- DRAFT VERSION -

Media coverage and state propaganda in armed conflicts - An international law perspective at the Armenia-Azerbaijan "Propaganda War"

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I. Introduction: Propaganda in multi-dimensional warfare

In the shadow of armed conflict usually another, subliminal, conflict takes place. Instead of being fought with arms, this conflict takes on words and pictures. Control over media coverage and the flow of information have always been employed by warring parties to achieve different goals: To keep their citizens' spirit high, to vilify the enemy, to demoralize enemy morale, and to influence public opinion. With the emerge of professional armies in the 19th century, new methods and weapons of warfare, the accumulation of capital and economical support, often by third states, armed conflicts can be fought on a large scale and for long periods. This has made warfare multi-dimensional. It is a combination of military, political, economic and psychological pressure, mostly through propaganda[2] directed at the enemy. It is not surprising that by the 1930s, propaganda was being used by most of the states that become a party to World War II, and propaganda has continued to play an role during the Cold War and beyond. But propaganda has not only become a formidable weapon against the enemy, but also a tool in promoting a national war effort and as an instrument for maintaining unity and good will among allies. For example, pictures showing the victims of the use of chemical weapons during the Syrian armed conflict in 2015[3] have contributed to the willingness of the United States, the United Kingdom and France to execute air strikes against the Syrian army. Just recently, 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.

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[2] 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*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW, online edition, last updated August 2019.

[3] Organisation for the Prohibition of Chemical Weapons, *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, on 1 and 3 September 2015*, S/2017/2022, 24 January 2022, https://www.opcw.org/sites/default/files/documents/2022/01/s-2017-2022%2B%28e%29.pdf.

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 to actively spread their 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 has unfold between the Republic of Armenia and the Republic of Azerbaijan over the territory of Artsakh (Nagorno-Karabakh). For many decades in the 20th century, this conflict took place 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, ethnic tensions and are longstanding and wide-ranging between Armenians and Azerbaijanis exploded and competing claims over that region resulted in hostilities that ended with a ceasefire in May1994. Further hostilities erupted in September 2020 and lasted 44 days. On 9 November 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, as of 10 November 2020, “[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared”. The main legal argument from the Azerbaijani side centers around historically and territorially founded claims to Artsakh, whereas the Armenian narrative points the right to self-determination of the ethnic Armenian 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, violations international humanitarian law, or international criminal law, to name just some sub-fields, this article focuses on the legality of the "Propaganda War" from an international law perspective.

After a brief description of role of traditional and social media platforms in the framing of the conflict and the measures of information warfare that have been taken by the warring parties, this article will take on 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, 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 the following questions: Does international law offer protection against disinformation, 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 even in a state of war rules of international law are binding upon the parties to a conflict and must be obeyed. The bodies of law are particularly relevant to answer these questions is general International Law, in particular the principle of non-intervention, International Humanitarian Law as *lex specialis* applicable in an armed conflict, and International Human Rights Law. It will explore possible remedies against the backdrop of fake news and disinformation. Finally, the lessons learned will be drawn.

II. The Armenian-Azerbaijan "Propaganda War"

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

This section focuses on media coverage on the local and regional level as well as the measures undertaken by the warring parties. It will be shown 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 way to calm the armed conflict and contrinute to a peaceful solution.

1. Disinformation and media practices during the Karabakh-War

a) 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 the consumption of media and in the use of social networks over the course of the conflict to find out about its impact on shaping Armenian and Azerbaijani societies' views to the conflict.[4] The report concluded that while in

[4] European Resources for Mediation Support (ERMES) III, *Media and disinformation in the Nagorno- Karabakh conflict and their role in conflict resolution and peacebuilding*,

the First Karabakh War, media coverage of the conflict 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 has dramatically changed. Traditional media outlets had played during the first Karabakh war in the 1990s a significantly greater role in mediating news about the conflict. In the Second Karabakh War, starting 2020, official authorities were spreading 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 figures.[5] The report further states that during the war, most Armenian and Azerbaijani-language media reduced their war coverage to the information provided by their respective country's Ministry of Defence. There had been little difference between state media, independent media, 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. [6]

b) Social media

In addition, in can also be observed that both Armenia and Azerbaijan have launched large-scale campaigns in legacy media and on social media platforms, using these platforms as narrative generating tools for the promotion of their policy agenda. They have 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 over the course of the Second Karabakh War digital media platforms and social networks reinforced enemy images and furthered the already extreme polarization between Armenian and Azerbaijani societies which confirmed existing beliefs and prejudices.[7] In this respect, the rise of social media has helped poisoned historical accounts and templates established already 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

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=

[5] *Ibid*, at 4.

