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Mission Statement: The *Journal of International Media & Entertainment Law* is a semi-annual publication of the Donald E. Biederman Entertainment and Media Law Institute of Southwestern Law School in association with the American Bar Association Forums on Communications Law and the Entertainment and Sports Industries. The *Journal* provides a forum for exploring the complex and unsettled legal principles that apply to the production and distribution of media and entertainment in an international, comparative, and local context. The legal issues surrounding the creation and dissemination of news and entertainment products on a worldwide basis necessarily implicate the laws, customs, and practices of multiple jurisdictions. The *Journal* examines the impact of the Internet and other technologies, the often-conflicting laws affecting media and entertainment issues, and the legal ramifications of widely divergent cultural views of privacy, defamation, intellectual property, and government regulation.

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Editor's Note

This issue begins with *How China Curbs Free Speech Beyond Its Borders: Legal Strategies of Transnational Censorship* by Ge Chen. This article examines China's transformation of domestic censorship into a global phenomenon under Xi Jinping's leadership. It analyzes constitutional reforms, the institutional machinery behind speech regulation, and normative standards prioritizing national security. Chen explores how censorship merges with propaganda, economic coercion, and technological control to influence multinational corporations, academia, and foreign governments. The piece concludes that China's legal strategies for transnational censorship pose a systemic challenge to global freedom of expression and liberal democratic principles. Chen is a professor of Global Media and Information Law at Durham Law School in the U.K..

Gurgen Petrossian's contribution to this issue is *Persecution as a Crime Against Humanity in the Context of the Nagorno-Karabakh Conflict.* Petrossian investigates the forced displacement of over 100,000 Armenians from Nagorno-Karabakh in 2023, framing it as persecution under Article 7 of the Rome Statute. The article traces the historical evolution of persecution as a crime against humanity, outlines its legal elements, and applies them to Azerbaijan's state policy of discrimination, hate speech, and violence. It further assesses ICC jurisdiction, admissibility, and the prospects for accountability, arguing that these acts meet the threshold for crimes against humanity, including deportation and other inhumane acts. Petrossian is an international criminal law expert at the International Nuremberg Principles Academy and a lecturer at the Friedrich-Alexander Erlangen-Nürnberg University,

From Guido Westkamp comes *Borrowed Plumes: Taking Artists' Interests Seriously in Artificial Intelligence Regulation.* Westkamp critiques the current EU and UK legal frameworks governing AI and copyright, focusing on issues such as data mining, pastiche exceptions, and AI personhood. He argues that granting AI creative rights undermines human artistic autonomy and calls for recognizing artists' personality rights as a "negative liberty" to oppose AI appropriation. The article proposes statutory licensing schemes and collision clauses in future AI regulation to balance technological innovation with the protection of human creativity and cultural integrity.

Westkamp holds the chair in intellectual property and comparative law at the Center for Commercial Law Studies, Queen Mary University of London.

Our fourth article is *Media in Unrecognized Countries: Challenges and Lessons from Artsakh (Nagorno-Karabakh) in the Face of Isolation and Misinformation,* by Arman Asyran. Asryan explores the role of media in the former Republic of Artsakh, an unrecognized state that maintained democratic media standards despite decades of conflict and isolation. The article reviews Artsakh's constitutional guarantees of freedom of expression, media laws, and access to information, comparing them with international norms and other unrecognized states. It highlights challenges such as outdated regulations, lack of international support, and Azerbaijani disinformation campaigns that marginalized Artsakh's voice and facilitated human rights abuses, culminating in the region's ethnic cleansing in 2023. Asyran is an international lawyer who worked at the Human Rights Ombudsman's Office of the former Artsakh Republic.

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

Professor Michael M. Epstein
Supervising Editor

HOW CHINA CURBS FREE SPEECH BEYOND ITS BORDERS: LEGAL STRATEGIES OF TRANSNATIONAL CENSORSHIP

Ge Chen*

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* Associate Professor in Global Media and Information Law, Durham Law School. His research focuses on free speech and global constitutionalism, with particular attention to China. He has held academic positions at the University of Oxford, the University of Cambridge, and Yale Law School, and was a Research Associate at the Mercator Institute for China Studies, the EU's leading China think tank. He is the author of *Copyright and International Negotiations: An Engine of Free Expression in China?* (Cambridge University Press, 2017), a monograph featured in the *Harvard Law Review*. Chen is the 2025 recipient of the Franklyn S. Haiman Award for Distinguished Scholarship in Freedom of Expression.

I. INTRODUCTION

The Constitution of the People's Republic of China (PRC) acknowledges the right to free speech.[1] However, the country's history is marred by a persistent record of political censorship. China signalled its commitment to upholding free speech by signing the International Covenant on Civil and Political Rights (ICCPR) in 1998.[2] Yet, the absence of ratification has left this commitment entirely symbolic.[3] Until the 2010s, the global community largely perceived China's censorship as an internal issue, separate from international considerations.[4] Nevertheless, its nuanced stance towards the international human rights regime often oscillated between resistance and collaboration.[5]

However, with Xi Jinping's rise to leadership in 2013, this landscape underwent a dramatic transformation. The Chinese Communist Party (CCP) embarked on a mission to fortify Xi's strategy of "rule by law,"[6] emphasizing the primacy of "intra-party regulations" within China's legal framework and broadening the

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[1] XIANFA [CONSTITUTION] Arts. 35, 41, 2018.
[2] ICCPR, Art. 19, *adopted* Dec. 16, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.
[3] For a critical analysis, *see* Margaret K. Lewis, *Why China Should Unsign the International Covenant on Civil and Political Rights*, 53 VAND. J. TRANSNAT'L L. 131 (2020).
[4] China's censorship was not officially examined at the United Nations until the Human Rights Council launched its first Universal Periodic Review of China in 2009. For the details of China's recent three reviews since then, *see id*. at 143–55.
[5] *See* RANA SIU INBODEN, CHINA AND THE INTERNATIONAL HUMAN RIGHTS REGIME 46–75 (2021).
[6] George G. Chen, *Le Droit, C'est Moi: Xi Jinping's New Rule-By-Law Approach*, OXFORD HUMAN RIGHTS HUB (July 16, 2017), https://ohrh.law.ox.ac.uk/le-droit-cest-moi-xi-jinpings-new-rule-by-law-approach/.

definition of "national security."[7] This strategic shift had profound implications for human rights, especially freedom of expression. Not only did the subsequent decade see China's intense nationalist sentiments,[8] but there was also a marked increase in national security legislation.[9] This evolution signifies China's ambition to globalize its domestic policies, extending the CCP's censorship reach beyond its borders,[10] with significant repercussions for

[7] The Fourth Plenary of the Eighteenth Central Committee of the CCP [中国共产党第十八届中央委员会第四次全体会议], The Decision of the Central Committee of the CCP on Several Significant Issues Concerning the Overall Promotion of Governing the Country in Accordance with the Law [中共中央关于全面推进依法治国若干重大问题的决定], Oct. 28, 2014.

