be achieved by the elimination of members of the target or victim group. The propagandists often seek to convince their audience of the need to ‘purify’ the community or ‘defend’ themselves against the enemy.

9. Incitement and Promotion of Racial Hatred and Discrimination

While there have been no international judicial proceedings of claims based on incitement to genocide in the conflict between Armenia and Azerbaijan (although in the media such allegations are being raised), proceedings have been instituted before the International Court of Justice concerning alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The convention imposes obligations on state parties with regard to the elimination of racial discrimination in all its forms and manifestations. Some commentators view the convention as a stop-gap measure to prevent even worse types of measures, such as genocide.

The CERD is a rather peculiar instrument, as it lacks a number of features other international human rights treaties: the obligations undertaken by the state parties to the CERD only apply to their own citizens. In this respect, the CERD is an instrument of minority protection and, while being so, it perfectly fits the

⁶⁰ *Id.* ¶ 692.

situation of Artsakh, an area that is part of Azerbaijan, but populated with approx. 120,000 citizens of Armenian ethnicity. Under the CERD, the state parties undertake not only to prohibit and eliminate racial discrimination in all its forms but to also forbid all state measures of propaganda and incitement to acts that would violate these standards. In particular, Article 4 CERD states that:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination . . . ” and they “(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

More importantly, the CERD contains a jurisdictional clause in Article 22 providing for the jurisdiction of the ICJ. Thus, the real importance of the CERD is not that it creates substantive rights for the state's parties, but rather that it provides a basis for jurisdiction. A State party to CERD may invoke the rights set out in the Convention to the extent that the acts complained of can constitute acts of racial discrimination as defined in Article 1 of the Convention.

Relying on this jurisdictional clause, Armenia initiated proceedings against Azerbaijan before the ICJ twice. The first proceeding was filed by Armenia against Azerbaijan on 16 September 2021. Azerbaijan responded by filing its own Application against Armenia on 23 September 2021 before the ICJ. Both states claim that the other has breached its obligations under Articles 2–7 of CERD. In its application, Armenia states that “[f]or

decades, Azerbaijan has subjected Armenians to racial discrimination” and that, “[a]s a result of this State-sponsored policy of Armenian hatred, Armenians have been subjected to systemic discrimination, mass killings, torture and other abuse.” Armenia further states that Azerbaijan has acted and continues to act in violation of its obligations under the CERD and asserts that Azerbaijan bears responsibility, inter alia, for glorifying, rewarding and condoning acts of racism; for inciting racial hatred, giving as an example, mannequins depicting Armenian soldiers in a degrading way at the “Military Trophies Park” which opened in Baku in the aftermath of the 2020 Conflict; for facilitating, tolerating and failing to punish and prevent hate speech.⁶¹ The ICJ considered plausible at least some rights were allegedly violated through incitement and promotion of racial hatred and discrimination against persons of Armenian national or ethnic origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage. In view of the ICJ, acts prohibited under Article 4 of CERD, such as propaganda promoting racial hatred and incitement to racial discrimination or to acts of violence against any group of persons based on their national or ethnic origin can generate a pervasive racially charged environment within society. This holds particularly true when rhetoric espousing racial discrimination is employed by high-ranking officials of the state. A situation such as this one may have serious damaging effects on individuals belonging to the protected group. The ICJ thus ordered Azerbaijan i.e., to “[t]ake all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin.”⁶²

On December 28, 2022, Armenia filed another request for the indication of provisional measures. The background is that, since 12 December 2022, the Lachin corridor, which is the only route whereby Armenia can provide food, fuel, and medicine supplies to Nagorno-Karabakh, has been blocked by persons claiming to be environmental activists. The blockade endangered the lives of the people living in Artsakh. By its application,

⁶¹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Armenia v. Azerbaijan*), Order, 180 I.C.J. 369, ¶ 22 (December 7).

⁶² *Id.* ¶ 98(1)(b) at 393.