[6] *Ibid*, at 9.

[7] Elise Thomas and Albert Zhang, *Snapshot of a Shadow War in the Azerbaijan-Armenia Conflict,* October 9, 2020, https://www.aspistrategist.org.au/snapshot-of-a-shadow-war-in-the-azerbaijan-armenia-conflict/

those nearest to them, but never with other islands."[8] 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."[9] As the conflict progressed, the fiery atmosphere on social networks led even moderate voices on both sides take up radical pro-war positions.[10] Social media helped one the one hand to spread old narratives and on the other hand promoted new, exceedingly simplistic narratives overlaying 'ancient' ones to take firm root: the dominant Azerbaijani narrative, one of defending itself from aggression, and the Armenian one, of victimhood and betrayal by the West.[11] In addition, conspiracy theories and false sensationalist claims spread by actors seeking to disrupt a putative peace process also spread like wildfire across social media, aided by reposting by public intellectuals and well-known journalists. In particular, young people have been targeted via short, easily digested and affective content, such as memes and short videos through applications such as Twitter, Instagram, TikTok, and Telegram. They are called upon 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 in both sides have wised up to these formats, regularly communicating directly with the public via Facebook livestream or increasing communication via Twitter. Through these strategies, heightened and accelerated at times of violent conflict, political leaders in Armenia and Azerbaijan have been able to emulate wider global trends of bypassing traditional media. Regime-friendly disinformation and narratives can spread through the population much faster than more critical investigative reporting, opinion pieces, or expert analysis, thereby depriving media of its traditional role of mediating, and in various senses regulating, information.

c) 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, which allows for restrictions of media freedom. A temporary government decree issued in Armenia prohibited the publication of reports "criticizing" or

[8] Nina Iskandaryan, Hrant Mikaelian, *Media coverage of the Nagorno-Karabakh conflict in Armenia and Nagorno-Karabakh,* CAUCASUS INSTITUTE POLICY BRIEF, March 2018, https://c-i.am/wp-content/uploads/Policy-brief-media_en_final-1.pdf.
[9] *Ibid*.
[10] Katy Pearce, *While Armenia and Azerbaijan fought over Nagorno-Karabakh, their citizens battled on social media,* WASHINGTON POST, December 4, 2020, https://www.washingtonpost.com/politics/2020/12/04/while-armenia-azerbaijan-fought-over-nagorno-karabakh-their-citizens-battled-social-media.
[11] *See* European Resources for Mediation Support (ERMES) III, *supra* note 17.

"questioning the effectiveness" of state actions concerning the conflict, leading to the forced takedown of hundreds of articles and fines issued to news outlets.[12] Authorities also blocked websites with Azerbaijani and Turkish domain names and the social media app TikTok.[13] The martial law currently in force in Armenia allows authorities i.a. to confiscate media outlets' equipment and to establish special procedures for journalists' accreditation.[14]

Azerbaijan's parliament followed with its own introduction of martial law. Internet restrictions and censorship have since increased. Social media, such as Twitter and Facebook are blocked as well opposition and independent news websites. In February 2022, President Aliyev signed a new media law compelling online media outlets to register with the government and obtain government permission before publishing news articles.[15] In addition to the restriction of speech, observers note that reporting on Nagorno-Karabakh war is getting increasingly dangerous for reporters. Even reporters wearing bullet-proof vests clearly marked with the word "Press" were allegedly targeted.[16]

In conclusion, in the Artsakh conflict we can observe the whole range of propaganda, disinformation, fake news, in addition to governmental restrictions on media freedom. For the purpose of this analysis, we can summarize all these different manifestations under the term "propaganda" in a broad sense, covering all aspects of potentially harmful state speech. The following section of this article will analyze the legality of these measures under international law.

IV. Propaganda under Public International Law

In this section I examine the rules and limitations of propaganda under public international law. The questions are: Are there any legally binding principles governing the speech of states, like propaganda, disinformation, fake news? What exactly do these rules prescribe? How do they set limits to the states' conduct in their international relations? I will tackle the question of how can such obligations be enforced? What is the role of courts, what is the role of fact-finding missions?

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[12] United States Department of State, ARMENIA HUMAN RIGHTS REPORT 2021, https://am.usembassy.gov/wp-content/uploads/sites/92/hrr2022.pdf

[13] Anahit Hakobyan, *Armenian digital communications in Karabakh War of 2020: Critical discourse analysis*, JOURNAL OF SOCIOLOGY, VOL. 12 NO. 1 (33) (2021), at 35.