[8] Aidan Powers-Riggs & Edardo Jaramillo, *Is China Putting "Wolf Warriors" on a Leash?*, THE DIPLOMAT (Jan. 22, 2022), https://thediplomat.com/2022/01/is-china-putting-wolf-warriors-on-a-leash/. For more recent examples of China's aggressive diplomatic performance*, see*, *e.g.*, Josh Halliday & Emma Graham-Harrison, *Chinese Diplomat Involved in Violence at Manchester Consulate, MP Says*, THE GUARDIAN (Oct. 22, 2022, 4:01 PM), https://www.theguardian.com/uk-news/2022/oct/18/china-claims-hong-kong-protester-entered-manchester-consulate-illegally#:~:text=Chinese%20diplomat%20involved%20in%20violence%20at%20Manchester%20consulate%2C%20MP%20says,-This%20article%20is&text=One%20of%20China's%20most%20senior,a%20British%20MP%20has%20said. *See also* Simone McCarthy, *Chinese Ambassador Sparks European Outrage over Suggestion Former Soviet States Don't Exist*, CNN (Apr. 25, 2023, 2:53 AM), https://edition.cnn.com/2023/04/24/china/china-ambassador-lu-shaye-baltic-soviet-states-europe-intl-hnk/index.html#:~:text=The%20remarks%20by%20China's%20ambassador,especially%20in%20the%20Baltic%20states.

[9] Alone China's central legislature has enacted more than twenty statutory acts concerning national security in the past ten years. To name a few examples, they include: the Counterespionage Act of the PRC, 2014; the National Security Act of the PRC, 2015; the Cybersecurity Act of the PRC, 2016; the National Intelligence Act of the PRC, 2017; the Anti-Terrorism Act of the PRC, 2018; the Cryptography Act of the PRC, 2019; the Act of the PRC on Safeguarding National Security in the Hong Kong Special Administrative Region, 2020; the Data Security Act of the PRC, 2021.

[10] *See, e.g.*, Jonas Gamso, *Is China Exporting Media Censorship? China's Rise, Media Freedoms, and Democracy*, 27 EUR. J. INT'L RELS. 858, 858–61 (2021) (discussing China's expansive censorship policies). *See also* Christopher A. Ford & Thomas D. Grant, *Exporting Censorship: The Chinese Communist Party Tries to Control Global Speech about China*, Nat. Sec'y Inst. Geo. Mason, NSI Law and Policy Paper (2022), https://nationalsecurity.gmu.edu/exporting-censorship-the-chinese-communist-party-tries-to-control-global-speech-about-china/.

global free speech.[11] These recent developments underscore the growing tension between the CCP's expansive speech regulation and the global imperative to safeguard free speech.[12]

China's practice of embedding political censorship within its legal frameworks is not new. However, such systematic transformation of domestic censorship into transnational law with global implications by an authoritarian state is unprecedented. Admittedly, any system of global governance is grounded in foundational assumptions about the interplay between law and politics.[13] First, modern governance, especially on a global scale, hinges on the "legitimacy" of its foundational elements—the rules and institutions.[14] Secondly, law, distinct from other societal mechanisms, embodies "normativity," offering reasons for actions that would otherwise lack legal justification.[15] Lastly, "functionality," gauged by the outcomes of global governance, serves as a critical metric to evaluate the efficacy of international laws in determining their scope and structure.[16]

Given this backdrop, while the CCP consistently asserts its legal actions aim to safeguard national interests and sovereignty,

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[11] Benedict Rogers, *Beijing Launches a Global Assault on Free Speech*, FOREIGN POL'Y (Jul. 9, 2020, 1:56 PM), https://foreignpolicy.com/2020/07/09/china-hong-kong-national-security-law-free-speech/. *See also* Suzanne Nossel, *Chinese Censorship Is Going Global*, FOREIGN POL'Y (Oct. 26, 2021, 5:37 AM), https://foreignpolicy.com/2021/10/26/chinese-censorship-enes-kanter-celtics-browder-is-going-global. The Editorial Board, *Free Speech Is Under Threat*, N. Y. TIMES, Mar. 20, 2022, at SR4.

[12] In fact, the United Nations (UN) has termed such challenges as "contemporary challenges to freedom of expression." David Kaye (Special Rapporteur), *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/71/373 (Sept. 6, 2016), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/278/27/PDF/N1627827.pdf?OpenElement.

[13] Even a restrictive political system needs a strong legal framework that upholds its legitimacy, norms, and effectiveness. THOMAS DEMMELHUBER & RICHARD YOUNGS, STRENGTHENING THE RIGHT TO PARTICIPATE: LEGITIMACY AND RESILIENCE OF ELECTORAL PROCESSES IN ILLIBERAL POLITICAL SYSTEMS AND AUTHORITARIAN REGIMES 11–12 (2023), https://www.europarl.europa.eu/RegData/etudes/STUD/2023/702581/EXPO_STU(2023)702581_EN.pdf.

[14] *See* JONAS TALLBERG ET AL. EDS., LEGITIMACY IN GLOBAL GOVERNANCE: SOURCES, PROCESSES, AND CONSEQUENCES 3–19 (2018).

[15] *See* Brian H. Bix, *The Normativity of Law*, *in* THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM 585 (Torben Spaak et al. eds., 2021).

[16] *See* Dana Burchardt, *The Functions of Law and their Challenges: The Differentiated Functionality of International Law*, 20 GERMAN L. J. 409, 411–14 (2019).

several pressing questions arise: What underpins the legitimacy of China's growing transnational censorship efforts? How is China's legal framework structured to allow itself to wield state power and influence the speech of foreign entities and individuals? And, crucially, how will China's approach to regulating speech across borders shape the future trajectory of global human rights?

This article offers a pioneering analytical lens to comprehend how China's transnational censorship intersects with broader challenges to global freedom of expression. To unpack the complexities of China's burgeoning censorship regime, this article delves into three pivotal legal sources that have gained prominence over the past decade. First, the bedrock of transnational censorship in China's legal infrastructure encompasses recent constitutional amendments and a myriad of censorship laws and regulations. Secondly, the CCP's Constitution and its internal speech regulations unveil the party's increasingly overt role in censorship. The ripple effects of the CCP's speech regulation have intensified, especially in the wake of a surge in national security legislation. Lastly, China employs extraterritorial political speech rules and intertwines censorship with trade-related laws, melding economic leverage with censorship.

Drawing from these sources, this article aims to define the evolving framework of China's transnational censorship laws, highlight the structural nuances in China's transnational censorship practices, and evaluate the multifaceted strategies China employs to amplify its authoritarian influence across political, economic, and technological domains. The subsequent sections are structured as follows. Part II delves into the legitimacy issue of China's evolving censorship framework, contextualized within its constitutional reforms. Part III provides an in-depth analysis of the normative aspects of the regime, spotlighting the distinct features of the party-state's revamped censorship approach. Part IV addresses the functionality of China's censorship, evaluating its multifaceted impacts across political, economic, and cultural spheres. Part V concludes.