Armenia asked the Court to order Azerbaijan to “cease its orchestration and support of the alleged ‘protests’ blocking uninterrupted free movement along the Lachin Corridor in both directions,” to “ensure uninterrupted free movement of all persons, vehicles, and cargo along the Lachin Corridor in both directions” and to “fully restore and refrain from disrupting or impeding the provision of natural gas and other public utilities to Nagorno-Karabakh.”⁶³ Azerbaijan denies to have orchestrated these blockades, explaining that the activists are stating a legitimate protest against illegal mining activity. Armenia on the other hand contends that Azerbaijan orchestrated these blockades, preventing anyone and anything from entering or exiting, designed to allow “ethnic cleansing.”⁶⁴ The ICJ concluded that the conditions for the indication of provisional measures were met. It ordered Azerbaijan to take all measures at its disposal to ensure unimpeded movement of persons, vehicles, and cargo along the Lachin Corridor in both directions.⁶⁵

These cases under the CERD, however, are only an incomplete legal victory of Armenia. It must be noted, that the ICJ Court was not called upon to establish the existence of breaches of CERD, but only to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. A final decision has yet to be made by the ICJ. Moreover, it is doubtful whether Azerbaijan will comply with this order. The impact of the blockade persists to this date and has a serious detrimental impact on the health and lives of individuals.

These cases are only the latest of a growing number of disputes brought before the ICJ based on the CERD. Other cases include disputes between Georgia v. Russian Federation, Ukraine v. Russian Federation, and Qatar v. UAE. The peculiarity of all these cases, including those discussed here, concerning the conflict between Armenia and Azerbaijan, is that their underlying issues do not only concern racial discrimination as prohibited under the CERD *per se* but, for instance, territorial sovereignty, international humanitarian law, and restrictions on trade and flow of persons. States were criticized for trying to fit their claims within the legal

⁶³ Forms of Racial Discrimination (Armenia v. Azerbaijan), Order, 180 I.C.J. 5, ¶ 22 (September 22), <https://www.icj-cij.org/sites/default/files/case-related/180/180-20230222-ORD-01-00-EN.pdf>.

⁶⁴ *Id.* ¶ 30 at 7.

⁶⁵ *Id.* ¶ 22 at 5.

framework of CERD to use the jurisdictional clause to bring a case to the ICJ.⁶⁶

In fact, over the past two decades, many states have brought cases based on the jurisdictional clause under CERD, even though the disputes to which those cases related hardly concerned racial discrimination as such.⁶⁷ The CERD, therefore, serves as a door opener to bring claims before the ICJ. While this is certainly beneficial for a peaceful dispute resolution, on the other hand, it has also raised fears regarding the willingness of states to further participate in the CERD as it has the potential to undermine the credibility of a multilateral convention and the reliance on its compromissory clause (Article 22) for genuine claims relating to racial discrimination. States might be inclined to withdraw from the Convention if it becomes evident, that others may bring claims only for the purpose of creating ICJ cases which are unrelated to racial discrimination.

10. *International Humanitarian Law*

Since time immemorial, parties to a conflict have made use of methods of psychological warfare. Psychological warfare is traditionally perceived to be conducted through the dissemination

⁶⁶ This has also been noted by Judge Yusuf concerning the Order of the ICJ of 22 February 2023 in the dispute between Armenia and Azerbaijan: "My objection relates to the continued misuse of the compromissory clause of CERD as a basis of jurisdiction of the Court with respect to alleged acts and omissions which do not fall within the provisions of that Convention. A regrettable tendency seems to have developed, whereby any State that fails to find a valid basis of jurisdiction of the Court for its claims, but still wishes to bring a case before it, tries to stuff those claims into the framework of CERD." Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Armenia v. Azerbaijan*), Order, 180 I.C.J. 369, ¶ 67 (December 7), Declaration of Judge Yusuf, Document Number 180-20230222-ORD-01-01-EN, <https://www.icj-cij.org/sites/default/files/case-related/180/180-20230222-ord-01-01-en.pdf>.

⁶⁷ See Cf. Lawrence Hill-Cawthorne, *International Litigation And The Disaggregation Of Disputes: Ukraine/Russia As A Case Study*, 72 Int'l Compar. L. Q. 779, 779 – 815 (2019). On this problem cf. Lawrence Hill-Cawthorne, INTERNATIONAL LITIGATION AND THE DISAGGREGATION OF DISPUTES: UKRAINE/RUSSIA AS A CASE STUDY, 2019, <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/international-litigation-and-the-disaggregation-of-disputes-ukrainerussia-as-a-case-study/4A7FA031628BB64FD19FDE98EB5822DE> (last accessed 23 February 2023).

of false rumors and the spreading of misinformation or disinformation to create a distorted or even completely false picture of the truth. It serves several objectives: To undermine the adversary's will and military discipline, to alienate and isolate the adversary from his allies, to strengthen the fighting morale among one's own troops and allies, as well as to generate support among its own population, among others. During the past years, psychological warfare has been conducted increasingly in the cyber domain as well. In addition, the advent of mass media has allowed this method of warfare to be effectively developed and applied broadly. Today, it is mainly the Internet that is used to spread false information via social media.