[14] Republic of Armenia, LAW ON THE LEGAL REGIME OF MARTIAL STATUS, December 5, 2006, https://www.arlis.am/documentview.aspx?docid=67147

[15] United States Department of State, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: AZERBAIJAN, https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/azerbaijan/

[16] Reporters without Borders, *Covering Nagorno-Karabakh war is getting increasingly dangerous and complex for reporters*, November 6, 2020, https://rsf.org/en/covering-nagorno-karabakh-war-getting-increasingly-dangerous-and-complex-reporters.

1. 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 and obligations of states vis-a-vis other states. Public International Law has distinct features, that distinguishes 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 rule[17] - not bound by Public International Law; thy must only respect the national law of the state on which territory they act or of which they are citizens. In particular, liability of media platforms and users are governed by national criminal law and media law.

So how do we know if an individual acts in private capacity or on behalf of a state as part of the state? Customary International Law provides for rules of attribution: They provide that 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, however, 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 private capacity, the state can be held responsible if this conduct is attributable to the state. But attributing reports of private media companies or individuals to states will often be difficult, since the rules of attribution under customary international law are strict. 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)[18], the conduct of private actors, can only be attributed to a state if the state directed or controlled the company's actions, in particular by giving instructions. The "Friendly Relations Declaration", a UN General Assembly resolution, which is held to reflect customary international law, stipulates that "no State shall organise, 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".[19] These requirements were further specified by the International Court of Justice (ICJ) in the Nicaragua case, and has since then been generally accepted as a necessary

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

[18] International Law Commission, ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, UN Doc A/56/83, August 3, 2001.

[19] General Assembly Resolution 2625, "The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States".

requirement of attribution.[20] 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 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 basis for attribution of conduct if it is acknowledged and accepted by a state subsequently as its own. However, the 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.[21] 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 as hostages of its diplomatic and consular staff.[22] The Court, in its Judgment of 24 May 1980, found that Iran had violated obligations owed by it 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 — for lack of sufficient information — Iran had however 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 taking of hostages, certain organs of the Iranian State had endorsed the acts complained of and decided to perpetuate them, so that those acts were transformed into acts of the Iranian State.

Because of 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. But here international law does not come to an end: Even though acts of private individuals and media companies may not be attributable to a state, a state nevertheless can be held responsible if it has failed to comply with its own obligations. 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,

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[20] Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Rep. 1986, p. 14.

[21] United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), ICJ Rep. 3 1980, p. 3.

[22] 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.

failing a duty to prevent harmful acts by private individuals. Here we may look again into jurisprudence of the ICJ and customary international law. According to the formulation by the ICJ in the Corfu Channel case, every State is under an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[23] This no-harm principle has been further developed in international environmental law, according to which 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 "ensure that their laws and practice eliminate safe havens for those who criminally misuse information technologies".[24]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 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 derive from special treaties, in which state explicitly undertake such duties, such as Article 20 ICCPR and Article 4 CERD, as will be explained below. But there is no 'general principle of due diligence' in international law. Therefore, a state cannot be held legally responsible for <u>all</u> activities of privates within its territory.

2. Freedom of action under Public International Law (Lotus principle)

Even though 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 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, they do not define "propaganda".

[23] Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), I.C.J. Reports 1949, p. 4.
[24] Resolution 65/230 of 2010.

While some international organs and organizations have proposed some clarifications, there is no uniform understanding on the term.[25] This is not surprising considering that even domestic legislators are struggling to find definitions when introducing anti-"fake news" legislation.[26]

This article argues that the lack of definition does not bar from making assessments on the legality of such forms of state speech under public international law. This is because under public international law sovereign states enjoy a general freedom of action. This principle has been formulated by the Permanent Court of International Justice (PCIJ) in the Case of the S.S. "Lotus" of 1927.[27] 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".[28] It has since become known as the "Lotus principle" and is used a general departure point for legal arguments under public international law: Sovereign states may act in any way they wish so 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 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 legal rights of other states. The following sections will analyze those rules of international law protecting the sovereign rights and legally protected interests of other states and therefore, set limits to offensive and harmful state speech.

3. Limits to state speech under international law

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[25] For instance, the Parliamentary Assembly of the Council of Europe considers "fake news," "propaganda," and "disinformation" as merely different forms of manipulation, see European Parliament, *The Protection of Editorial Integrity*, EUR. PARL. ASS. RES. 2212, at paras. 8.7, 9.5 (2018). The Organization for Security and Co-operation in Europe (OSCE) acknowledges "fake news" in the title of its 2017 joint declaration, but it only mentions "disinformation" and "propaganda" throughout the main text, suggesting that a clear distinction cannot be made, see Organization for Security and Co-operation in Europe, *Joint Declaration on Freedom of Expression and "Fake News," Disinformation and Propaganda,* March 3, 2017, https://www.osce.org/fom/302796. The European Commission suggests a "multidimensional approach", using the rather neutral term "disinformation" to include "all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit", see European Commission, *A Multi-Dimensional Approach to Disinformation*, Report of the Independent High Level Group on Fake News and Online Disinformation, March 2, 2018, at 10–11.