II. DEFINING CHINA'S NEW FRAMEWORK OF CENSORSHIP

Between 2017 and 2022, significant amendments were made to both the Constitution of China and the Constitution of the CCP, further consolidating the dominant leadership of the CCP.[17] While these changes were not explicitly cantered on censorship, this strengthened power structure indirectly set the stage for a reshaped censorship framework, presenting an illiberal substance under a facade of legitimacy.[18]

A. THE SHIFT IN CENSORSHIP DYNAMICS

Over the past decade, China's censorship paradigm has undergone profound transformations, prompting a re-evaluation. A salient feature of today's censorship in China is its pronounced transnational dimension. During earlier phases of economic reforms (1980-2010), the Chinese party-state seemed open to compromises, allowing limited criticism based on the prevalent belief among critics that economic prosperity would inevitably usher in political reforms.[19] Capitalizing on this perception, the party-state attracted foreign investments and technologies, thereby bolstering its political foundation.[20]

In contrast, the modern transnational censorship approach is in line with the party-state's revised objectives: to eradicate any discourse that could threaten the CCP's unchallenged authority and to actively disseminate, both domestically and internationally,

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[17] The 2017 amendment of the Constitution of the CCP highlighted that "the party leads all" and that "the CCP leadership is the defining feature of socialism with Chinese characteristics." It was amended in 2022 to establish the party as "the supreme force for political leadership." The Constitution of the CCP, pmbl. The 2018 amendments of the Constitution of the PRC reproduce the mandate in the CCP Constitution that "the CCP leadership is the defining feature of socialism with Chinese characteristics." XIANFA, *supra* note 1, Art. 1.

[18] For a detailed discussion of the implications of China's recent constitutional amendment on censorship, *see* Ge Chen, *The Constitutional Rise of Chinese Speech Imperialism*, 2 J. FREE SPEECH L. 483 (2023).

[19] For an analysis of China's reform-era legal policy of censorship, *see* Xin He, *The Party's Leadership as a Living Constitution in China*, *in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 245, 257–58 (Tom Ginsburg & Alberto Simpser eds., 2013).

[20] *See* Anna L. Ahlers & Gunter Schubert, *"Adaptive Authoritarianism" in Contemporary China: Identifying Zones of Legitimacy Building*, *in* REVIVING LEGITIMACY: LESSONS FOR AND FROM CHINA 59 (Deng Zhenglai & Su Jianguo eds., 2011).

ideologies reinforcing the CCP-led "democratic dictatorship."[21] During the era of economic reforms, the party-state used to tolerate some minor dissenting voices,[22] but only during specific periods, especially when such voices did not seriously contravene policies the party-state might soon adopt.[23] These voices, however, must tactfully avoid touching upon sensitive topics like intra-party political disputes,[24] economic challenges,[25] or significant social unrest.[26]

Thus, China's censorship strategy has evolved significantly, adopting a dual approach: a robust defensive strategy for domestic information control and an aggressive transnational strategy to enforce authoritarian speech norms. This revamped system not only suppresses opposition but also vigorously promotes the narrative that China's advancements are unequivocally attributed to its current one-party leadership model.[27] This evolving form of censorship mirrors governance strategies that allowed certain authoritarian regimes to endure

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[21] For an account of China's successful transnational propaganda and infiltration through social media, *see* DAVID L. SLOSS, TYRANTS ON TWITTER: PROTECTING DEMOCRACIES FROM INFORMATION WARFARE 100–6 (2022).

[22] *See*, *e.g.*, Philip Shenon, *China 'Somewhat More Tolerant' of Dissent, U.S. Says*, N.Y. TIMES, Jan. 31, 1998, at A5.

[23] Brian Bremner, *China: Tolerate Dissent to Continue Growth*, BLOOMBERG (Sept. 12, 2006, 5:00 AM), https://www.bloomberg.com/news/articles/2006-09-11/china-tolerate-dissent-to-continue-growth?leadSource=uverify%20wall.

[24] A recent example was the Chinese foreign minister's prolonged absence before his dismissal which caused widespread rumours and speculations that were not censored completely. Emma Graham-Harrison, *Where Is Qin Gang? China's Foreign Minister Has Not Been Seen in Public for Three Weeks*, GUARDIAN (July 18, 2023, 9:12 AM), https://www.theguardian.com/world/2023/jul/18/where-is-qin-gang-chinas-foreign-minister-has-not-been-seen-in-public-for-three-weeks.

[25] There are "cycles of economic censorship" between which the regime would tolerate some comments on failed economic policies. Sarah Cook, *No Bears Allowed: China's Latest Round of Economic Censorship*, THE DIPLOMAT (July17, 2023), https://thediplomat.com/2023/07/no-bears-allowed-chinas-latest-round-of-economic-censorship/.

[26] For instance, widespread discontent about the Zero-Covid policy was not censored intensely amid the "White Paper Protest" across the country so in the wake of lifting that policy. KAWASHIMA Shin, *China: Exploiting the 'White Paper Protests' to Revoke the Zero-COVID Policy*, THE DIPLOMAT (Jan. 30, 2023), https://thediplomat.com/2023/01/china-exploiting-the-white-paper-protests-to-revoke-the-zero-covid-policy/.

[27] *Rule by Law, with Chinese Characteristics*, THE ECONOMIST (July 13, 2023), https://www.economist.com/china/2023/07/13/rule-by-law-with-chinese-characteristics.

challenges in the twentieth century, a model some have labelled as "perfect dictatorship."[28] Even in instances where some criticism is tolerated, the boundaries are evident: minor critiques of local state entities might be permissible, but direct criticism of central institutions, like the State Council or the CCP, remains strictly off-limits.[29] To achieve this, the party-state endeavors to anchor its new censorship framework's institutional and normative pillars within its recent constitutional reforms, which encompass both institutional and normative aspects.

B. THE INSTITUTIONAL MACHINERY

A defining characteristic of China's evolving censorship approach is its comprehensive institutional structure. This system, integrating the substantial resources, manpower, technology, and financial assets of both parties and state agencies, has evolved and expanded over the years. However, it has always had to navigate the constraints set by the CCP's constitutional position.[30] Historically, Chinese censorship regulations encompassed a wide spectrum: public political dialogues, educational content, research, and various mass media platforms, including print (e.g., books, journals, magazines, newspapers, correspondence),[31] broadcast (e.g., radio, television, film, music, CDs),[32] and online platforms (e.g., social media/networks, self-media, e-mails, newsletters, instant messaging, Internet TV, and games).[33] In addition to

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[28] *See generally* STEIN RINGEN, THE PERFECT DICTATORSHIP: CHINA IN THE 21ST CENTURY (2016).