Psychological warfare is not per se illegal under International Humanitarian Law. Ruses of war are permissible, as reflected under Article 24 of Hague Regulations and Article 37 (2) of the Geneva Conventions Additional Protocol I (1977),⁶⁸ as long as there is no resort to perfidious methods of warfare or no other compelling violations of international law.

The line to perfidy would be crossed if the other party was misled into believing that it was protected by international law (e.g., a humanitarian agreement to cease fighting with the intention of surprising the enemy who relied on it). Beyond that, there are no criteria that help to distinguish ruses of war and illegal perfidious acts in armed conflicts. State practice shows, for example, that one of the most common methods of psychological warfare—the dissemination of propaganda through the use of aircraft—is considered legal. Also, the spread of false information regarding flights and movement units and the transmission of false or misleading messages via radio/telephone/electronic/internet

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Article 37 (2) AP I states: Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 37, ¶ 2, Dec. 12, 1977, 1125 U.N.T.S. 3.

communication are included in many national military handbooks as permissible ruses of war.⁶⁹

The fine line of division between the legality and illegality of the method of warfare must be determined by the protection of other goods under international law. For example, as stated above, this includes incitement to genocide. A recent and highly problematic example concerns the war in Ukraine. Ukraine's Ministry of Internal Affairs posted videos on media platforms and social media sites of what appear to be captured Russian soldiers giving testimonials to interrogators about the misinformation they had been hearing from the Kremlin justifying the war. In addition, pictures were circulating on the Internet that allegedly showed Russian soldiers in Ukrainian captivity. For example, one Russian soldier is being served tea, another is crying on the phone while speaking with his mother, and another is asking for forgiveness in front of the camera. The aim of this media footage seems clear: To demonstrate that the soldiers have been let down by their own state and that they show signs of regret. However, using prisoners of war for such purposes violates International Humanitarian Law since Article 13 of the Third Geneva Convention clearly expresses, that "prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity." Moreover, Article 14 of Geneva Convention III provides that prisoners of war are "entitled in all circumstances to respect for their person and honor."

It is clear that displaying degrading pictures, such as the torture images from the U.S. prison of Abu Ghraib during the Iraq War, is illegal. However, there are good reasons to believe that Ukraine has also crossed a line by showing images of captured soldiers if it can be proven that the captured soldiers were forced to participate in this media "circus".

Since states enjoy wide discretion as to the use of psychological methods of warfare, it is essential to rely on neutral and factually correct news. However, as reporting from conflict areas entails risks for journalists, their protection is important. Protecting news media workers is not only a matter of human rights law, but it is also a matter of international humanitarian law when such reporting takes place in an armed conflict.

The Geneva Convention relative to the Treatment of Prisoners of War of 1949 (Geneva Convention III) defines war

⁶⁹ Kalliopi Chainoglou, *Psychological Warfare*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum eds., 2016).

correspondents as persons "who accompany the armed forces without actually being members thereof" (Article 4 A (4)). War correspondents and journalists are entitled to the protection granted to civilians. This means they may not be the object of attacks. Violations amount to a grave breach of international humanitarian law (Art. 85.3 (a) Protocol I) and can, under qualified circumstances, be prosecuted as war crimes by the International Criminal Court (ICC) (Art. 8.2 (b) (i) ICC Statute).

Of course, respect for this rule requires that a journalist in a conflict area must be identifiable as such, but this may not always be easy in operational zones, in particular in the case of "embedded journalists", who accompany military units. The suggestion to introduce a special sign to identify news media workers (a 'P' or 'Press') has been controversially discussed. Journalist organizations have expressed their fear that such a sign may attract enemy fire rather than protect them.⁷⁰

Article 79 of the Protocol Additional to the Geneva Conventions of 1977 extends protection to all "journalists engaged in dangerous professional missions in areas of armed conflict." This provision covers all persons associated with media work who are on professional assignment in an operational zone, in particular journalists/reporters, cameramen, photographers, and technical support personnel. Such media workers should also be given an identity card attesting to their assignment as proof of their formal identification as journalists.