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

[27] 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?

[28] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

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, which 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 special rules, formulated in treaties. But 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

a) The principle of non-intervention

Non-intervention into 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: If all states are by law considered to be sovereign and equal no state may intervene or interfere into the domestic affairs of the other. In 1970 UN General Assembly adopted the Resolution 2625 "The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" (so-called Friendly-Relations-Declaration).[29] The Declaration specifies that no state has the right "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, by means of propaganda by one State with the aims to destabilizing 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, state practice with respect to propaganda, is

[29] 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.

ambivalent.[30] 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 principle on non-interventions.[31] However, the line between permissible political pressure to impermissible coercion is blurry as neither state practice nor doctrine has yet developed convincing criteria that allow to make a 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.

b) Protection of the dignity of Heads of State and Diplomatic Relations

Customary international law requires States to refrain from offensive or defamatory speech directed of foreign Heads of State. In addition, it is argued that there are also positive "obligations of prevention as regards possible acts by individuals".[32] The State against which the attacks are directed has a right to protest and to demand appropriate reparation, which can include a formal apology. It is not clear whether this positive obligation would also amount to an obligation to provide for criminal sanctions for defamatory attacks on foreign representatives.[33] While some states, such as Germany, provide for a special offence of the insult or defamation of the head of state under their domestic criminal law,[34] other states, many in Europe, have abolished similar provisions.[35]

International law traditionally protects diplomatic relations, too. These rules are codified in the Vienna Convention on Diplomatic Relations (1961).[36] Art. 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

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[30] Maziar Jamnejad and Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN JOURNAL OF INTERNATIONAL LAW (2009) 345, at 374.
[31] Lori Fisler Damrosch, *Politics across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) (1989) 1, at 49.
[32] Case concerning Certain Questions of Mutual Assistance in Criminal Matters [Djibouti v France] [2008], ICJ Rep 177, para. 174.
[33] Cf. Alexander Heinze, *The defamation of foreign state leaders in times of globalized media and growing nationalism*, J. INT'L MEDIA & ENTERTAINMENT LAW VOL. 9, NO. 1, at 33 (discussing the existence of a Customary International Law norm to criminalize defamatory attacks on foreign representatives). Eric De Brabandere, *Propaganda*, Max Planck Encyclopedia of Public International Law, online ed., Article last updated: August 2019 (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").
[34] See e.g. Germany, Article 103 Criminal Code.
[35] Since the 1990s, Hungary (1994), the Czech Republic (1998) Belgium 2005, France (2004) and Romania (2014) have removed the offence from their domestic law.
[36] 500 UNTS 95.

Persons, including Diplomatic Agents[37] includes the "dignity" of a state representative or official as a protected good.

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.

c) International Broadcasting Law

One area in which early attempts by the states have been made to further specify the principle of non-intervention by an international agreement is broadcasting. Audio radio broadcasting emerged in the early 20th century, at first for military purposes. After WW I, 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 contents could be highly problematic for other states. For these reasons the International Convention concerning the Use of Broadcasting in the Cause of Peace (Broadcasting Convention) was concluded in 1936 among the Member States of the League of Nations.[38] According to Art. 1, States are required to undertake to 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 obligations 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

[37] UNTS Vol. 1035, p. 167.

[38] 186 LNTS 301. *See* also THE AMERICAN JOURNAL OF INTERNATIONAL LAW VOL. 32, NO. 3, Supplement: Official Documents (Jul., 1938), at 113-120.

company, or in the rules applicable to other private concerns, and to take the necessary measures to ensure the application of theses clauses".

While the Broadcasting Convention is still in force today and there has since been no comparable attempt for regulating other modern forms of communication by 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 Broadcasting Convention, while, 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.[39]

The accession to the Convention by the Soviet Union and its call on other socialist states to follow suit (such as the former Czechoslovakia, German Democratic Republic, Hungary) had a strong symbolic character. The accession to the Broadcast Conventions was motivated by Soviet Union's intent as a step towards improving the Soviet Union's legal position against Western broadcasts. In particular, The Soviet Union aimed to ward off outside interference bywestern 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.[40] It was also driven against the backdrop of western policy, promoting the principle of free flow of information.[41]

There is good reason to hold that Russia's disinformation campaign and war propaganda relating to the war in Ukraine violate the Broadcasting Convention, since they 'harm good international understanding' between states parties. Although Ukraine is not a party to the Convention, several states that have condemned Russia's military actions in Ukraine are parties

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

[40] 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 (pp. 241-269) (2013), at 242–243.