[29] This is because local governance in China is held directly responsible for failures in a bottom-up accountability system. *See* Shui-Yan Tang, *Rethinking local and regional governance in China: An institutional design and development perspective*, 1 URBAN GOVERNANCE 51, 53–54 (2021).

[30] The CCP's leadership is enshrined in the preamble of China's Constitution. However, several Chinese scholars claim that the Preamble does not assume legal force in general. Qianfan Zhang [张千帆], *The Preamble of the Constitution and the Controversy about Its Legal Force [宪法序言及其效力争议]*, 6 YANHUANG CHUNQIU [炎黄春秋] 1, 5–7 (2013).

[31] Regulation on the Administration of Publication [出版管理条例], 1997, *revised* in 2001, 2011, 2013, 2014, 2016, 2020, and 2024.

[32] Regulations on Broadcasting and Television Administration [广播电视管理条例], 1997, *revised* in 2013, 2017, 2020, and 2024. Regulations on the Administration of Movies [电影管理条例], 2001.

[33] Administrative Measures for Internet Information Services [互联网信息服务管理办法], 2000, *revised* in 2011 and 2024. Provisions for the

political content, commercial communications, including advertisements on both traditional and digital platforms, were also subject to censorship.[34] This governance model once functioned within a somewhat fragmented institutional framework, with various government units operating under the oversight of the CCP's Central Publicity Department (CPD).[35]

However, a closer look at China's constitutional changes since 2018 reveals a transformative shift, with a new emphasis on institutionalizing speech regulation through intra-party discipline. With the 2018 amendment to the PRC's Constitution and the concurrent changes to the CCP's Constitution, there's a clear mandate for the CCP's regulatory bodies to exert full control over political discourse.[36] This principle of "party supremacy," solidified in the 2018 amendment, has reshaped China's speech regulation infrastructure, bestowing greater authority upon party entities in steering institutional speech governance.[37] Thus, post-2018 reforms have seen the CCP's censorship apparatus expand its overall reach. Decision-making entities like the Cyberspace Administration of China (CAC) have gained prominence,[38] government administrative bodies have been integrated into party organs,[39] and political speech by public servants is now monitored

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Administration of Internet News Information Services [互联网新闻信息服务管理规定], 2017.

[34] Measures for the Administration of Internet Advertising [互联网广告管理办法], 2023.

[35] Ge Chen, *Piercing the Veil of State Sovereignty: How China's Censorship Regime into Fragmented International Law Can Lead to a Butterfly Effect*, 3 GLOB. CONST. 31, 39–41 (2014).

[36] XIANFA, *supra* note 1, art. 1. *The Constitution of the CCP*, pmbl., amended on Oct. 22, 2022, the Twentieth National Congress of the CCP ("Party is the supreme force for political leadership").

[37] Chen, *supra* note 18, at 506–9 (illustrating the emergence of party supremacy as an explicit constitutional doctrine).

[38] *See* Jamie P. Horsley, *Behind the Façade of China's Cyber Super-Regulator*, DIGICHINA, Stanford Cyber Policy Center (Aug. 8, 2022), https://digichina.stanford.edu/work/behind-the-facade-of-chinas-cyber-super-regulator/

[39] For instance, the CPD merged with National Press & Publication Administration and National Copyright Bureau. 中国共产党第十九届中央委员会第三次全体会议 [The Third Plenary of the Nineteenth Central Committee of the CCP], [中共中央关于深化党和国家机构改革的方案] Program of the CCP Central Committee on Deepening the Reform of the Party and State Institutions, §§ 11–12 (Mar. 21, 2018).

through a combined party-state enforcement mechanism.[40] These developments have restructured the allocation of personnel, technology, and financial resources for censorship, emphasizing the party's role and extending its influence beyond China's borders.[41]

For instance, party-state initiatives, such as the establishment of "international communication centers" (ICCs) at provincial and regional levels, aim to enhance China's overseas propaganda capacity.[42] The ICCs are strategically focused on "telling China's stories well" in developing regions, particularly Africa and Latin America, to bolster China's ideological influence and counter Western narratives on human rights.[43] Furthermore, private entities—including social media companies—have evolved from mere communication tools into active platforms operating under the oversight of the CCP's multi-layered censorship framework.[44] Recent laws and regulations targeting social media

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[40] This includes the National Supervisory Commission and subnational supervisory commissions. XIANFA, *supra* note 1, arts. 123, 125. The National Supervision Act of the PRC (2018), art. 15.

[41] For example, the United Front Department (UFD) of the CCP is a unique and multifaceted organization that plays a crucial role in the Party's efforts to consolidate its power, maintain domestic stability, and project its influence overseas. The UFD operates globally to influence overseas Chinese communities, foreign governments, and other entities to support China's political objectives. This includes efforts to counteract negative perceptions of the CCP and promote a positive image of China. The UFD works to identify and counteract what the Party perceives as "hostile" foreign forces that seek to undermine the CCP's power. This includes efforts to counter overseas influence that might be critical of the Party or supportive of groups the Party views as antagonistic, such as Tibetan or Uyghur activists. *See* U.S.-CHINA ECON. & SEC. REV. COMM'N, CHINA'S OVERSEAS UNITED FRONT WORK: BACKGROUND AND IMPLICATIONS FOR THE UNITED STATES (Aug. 24, 2018), https://www.uscc.gov/sites/default/files/Research/China%27s%20Overseas%20United%20Front%20Work%20-%20Background%20and%20Implications%20for%20US_final_0.pdf. *See also* Ryan Fedasiuk, *How China's United Front System Works Overseas*, STRATEGIST (Apr. 13, 2022), https://www.aspistrategist.org.au/how-chinas-united-front-system-works-overseas/.

[42] *See* Insikt Group, *Breaking the Circle: Chinese Communist Party Propaganda Infrastructure Rapidly Expands*, RECORDED FUTURE (2024), https://go.recordedfuture.com/hubfs/reports/ta-cn-2024-1210.pdf.

[43] CONG.-EXEC. COMM'N ON CHINA (CECC), 118TH CONG., ANNUAL REPORT 2024, 49 (2024).

[44] Nate Schenkkan & Isabel Linzer, *Out of Sight, Not Out of Reach: The Global Scale and Scope of Transnational Repression*, FREEDOM HOUSE (2021), https://freedomhouse.org/sites/default/files/2021-02/Complete_FH_TransnationalRepressionReport2021_rev020221.pdf.

have significantly intensified, emphasizing nationalism, promoting self-censorship, and enabling surveillance through mandatory real-name registrations.[45] Crucially, these regulatory measures extend—often covertly—to transnational social media platforms controlled or influenced by the party-state, such as TikTok.