Civilians may lose protection if they directly take part in hostilities. This includes e.g., violently opposing arrest, taking up arms other than for self-defense, or resorting to violence in any other way. With respect to journalists in conflict zones, mere interviewing people, taking notes, or filming with a TV camera are not hostile acts. But could journalists' reports published in media in support of one party to a conflict be qualified as an act of violence and thus as 'active participation' in the conflict? Such a question was dealt with by the International Criminal Tribunal for Rwanda (ICTR) in the case *Nahimana et al.*, where the ICTR evaluated the criminal responsibility of the founders of the Radio Télévision Libre des Mille Collines (RTL) and of the editor-in-chief of the newspaper *Kangura* with regard to the incrimination of the Tutsis. In 2003, the trial chamber found the defendants guilty on multiple counts of genocide, incitement to genocide, and crimes

⁷⁰ Hans-Peter Gasser, *War, Protection of News Media Workers*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum eds., 2015).

against humanity, namely “persecution on political grounds of an ethnic character.”⁷¹ The significance of the judgments for mass media was that the persons concerned were punished precisely because of their strategic role and control exercised in the respective media organizations (newspaper editor, broadcast executive). The ICTR, therefore, concluded that spreading hate propaganda may qualify as active participation in the conflict.

If journalists or media facilities are closely involved in disseminating other propaganda during an armed conflict, it is questionable at what point they may become legitimate military targets under International Humanitarian Law. A prominent example is the bombing of the Belgrade Television and Radio Station (RTS) building by NATO forces in 1999, which NATO justified by the argument that the radio installations were also used for military purposes as a propaganda tool. Media facilities and objects may be dual-use objects, serving both civilian and military purposes. The law is not clear regarding such dual-use objects, like roads, bridges, railroad tracks, or radio stations, that can serve both civilian and military purposes. There is no uniform state practice as to when such dual-use objects can be lawfully targeted as military objects. The ICRC and the Institute du Droit International propose a narrow definition. Many states, such as the U.S., take a broader view, considering all objects that provide the enemy with the ability to sustain war are military objects.

In addition to protection as a civilian from direct attacks, rules exist for the Protection of Journalists and Media Professionals in Time of Armed Conflict. Here, a distinction must be drawn between “journalists engaged in professional missions” and “war correspondents”. The difference is that war correspondents are formally authorized to accompany armed forces.

While both are considered civilians under International Humanitarian Law, only war correspondents will receive prisoner of war status if captured, just like members of the armed forces. Provided that the correspondent is accredited by the armed forces being accompanied, a war correspondent is entitled to prisoner-of-war status if taken into captivity by the adversary. For these reasons, a war correspondent shall be given an identity card. If the journalist is not accredited, a further distinction must be drawn between nationals of the adversary party and foreigners. As a national of a party, the captured enjoys the same protection as

⁷¹ *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 1071 (Dec. 3, 2003).

civilians in the hands of the opponent, i.e., he must be protected against any form of violence and in all circumstances, be treated humanely. In the event of arrest and detention, their right to humane treatment must be respected. They have a right to a fair trial with all its implications. Non-nationals, i.e., foreign journalists who are nationals of a neutral country having normal diplomatic relations with that party to the conflict, are not covered by international humanitarian law. Their situation must be examined by the standards of international human rights law. The idea behind this is as follows: If diplomatic protection is possible, it is to be exercised with priority. In this case, the individual is mediatized by his home state; he is not a direct object of protection of the CC IV. Only if no diplomatic relations with the occupying power are maintained, and the state in question is itself a party to the CC IV are its nationals included in the protection under the CC IV.

In conclusion, by protecting people seeking, receiving, and imparting information, the Geneva Conventions, Protocol I, and related customary law rules make a significant though indirect contribution to promoting and safeguarding the right to information in times of armed conflict.

V. CONCLUSION

It has been shown that Public International Law only provides for rules limiting offensive state speech, propaganda, and other measures of information warfare. The general obligation is to refrain from intervening in the domestic affairs of another state. This general obligation is further specified for diplomatic relations, the protection of the dignity of the state, broadcasting, human rights, and international humanitarian law. The problem is that there are no effective enforcement mechanisms.