[41] The socialist states' real intention can be clearly seen in a statement made by the German Democratic Republic upon its accession to the Convention: " In order to deal with the intensified confrontation politics by the most aggressive parts of Imperialism – especially in the UN and the UNESCO – the Convention is of particular importance today. At the same time, it can serve as an important instrument in the struggle of all progressive, democratic forces for a new international information order. For these reasons, the USSR … called [on other states] to strengthen the Convention with as many accessions as possible and to do everything to stand up against the abuse of modern mass media for intervention in the internal affairs of States, for subversive propaganda and for fomenting hostility between peoples. The USSR has also asked the GDR to consider acceding to the Convention."Vorlage für den Ministerrat der DDR vom 28.5.1984 zum Beschluss über den Beitritt der DDR zur Internationalen Konvention über den Gebrauch des Rundfunks im Interesse des Friedens vom 23. September 1936 (Draft for the Council of Ministers of the GDR on the Accession to the Broadcasting Convention), file DC 20 I/4 /85382, at 128, Federal Archive of German, cited and translated by Björnstjern Baade, *Fake News and International Law*, EJIL (2018), Vol. 29 No. 4, 1357–1376, at 1367.

thereto, such as Norway, Finland, Estonia, Denmark, Luxembourg, Latvia, and Bulgaria, and therefore could be regarded as harmed by Russian disinformation. But they can not 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.

d) The clash of principles: Freedom of information vs. the prior consent

The controversies over the Broadcasting Convention displays that the transmission of ideas and information across borders is an area where the interests of western states and eastern states clashed during the Cold War and still 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 right. But the conception of a free flow of information has put eastern states, pursuing a marxist-leninist policy with a tend to monopolize information on the state level, to a dilemma. 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 ("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"), 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.

An instrument, which 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 Artice 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." And 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 states borders.

Interestingly, it must be recalled that while during the Cold War, it was mainly Western broadcasting stations, which aimed at influencing public opinion in socialist states,[42] today, it is vice versa. In light of the massive disinformation campaign by the Russian Federation, it is the western states who now in turn attempt 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.

e) International Human Rights Law

Since early attempts to regulate state speech have failed, States have taken a different approach to bring at least some clarifications. That is by international human rights law. 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 cease to apply in situations of an (international or non-international) armed conflict.[43] Some human rights treaties, including the ICCPR and ECHR, allow state parties to suspend some human rights obligations.[44] These derogation clauses also permit the temporary restriction of media freedoms, provided that they do not involve

[42] Nicholas J. Schlosser, *Cold War on the Airwaves: The Radio Propaganda War against East Germany* (2015), at 57–58, 73–105.

[43] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, [1996] ICJ Rep 226, at para. 25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, [2004] ICJ Rep 136, at paras. 102-142.

[44] *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.

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). States Parties wishing to temporary suspend certain human rights, must adhere to the formal requirements of these derogation clauses, that is to officially proclaim this situation of emergency and to notify the other states parties.

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

aa) Freedom of expression and information (Article 10 ECHR and Article 19 ICCPR)

For Armenia and Azerbaijan, human rights obligations stem from the International Covenant of 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 run in conformity 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 minimise interference by public officials and privates.[45] The ECtHR has also emphasized that freedom of information is applicable "not only to "information" or "ideas" that are favourably 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".[46]

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

[46] Handyside v. United Kingdom, para. 49; Lingens v. Austria, para. 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 legally non-binding.

The ECtHR has been concerned with various individual complaints against Armenia. Decisions include findings that Armenia has violated the right to freedom of expression under Article 10 ECHR. For example, the case Dareskizb Ltd v. Armenia[47] concerned actions by State authorities during a state of emergency following a presidential election in 2008, during which the applicant company was prevented from publishing its newspaper, Haykakan Zhamanak. The Court 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, the independent broadcasting company Meltex Ltd was repeatedly refused broadcasting licences by the National Television and Radio Commission, without reasons. The ECtHR found that the interference with Meltex's freedom to impart information and ideas, namely having been refused a broadcasting licence 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, i.a. a case concerning an alleged smear campaign against a well-known journalist, who was being accused of an anti-government bias and immoral behavior,[48] and criminal conviction of a journalist in an unfair trials for several of his published statements[49].

However, it must be borne in mind that freedom of expression and freedom of information are no absolute human rights guarantees, but are subjected to limitations. Article 19 (3) ICCPR authorizes to 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.