C. THE NORMATIVE STANDARDS

While China's Constitution acknowledges certain free speech rights, it also delineates specific limitations, including concerns of national security, public order, and the rights of others.[46] Historically, these limitations were enforced through regulations targeting content deemed critical of the CCP's rule or policies, and the government seemed to apply these restrictions somewhat indiscriminately.[47] However, with the amendment to Article 1 of China's Constitution, the CCP's leadership is now formally recognized in the constitutional text, leading to a redefined hierarchy of normative standards: This hierarchy prioritizes the CCP's interpretation of "national security" above all else,[48] suggesting that existing speech constraints should now be viewed in light of broader national security considerations, even extending beyond domestic borders.[49] Over the past decade, the government has strengthened its position by developing new narratives and legal instruments focused on national security and surveillance.[50] Justified under the banner of "sovereignty" over internet content tied to China's national security, these measures have intensified the reach and rigor of its transnational censorship regime.[51]

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[45] CECC, *supra* note 43, at 52.
[46] XIANFA, *supra* note 1, Arts. 51, 53 and 54.
[47] Chen, *supra* note 18, at 515–16.
[48] For a comprehensive definition of "national security," *see* the National Security Act, *supra* note 9, Art. 2.
[49] Chen, *supra* note 18, at 517–22 (reinterpreting the national security constraints in the constitution of the PRC).
[50] Katja Drinhausen & Helena Legarda, *"Comprehensive National Security" Unleashed: How Xi's Approach Shapes China's Policies at Home and Abroad*, MERICS CHINA MONITOR, (Sept. 15, 2022), https://merics.org/sites/default/files/2022-09/Merics%20China%20Monitor%2075%20National%20Security_final.pdf.
[51] *See generally* HARRIET MOYNIHAN & CHAMPA PATEL, *RESTRICTIONS ON ONLINE FREEDOM OF EXPRESSION IN CHINA: THE DOMESTIC, REGIONAL AND INTERNATIONAL IMPLICATIONS OF CHINA'S POLICIES AND PRACTICES* (2021),

From a legal perspective, the ramifications of this transnational censorship are evident. Laws like the National Security Act, the Cybersecurity Act, and the Counterespionage Act have amplified the weight of national security over free speech rights. For instance, offenses that previously pertained to public disturbances, such as "picking quarrels and provoking trouble,"[52] have been expanded to encompass online political discourse. This is evident in cases where individuals have faced repercussions for actions perceived as challenging the state's image. For instance, the 2018 Act on the Protection of Heroes and Martyrs prohibit any negative portrayal of national heroes, forbidding actions that "distort, defame, desecrate or deny the deeds and spirit of heroes and martyrs," including their "name, portrait, reputation, and honor."[53] The Act has been applied in various contexts. Domestically, it has been invoked in cases where online photos depicted individuals holding signs calling for Xi to step down and advocating for national elections.[54] In another case, an individual shared photos in support of the "Occupy Central Movement" and the protesters in Hong Kong.[55] The international impact of the party-state's regulation of online speech has become increasingly evident. A Chinese student studying in the US faced legal repercussions after posting cartoons that were perceived as mocking President Xi, resulting in charges of "denigrating the image of the country's leader."[56] Similarly, an ethnically Korean individual faced legal repercussions for wearing a t-shirt labelled "Xitler" and sharing a selfie of it online while in China. Each of

https://www.chathamhouse.org/sites/default/files/2021-03/2021-03-17-restrictions-online-freedom-expression-china-moynihan-patel.pdf.

[52] The Criminal Code of the PRC, 2020, Art. 293.

[53] The Act of the PRC on the Protection of Heroes and Martyrs, 2018, Art. 22.

[54] Lily Kuo, *Death of Chinese Activist in Police Custody Prompts Calls for Investigation into Torture*, THE GUARDIAN (Sept. 27, 2019), https://www.theguardian.com/world/2019/sep/27/death-of-chinese-activist-in-police-custody-prompts-calls-for-investigation-into-torture.

[55] Kashmira Gander, *Hong Kong Protests: Chinese Activist, Wang Long, 'Arrested for Sharing Occupy Central Photos Online',* INDEPENDENT (Oct. 2, 2014, 8:48 PM), https://www.independent.co.uk/news/world/asia/chinese-activist-wang-long-arrested-sharing-photos-hong-kong-protests-social-media-9767936.html.

[56] *Judgment in Case of U.S. University Student Jailed for Twitter Postings*, People's Ct. of Wuchang Dist., Wuhan, Hubei, Criminal Judgment, (2019) E 0106 Criminal First Instance No. 1087 (Nov. 5, 2019) http://blog.feichangdao.com/2020/10/translation-judgment-in-case-of-us.html.

these cases underscores the extensive reach and application of these censorship laws, both domestically and abroad.[57]

Moreover, China's transnational censorship often extends beyond its borders through indirect pressures in trade-related influence. Multinational corporations, from book publishers to video game designers, have long been expected to adhere to China's censorship rules to access its market.[58] One clear example of China's reach over free speech is the controversy involving the U.S. National Basketball Association.[59] Today, multinational companies operating in China face a tough dilemma: either forgo potential profits in the Chinese market or self-censor their online content.[60] Additionally, the Chinese government's efforts to control the influx of information are evident with its recent legislation on sensitive cross-border data: New laws categorize data based on national security, with "national core data" coming under heightened scrutiny.[61] This not only impacts individuals but also hinders the free flow of information. The government's top-down surveillance approach, as seen in the Data Security Act and the Personal Information Protection Act,[62] further consolidates this stance. The repercussions of these regulations were notably seen

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[57] Chris Buckley, *He Called China's President 'Xitler' on Twitter. Now He Faces Prison.*, N.Y. TIMES (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/world/asia/china-xi-jinping-xitler-tshirt-kwon-pyong.html.

[58] CECC, 117TH CONG., ANNUAL REPORT 2022, 2662–63 (2022), https://www.uscc.gov/annual-report/2022-annual-report.

[59] When a basketball team owner publicly criticized the Chinese government in support of protestors in Hong Kong, it led to significant repercussions, highlighting China's economic and political leverage on global entities. David Dayen, *The NBA's Self-Censorship and China's Dominance*, THE AMERICAN PROSPECT (Oct. 7, 2019), https://prospect.org/blogs-and-newsletters/tap/the-nbas-self-censorship-and-chinas-dominance/. For further discussion, *see* Ge Chen, *Fighting Words: US and China Clash on Free Speech*, *YaleGlobal Online* (Oct. 17, 2019), https://archive-yaleglobal.yale.edu/content/fighting-words-us-and-china-clash-free-speech.

[60] *See*, *e.g.*, Patrick Hruby, *How the NBA's Rift with China Laid Bare the Cost of Free Speech*, THE GUARDIAN (Oct. 12, 2019, 4:00 AM), https://www.theguardian.com/sport/2019/oct/12/how-the-nbas-rift-with-china-laid-bare-the-cost-of-free-speech.

[61] The Cybersecurity Act, *supra* note 9, Arts. 21, 31, 37.