[47] Dareskizb Ltd v. Armenia, Appl. No. 61737/08 (Eur. Ct. H.R. Sept.21, 2021)
[48] Khadija Ismayilova v. Azerbaijan, Appl. Nos. 65286/13 and 57270/14 (Eur. Ct. H.R. April 10, 2019).
[49] Mahmudov and Agazade v. Azerbaijan, Appl. No. 35877/04 (Eur. Ct. H.R. March 18, 2009).

bb) 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 at first sight rather odd, as it contains not a subjective human right, but formulates an objective requirement directed at the states. The concept of "war propaganda" had been 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).[50] 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 which 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".[51] 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 Art. 20 ICCPR in order to undermine the right to free speech. They had good reason to that, 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.[52] Despite of that, the 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

[50]Paul M. Taylor, A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 2020, Commentary on Article 20, at 580.

[51] UN General Assembly, [20 October 1961] GAOR 16th Session 3rd Committee 1079th Meeting, at para. 2.

[52] *See* Art. 4 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (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, 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."

Cold War superpowers.[53] However, upon ratifying the ICCPR, 15 states, declared reservations to Article 20 ICCPR.[54] The common thread to these reservations is that the provision is unnecessary given pre-existing legislation on public order offences and that it constitute 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.[55] In light of this, it is has been suggested that the term 'propaganda' has a particular meaning. It may be understood to mean "intentional, well-aimed influencing of individuals by employing various channels of communication to disseminate, above all, incorrect or exaggerated allegations of fact. Also included thereunder are negative or simplistic value judgements whose intensity is at least comparable with that of provocation, instigation or incitement . . . However, propaganda must be specific enough for evaluating whether it relates to a war of aggression or not.'[56] The Human Rights Committee's General Comment 11 distinguishes between acts of aggression, and permissible defensive conflict and other assertion 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-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations".[57] 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 Faurrison v. France, where the Human Rights Committee confined its consideration only to Article 19(3)

[53] Paul M. Taylor, supra note 58.

[54] Australia, Denmark, Iceland, Ireland, Liechtenstein, Malta, the Netherlands, New Zealand, Norway, Sweden, Switzerland, United Kingdom, and the US, as well as five declarations by Belgium, Finland, France, Luxemburg, and Thailand.

[55] Michael G Kearney, Propaganda for War, Prohibition of, Max Planck Encyclopedias of International Law [MPIL], online edition, last updated May 2009

[56] Manfred Nowak, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS - CCPR COMMENTARY, 205, at 472–3.

[57] Human Rights Committee, General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20).

without engaging with the State's argument that the restriction was mandated by Article 20.[58] 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.

cc) Incitement to genocide

An extreme form of hate speech is incitement to genocide. One of the many effects words can have is not only to cause psychological harm, but they can also directly or indirectly incite to physical violence. Empirical studies suggest that propaganda before and during armed conflicts are likely to have deteriorating effects on society, as it may lead to the vilification of certain groups and even encourages violence against them.[59] The history of hate propaganda and violent speech in international conflicts begins with the Nuremberg Trials of German Major War Criminals in 1946.[60]

Historically, this crime 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 critized by the Republic of Türkiye and the Republic of Azerbaijan.[61]

Drawing on these historical experiences, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948.[62] Art. 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.

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[58] Faurisson v. France, CCPR/C/58/D/550/1993, 8 November 1996 [9.6].

[59] ARTICLE 19 (Non-Governmental Organisation), Response to the consultation of the UN Special Rapporteur on Freedom of Expression on her report on challenges to freedom of opinion and expression in times of conflicts and disturbances, 19 July 2022, https://www.ohchr.org/sites/default/files/documents/issues/expression/cfis/conflict/2022-10-07/submission-disinformation-and-freedom-of-expression-during-armed-conflict-UNGA77-cso-article19.pdf.

[60] Trial of German Major War Criminals, [Judgment] Nuremberg International Military Tribunal [30 September and 1 October 1946], (1947) 41 AJIL 172. 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.

[61] 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". Deutscher Bundestag, Drucksache 18/8613, May 31, 2016.

[62] Convention on the Prevention and Punishment of the Crime of Genocide, entered into force 12 January 1951, 78 UNTS 277.

Incitement to genocide also leads to the 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.[63] Art. 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.[64] 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 commit an act [of genocide]; it has to be more than a mere vague or indirect suggestion."[65]

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. These events to the attention of the international community and the UN Security Council, who emphasized the need to stop propaganda aimed at spreading hate and it urged "all States and relevant organizations to cooperate in countering radio broadcasts and publications that incite acts of genocide, hatred and violence in the region."[66]

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 the 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. Many have

[63] adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 90.
[64] *Prosecutor v Nahimana [Judgment]* [28 November 2007], ICTR-99-52-A, at paras 677–78.
[65] Ibid, at para. 692.
[66] UN Security Council, Resolution 1161, adopted by the Security Council at its 3870th meeting, on 9 April 1998.

argued that Russian state media has also orchestrated incitement to genocide in their coverage of events concerning the ongoing Russian-Ukrainian War.

f) Incitement and promotion of racial hatred and discrimination

While there have been no international judicial proceedings on claims based on incitement to genocide in the conflict between Armenia and Azerbaijan (although in the media such allegations are beeing 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 States 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 kinds of measures, such as genocide.

The CERD is a rather peculiar instrument, as it has a number of features other international human rights treaties are lacking:

First: The obligations undertaken by the States Parties to the CERD only apply to their own citizens. In this respect, the CERD is instrument of minority protection and while being so, it perfectly fits to the situation of Artsakh, an area that part of Azerbaijan, but is populated with approx. 120,000 citizens of Armenian ethnicity.

Second: Under the CERD the states parties undertake not only to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, in particular security of person and protection by the State against violence or bodily harm. In addition, the CERD but also forbids 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 colour 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 colour 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."

Third: What is even more important the CERD contains a jurisdictional clause in Article 22 providing for the jurisdiction of the ICJ. So the real importance of the CERD is not that its create substantive rights for the States parties, but because it provides for jurisdiction for disputes. Most notably, 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 to, 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 good for a peaceful dispute resolution, on the other hand it has also raised fears for the willingness of States to further participate in the CERD: Certain States might withdraw from the Convention if it becomes evident, that other States may frame claims only for the purpose to file ICJ cases which are, in truth, unrelated to racial discrimination.

Relying on this jurisdictional clause Armenia has initiated proceedings against Azerbaijan twice before the ICJ: In 2021 and just recently on December 28, 2022.

aa) First provisional order of the ICJ (2021)

Even though the Second Nagorno Karabakh conflict ended with a ceasefire on 10 November 2020, it did not stop the hostilities. This eventually resulted in Armenia filing an Application 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.

Armenia contends 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 argued 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.

The ICJ considered plausible at least some rights allegedly violated through incitement and promotion to racial hatred and discrimination against persons of Armenian national or ethnic

[67] 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

origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage. In the 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. Such a situation may have serious damaging effects on individuals belonging to the protected group. The ICJ, therefore, ordered Azerbaijan 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."[68]

(2) Second application for provisional orders (2022)

On 28 December 2022 Armenia again filed a request for the indication of provisional measures. 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 protesters claiming to be environmental activists. They stopped traffic by setting up tents. Azerbaijan denies to have orchestrated these blockades, claiming that the activists are stating a legitimate protest against illegal mining activity. Armenia claims that Azerbaijan orchestrated these blockades, preventing anyone and anything from entering or exiting, designed to allow "ethnic cleansing".

Armenia requested that the Court indicate the following provisional measures:

- "Azerbaijan shall cease its orchestration and support of the alleged 'protests' blocking uninterrupted free movement along the Lachin Corridor in both directions."
- "Azerbaijan shall ensure uninterrupted free movement of all persons, vehicles, and cargo along the Lachin Corridor in both directions.

The two cases between Armenia and Azerbaijan are only the latest of a growing number of disputes brought before the ICJ based on the CERD. In cases include disputes between

[68] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021, p. 361

Georgia v. Russian Federation[69], Ukraine v. Russian Federation[70] and Qatar v. UAE[71]. The peculiarity of all these cases, including the ones discussed here concerning the conflict between Armenia and Azerbaijan, is that their underlying issues do not only concern racial discrimination but, for instance, territorial sovereignty, international humanitarian law and restrictions on trade and flow of persons. Therefore, Armenia and Azerbaijan try to fit their claims within the legal framework of CERD to use the jurisdictional clause of that Convention to bring a case to the ICJ.

g) International Humanitarian Law

International Humanitarian apply when there is an armed conflict. I argue that while propaganda in war is not in general illegal under International Humanitarian Law (because it may constitute a permissible ruse of war), a limit is reached when other compelling rules of international law are violated in the dissemination of propaganda. Moreover, as will be shown below, International Humanitarian Law also protects journalists and news media workers as well as media objects.

aa) Psychological warfare

Since time immemorial, parties to a conflict have made use of methods of psychological warfare. Some of the first applications of the human psyche as the target of military operations date back to ancient times. For instance, the "Art of War", is an ancient Chinese military treatise dating from the 5th century BC, in which the Chinese military strategist Sun Tzu describes the main objective of war as defeating the enemy without having to fight.