[62] On the one hand, the law empowers the government to oversee big data. The Data Security Act, *supra* note 9, Art. 14. On the other hand, the law restricts personal data misuse but grants the government exceptions. The Personal Information Protection Act of the PRC, 2021, Art. 34.

with the government's actions against tech behemoths like Alibaba and Tencent.[63]

III. UNPACKING CHINA'S EVOLVING FRAMEWORK OF TRANSNATIONAL CENSORSHIP

Apart from building a seemingly legitimate veneer, the party-state has crafted a "normative discourse,"[64] detailing the objectives, guidelines, and structures that China's transnational censorship laws bring to speech regulation. This discourse is rooted in authoritarian principles, encompassing political repression, economic coercion, and technological control.

A. POLITICAL REPRESSION

1. TRANSITION FROM DOMESTIC TO TRANSNATIONAL REGULATION

China's censorship strategy, while primarily targeting content deemed sensitive by the government, has evolved from a domestic focus to influencing the global narrative. This shift has necessitated enhanced coordination between agencies overseeing both domestic and international censorship. Recent legislative developments reflect a strategic move to amplify the CCP's role in both gathering and shaping public information.[65]

As a result of a series of comprehensive constitutional reforms, key CCP entities, including the CAC, CPD, Central Political and Legal Affairs Commission, and the UFD, have acquired distinct censorship roles. For example, they collaborate seamlessly with governmental agencies to regulate speech beyond China's borders.[66] These CCP decision-making bodies, having integrated with certain governmental departments for domestic oversight, are now partnering with more agencies to counter overseas dissent and shape international discourse.[67]

Above all, government departments like the Ministry of National Security (MNS), the Ministry of Public Security (MPS),

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[63] Li Yuan, *China Gets Strict with Tech*, N. Y. TIMES, Jul. 19, 2021, at B1.
[64] Bix, *supra* note 15, at 586–89.
[65] *See* MARTIN K. DIMITROV, DICTATORSHIP AND INFORMATION: AUTHORITARIAN REGIME RESILIENCE IN COMMUNIST EUROPE AND CHINA 303–66 (2022).
[66] Chen, *supra* note 18, at 529–36 (explaining how the party organs expanded their decision-making capacities by merging with government agencies).
[67] *Id*. at 558–63 (analyzing the structure of China's global speech regulation).

and the Ministry of Foreign Affairs (MFA) play pivotal roles in this coordinated network of transnational censorship. For instance, the MNS reportedly operates covert stations abroad, allegedly to coerce Chinese dissidents into returning home.[68] While the government posits these operations as efforts to bring nationals to face domestic legal proceedings, critics suggest these stations are extensions of the CCP's UFD.[69] Similarly, the MPS has been active in covert operations, targeting overseas critics.[70] The MFA, known for its assertive "wolf warrior diplomacy," guides Chinese embassies globally, supporting pro-CCP groups and facilitating the party-state's transnational repression.[71]

Recent legislation has fortified the legal framework, allowing censorship authorities to enforce the CCP's ideologies and penalize overseas speakers in the realm of transnational censorship. The Foreign Relations Act empowers the Chinese government to retaliate against actions perceived as threats to the PRC's sovereignty or national interests.[72] The Counterespionage Act targets "overseas institutions, organizations, and individuals" deemed as potential espionage threats.[73] The Patriotism Education Act aims to bolster the patriotism of overseas Chinese, with

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[68] Nina dos Santos, *Exclusive: China Operating over 100 Police Stations across the World with the Help of Some Host Nations, Report Claims*, CNN (Dec. 4, 2022, 12:03 AM), https://edition.cnn.com/2022/12/04/world/china-overseas-police-stations-intl-cmd/index.html.

[69] Michael Martina & Ted Hesson, *China Pushes Back on FBI Claims of Chinese 'Police Stations' in U.S.*, REUTERS (Nov. 18, 2022, 1:15 PM), https://www.reuters.com/world/china/china-pushes-back-fbi-claims-chinese-police-stations-us-2022-11-18/.

[70] In 2015, Chinese police arrested booksellers in Hong Kong including a Swedish citizen on secret missions and took them back to the mainland without legal channels. John Kang, *The Missing Hong Kong Booksellers Saga Explained*, FORBES (Jun 17, 2016, 2:10 AM), https://www.forbes.com/sites/johnkang/2016/06/17/missing-hong-kong-booksellers-saga-explained/?sh=1a0860ad314d. In 2023, a German citizen traveling to China was detained and pressured by the police to provide a list of critics in Germany who participated in local protests against the party-state in 2022. *German Citizen Forced to Spy,* TABLE CHINA (July 10, 2023, 0:16), https://table.media/china/en/news/german-citizen-forced-to-spy/.

[71] Schenkkan & Linzer, *supra* note 44, at 17.

[72] The Chinese government can "take corresponding countermeasures and restrictive measures" against any countries regarding their "acts that endanger the sovereignty, security, and development interests" of the PRC. The Foreign Relations Act of the PRC, 2023, Art. 33.

[73] The Counterespionage Act, *supra* note 9, revised 2023, Arts. 4 and 10.

provisions to prosecute those deemed unpatriotic or threats to national security.[74]

Notably, these new laws explicitly extend their reach beyond China's borders through practices often described as "transnational repression,"[75] despite international protections of speech, media freedom, and the right to protest. In a recent instance of such transnational policing, Chinese authorities collaborated with Laos to detain Yang Zewei, a free speech activist and journalist living in exile. Yang was subsequently returned to China to face charges of "subversion of state power," accused specifically of founding the "Ban the Great Firewall" group aimed at circumventing internet censorship.[76] In another notable case of transnational online repression, the Chinese government interrogated several hundred followers of Teacher Li, a prominent online dissident residing in Italy. Teacher Li gained significant popularity in 2022 for disseminating censored news and footage (including the White Paper protest videos) via the platform X, leading authorities to pressure followers, resulting in Li losing around 200,000 followers on that platform.[77] Furthermore, Chinese consulates reportedly mobilized pro-CCP groups abroad by providing financial resources, transportation, and accommodation to intimidate and physically attack demonstrators protesting against Xi Jinping at the APEC Summit in San Francisco.[78]

Typically, these acts of transnational repression aim to silence dissidents living in diaspora communities by placing transnational bounties on their arrest, severing their connections to domestic relatives, and harassing or threatening them or their

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[74] The law requires the government to "enhance the patriotic feelings of overseas Chinese" and lays down the liabilities to prosecute anyone who is deemed not "patriotic" and contravenes the principle of national security. The Patriotism Education Act of the PRC, 2023, Arts. 22, 35–37.

[75] CECC, 118TH CONG., ANNUAL REPORT 2023, 346 (2024).

[76] *Disappearance of Chinese Critic in Laos, Feared Kidnapped*, SAFEGUARD DEFENDERS (Jun. 18, 2023), https://safeguarddefenders.com/en/blog/disappearance-chinese-critic-laos-feared-kidnapped.