Psychological warfare is traditionally perceived to be conducted through the dissemination of false rumours and the spreading 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 increasingly been conducted in the cyber domain as well. In addition, the advent of the mass media has

[69] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), https://www.icj-cij.org/en/case/140.

[70] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), https://www.icj-cij.org/en/case/166.

[71] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), https://www.icj-cij.org/en/case/172

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 Art. 24 Hague Regulations and Art. 37 (2) of the Geneva Conventions Additional Protocol I (1977)[72], as long as there is no resort to perfidious methods of warfare or no other compelling rules of international law are violated.

The line to perfidy would be crossed if the other party was misled into believing that it was protected by international law (e.g., humanitarian agreement to cease fighting with the intention of surprising the enemy who relied on it). Beyond that, there are no criteria which 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 transmission of false or misleading messages via radio/telephone/electronic/internet communication are included in many national military handbooks as permissible ruses of war.[73]

The fine line of division between 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 example, which is also a highly problematic one, 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 these 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

[72] Art. 37 (2) AP I states: "Ruses of war are not prohibited. Such ruses are acts intended to mislead an adversary 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 ruses: the use of camouflage, decoys, mock operations and misinformation."

[73] Kalliopi Chainoglou, Psychological Warfare, Max Planck Encyclopedias of International Law, online ed., Article last updated: August 2016, at 11

insults and public curiosity." Moreover, Article 14 of GC 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 Abu Ghraib during the Iraq war, are illegal. But there are also good reasons to hold 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".

bb) Protection of war correspondents and journalists

Since states enjoy a wide discretion as to the use psychological methods of warfare, it is necessary to be able to rely on neutral and correct news. Reporting directly from conflict zone is necessary to provide accurate factual information and inform the public about the commission of war crimes. As reporting from conflict areas entails great personal risk, the protection journalists in conflict zones is important. This issue has also drawn the attention of the UN Security Council. In Resolution 1738 of 23 December 2006, the UN Security Council expressed its concern about violence against "journalists, media professionals and associated personnel" in armed conflict.

Protecting news media workers is not only a matter of human rights law, protecting them from infringements of individual rights, such as life, health, but also freedom of expression, but it is also a matter of international humanitarian law, when such reporting takes place in conflict zones.

(1) General Protection from attacks

The Geneva Convention relative to the Treatment of Prisoners of War of 1949 (Geneva Convention III) protects war correspondents, which are defined by article 4 A (4) GC III as persons "who accompany the armed forces without actually being members thereof". War correspondents and journalists are entitled to the protection granted to civilians. This means they may not be the object of attacks. Violations of this prohibition, if they result in death or serious injury, are a grave breach of international humanitarian law (Art. 85.3 (a) Protocol I) and can, under qualified circumstances by 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.[74]

Article 79 Protocol Additional to the Geneva Conventions of 1977 extends protection to the broader group of 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 for the formal identification as a journalist.

Under the general rule of international humanitarian law civilians 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 the question is under which circumstances journalists would lose their protection: Of course, interviewing people, taking notes, or filming with a TV camera are no 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 the International Criminal Tribunal for Rwanda (ICTR) in the Case Nahimana and Others, where the ICTR evaluated the criminal responsibility of the founders of the Radio Télévision Libre des Mille Collines (RTLM) 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 against humanity, namely 'persecution on political grounds of an ethnic character'.[75] The significance of the judgments for the mass media was that the persons concerned were punished precisely because of their strategic role and control they 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 problem is whether Television or radio buildings and other installations serving the news media are protected from attacks as civilian objects. A prominent example is the bombing of the Belgrade Television and Radio Station (RTS) building

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[74] Hans-Peter Gasser, *War, Protection of News Media Workers, Max Planck Encyclopedias of International Law, online edition*, last updated: December 2015.

[75] *Prosecutor v Nahimana [Judgment and Sentence]* para. 1071.

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.

(2) Protection upon capture

In addition to protection as civilian from direct attacks rules exist for Protection of Journalists in the Power of a Party to an 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 and can therefore not be military targets, 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 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 party to the CC IV, its nationals are included in the protection of 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 time of armed conflict.

V. Conclusion

It has been shown that Public International Law only provides for fragmented rules limiting offensive state speech, propaganda and other measures of information warfare. The general obligation is to refrain from intervening into the domestic affairs of another state. This general obligation is further specified for diplomatic relations, the protection of dignity of the state, broadcasting, human rights and international humanitarian law. The problem is that there are no effective enforcement mechanism under international law and not all treaties provide for jurisdiction of international courts to solve disputes.