[77] *China: X Must Immediately End Shadow Ban of Prominent Human Rights Account*, ARTICLE 19 (Nov. 28, 2024), https://www.article19.org/resources/china-x-must-immediately-end-shadow-ban-of-prominent-human-rights-account/.

[78] Shibani Mahtani et al., *How China Extended its Repression into an American City*, THE WASHINGTON POST (Sept. 3, 2024), https://www.washingtonpost.com/world/interactive/2024/chinese-communist-party-us-repression-xi-jinping-apec/.

family members abroad.[79] Reports indicate that these tactics are particularly focused on monitoring and intimidating overseas Chinese students, deterring them from accessing "sensitive information" or speaking out against the party-state.[80] As an extreme deterrent measure, the PRC government has used its international influence to forcibly repatriate Chinese dissidents residing overseas under the pretext of punishing "illegal border crossings," a tactic officially referred to as "Operation Fox Hunt."[81]

2. MERGING CENSORSHIP WITH PROPAGANDA

The party-state has intricately woven its expansive propaganda apparatus alongside its censorship mechanism. Both serve as pillars of the CCP's ideological strategy, overseen by a member of the Politburo's Standing Committee.[82] The goal of transnational propaganda is to bolster transnational censorship, saturating the global discourse with narratives that underscore the "merits" and "validity" of the CCP's ideologies.[83] These narratives often contrast with Western notions of individualism and private interests, which are frequently associated with "Western-style human rights and democracy."[84] As a result, the information disseminated by propaganda departments is framed as essential for upholding "national security" within Chinese legal parameters.[85]

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[79] CECC, *supra* note 43, at 290–91.
[80] *Id*. at 291–92.
[81] *Id*. at 293–94.
[82] This member is often referred to as China's "ideology tsar." Charlotte Gao, *China's New Ideology Czar Takes Center Stage on Journalists' Day*, THE DIPLOMAT (Nov. 9, 2017), https://thediplomat.com/2017/11/chinas-new-ideology-czar-takes-center-stage-on-journalists-day/.
[83] Joel Slawotsky, *The Expanding Horizons of National Security and the China-US Strategic Competition – Where Are We Heading?*, OUPBLOG (Aug. 20, 2021), https://blog.oup.com/2021/08/the-expanding-horizons-of-national-security-and-the-china-us-strategic-competition-where-are-we-heading/.
[84] For example, a recent CCP document mandates that China's law schools and lawyers "adamantly oppose to and resist western constitutionalism, separation of powers, and judicial independence." *The General Office of the CCP Central Committee and the General Office of the State Council Printed Opinions on Reinforcing the Legal Education and the Research on Legal Theories in the New Era* [*中共中央办公厅国务院办公厅印发《关于加强新时代法学教育和法学理论研究的意见》*] XINHUA AGENCY [新华社] (Feb. 26, 2023).
[85] *See*, *e.g.*, CAC, Provisions on Ecological Governance of Network Information Content [网络信息内容生态治理规定] (PEGNIC), 2019, art. 5(1)–(7).

In practice, propaganda efforts permeate both public and private sectors.[86] Public entities, encompassing a range of party-state organs, articulate and propagate the CCP's ideological directives across various domains, including politics, economics, education, culture, society, and religion—mandated to promote narratives that "reflect the people's great struggle and fervent lives," highlight China's "exceptional moral culture and zeitgeist," and "present the world with a true, three-dimensional, and complete China.".[87] Notably, these public entities are directly government-owned. Conversely, private platforms like WeChat, Baidu, and TikTok, despite their private ownership, operate under the watchful eye of party-state regulators.[88] They will not only carry out self-censorship, but also be obliged to promote the official ideological guidelines and narratives in their programs and channels.[89]

B. ECONOMIC COERCION

1. ENGAGING AND INFLUENCING MULTINATIONAL INTERNET FIRMS

Emerging censorship laws empower the party-state to regulate online discourse by both engaging and pressuring multinational firms operating in China, which are mandated to oversee online content and, when deemed necessary, restrict access. Recent national security legislation has given credence to extensive surveillance initiatives like the "Golden Shield Project,"[90] designed to monitor Chinese citizens

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[86] Mareike Ohlberg, *Propaganda beyond the Great Firewall*, MERCATOR INST. FOR CHINA STUDIES (Dec. 5, 2019), https://merics.org/en/comment/propaganda-beyond-great-firewall.

[87] PEGNIC, *supra* note 81, art. 5.

[88] *Id*. arts. 30–33 (describing regulatory oversight mechanisms applicable to online content platforms, including inspections, information disclosures, and joint enforcement by state bodies).

[89] *Id*. arts. 10–11 (requiring platforms to remove prohibited content and encouraging promotion of state-approved values).

[90] For example, China's cybersecurity laws provide the legal framework for internet regulation, and commentators have linked this regime to the "Golden Shield Project". *See, e.g.*, Maud Descamps, *China's Cybersecurity Legislation: A Paper Tiger or an Institutionalized Theft?*, The Institute for Security and Development Policy, 2, (May 2020), https://www.isdp.eu//wp-content/uploads/2020/05/Chinas-Cybersecurity-Legislation-FA-14.05.20.pdf.

comprehensively.[91] Consequently, with the assistance of Internet companies and foreign technologies, the party-state has developed a comprehensive national database of its citizens, incorporating features like language and telephone recognition, facial scans, and fingerprints.[92] Under the Cybersecurity Act, network operators and electronic information service providers must monitor and manage user-generated content.[93] When information whose release or transmission is prohibited is detected, they are obligated to stop its transmission and to take deletion or blocking measures to prevent further dissemination [94]

This heightened censorship means unrestricted browsing of global platforms like Google, Facebook, and Twitter remains elusive for many in China without VPNs.[95] Platforms like WeChat, akin to Twitter, have become indispensable communication tools for many Chinese citizens, yet they also serve as potent surveillance and propaganda instruments.[96] Under national security and data governance laws, these platforms are required to retain user data and provide technical assistance and access to law enforcement and security authorities upon request,[97] granting the state extensive reach into personal communications.[98] Not only are

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[91] Maya Wang, *China's Dystopian Push to Revolutionize Surveillance*, HUMAN RIGHTS WATCH (Aug. 18, 2017), https://www.hrw.org/news/2017/08/18/chinas-dystopian-push-revolutionize-surveillance.

[92] Valentin Weber & Vasilis Ververis, *China's Surveillance State: A Global Project* 4, 11, 15, 20 (TOP10VPN 2021), https://www.top10vpn.com/assets/2021/07/Chinas-Surveillance-State.pdf.

[93] Cybersecurity Act*, supra* note 9, arts. 47–50.

[94] *Id*. arts. 47, 48, 50.

[95] Benjamin Haas, *China Moves to Block Internet VPNs from 2018*, THE GUARDIAN (July 11, 2017), https://www.theguardian.com/world/2017/jul/11/china-moves-to-block-internet-vpns-from-2018

[96] Yaqiu Wang, *WeChat Is a Trap for China's Diaspora: App's Dominance Forces People to Adopt Self-Censorship*, FOREIGN POL'Y (Aug. 14, 2020, 2:19 PM), https://foreignpolicy.com/2020/08/14/wechat-ban-trump-chinese-diaspora-china-surveillance/.

[97] Cybersecurity Act*, supra* note 9, art. 54. Data Security Act, *supra* note 9, arts. 24, 35.

[98] WeChat Privacy Protection Guidelines [微信隐私保护指引], 2025, § 1.2 (China), https://weixin.qq.com/cgi-bin/readtemplate?lang=zh_CN&t=weixin_agreement&s=privacy.

"sensitive" terms on these platforms censored,[99] but sharing highly sensitive content might also attract attention from national security agencies.[100] New regulations hold group chat administrators and Internet Service Providers accountable for any sensitive content shared within group chats.[101] Online platforms operated by private entities are now obligated to not only oversee content but also report users sharing sensitive content to the appropriate authorities.[102] For instance, online bookstores are required to adhere to a government rating system, with evaluation criteria encompassing the CCP's "core socialist values."[103] Video platforms have faced directives to halt the streaming of foreign content,[104] and locally produced online content undergoes stringent censorship akin to traditional TV broadcasts.[105]

Given the significant economic stakes involved, multinational internet corporations frequently comply with China's evolving censorship regulations, thereby facilitating the party-state's control over the online information environment. For example, Apple was compelled to remove a social networking app

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[99] CAC, Provisions on the Administration of Internet Group Information Services (PAIGIS) [互联网群组信息服务管理规定], 2017, art. 10 (China), https://www.cac.gov.cn/2017-09/07/c_1121623889.htm.

[100] Jessie Yeung & Yong Xiong, *Man Detained for 9 Days in China for Sending Meme Deemed 'Insulting' to Police*, CNN (Nov. 2, 2021, 4:51 AM EDT), https://www.cnn.com/2021/11/02/china/china-man-detained-meme-intl-hnk-scli/index.html.

[101] PAIGIS, *supra* note 100, art. 6. *See also* CAC, Provisions on the Administration of Internet Users' Public Account Information Services (PAIPAIS) [互联网用户公众账号信息服务管理规定], 2021, art. 9 (China), https://www.cac.gov.cn/2021-01/22/c_1612887880656609.htm.

[102] PAIPAIS, *supra* note 102, art. 19. *See also* PAIGIS, *supra* note 100, art 11.

[103] These criteria serve to guide "correct public opinion orientation" in terms of the CCP's ideologies. PAIPAIS, *supra* note 102, art. 4; *see also* PAIGIS, *supra* note 100, arts. 6, 7, 10, 12.

[104] State Administration of Press, Publication, Radio, Film and Television [国家新闻出版广播电影电视总局], Notice on Strengthening the Management of Audio-visual Program Dissemination on Weibo, WeChat and Other Online Social Platforms [关于加强微博、微信等网络社交平台传播视听节目管理的通知], Dec. 7, 2016.

[105] Casey Hall, *Chinese Authorities Slap Comedy Firm with $2 Million Fine after Military Joke*, REUTERS (May 20, 2023, 12:35 AM PDT), https://www.reuters.com/business/media-telecom/chinese-slaps-comedy-firm-with-2-mln-fine-after-military-joke-2023-05-17/. Some of the censorship rules applied came from the State Council's Regulations on the Administration of Commercial Performances [营业性演出管理条例], 2005, arts. 25, 26, 46 (China), https://www.cecc.gov/resources/legal-provisions/regulations-on-the-administration-of-commercial-performances-cecc-partial.

from its Chinese App Store due to the app's capability to circumvent governmental censorship, thus allegedly enabling access to "illegal" content.[106] Disney similarly censored references to forced labor practices in China from its streaming content in Hong Kong,[107] while Amazon Prime filtered scenes depicting pro-democracy protests in Hong Kong on its platform.[108] As these multinational companies align with China's censorship demands to safeguard their market presence and revenue streams, prominent Chinese tech companies such as WeChat, Alibaba, Baidu, Tencent, and ByteDance—the last of which controls the global social media app TikTok—actively export Chinese-style censorship practices worldwide.[109]

2. ENHANCING TRANSNATIONAL DATA GOVERNANCE

China's approach to data governance has been meticulously crafted to bolster the CCP's objectives in managing the realm of transnational information.[110] The nation's strategy, rooted in technology, has transitioned from a primarily political discourse to

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[106] Coco Feng & Matt Haldane, *Apple's Removal of Damus Social Media Platform from China App Store Was 'Expected' by Developers amid Beijing's Strict Censorship*, S. CHINA MORNING POST (Feb. 6, 2023, 9:46 PM), https://www.scmp.com/tech/policy/article/3209265/apples-removal-damus-social-media-platform-china-app-store-was-expected-developers-amid-beijings.

[107] Wilhelmine Preussen, *Disney Drops 'Simpsons' Episode in Hong Kong that Mentions Forced Labor in China*, POLITICO (Feb. 6, 2023, 6:58 PM), https://www.politico.eu/article/disney-self-censorship-remove-simpsons-episode-hong-kong-china-forced-labour/.

[108] Helen Davidson, *Amazon's Expats Series Not Available in Hong Kong, Where It Is Set*, THE GUARDIAN (Jan. 29, 2024, 12:20 AM PDT), https://www.theguardian.com/world/2024/jan/29/amazon-the-expats-series-not-available-in-hong-kong-where-it-is-set.

[109] *See*, *e.g.*, Ge Chen, *Digital Platforms like TikTok Could Help China Extend Its Censorship Regime Across Borders*, THE CONVERSATION (Dec. 11, 2023, 7:50 PM PDT), https://theconversation.com/digital-platforms-like-tiktok-could-help-china-extend-its-censorship-regime-across-borders-204322.

[110] Karen M. Sutter, *Capturing the Virtual Domain: The Expansion of Chinese Digital Platforms*, *in* CHINA'S DIGITAL AMBITIONS: A GLOBAL STRATEGY TO SUPPLANT THE LIBERAL ORDER 23, 28–29 (Emily de La Bruyère et al. eds., 2022), https://www.nbr.org/wp-content/uploads/pdfs/publications/sr97_chinas_digital_ambitions_mar2022.pdf.

a more encompassing economic stance in the global trade arena.[111] Foundational laws like the Cybersecurity Act, Data Security Act, and the Personal Information Protection Act form the bedrock of the party-state's data governance.[112] These laws facilitate the CCP's endeavors in data collection, processing, and dissemination, effectively supplanting the free flow of information.[113] The underlying principle is the party-state's ability to access, monitor, and surveil the personal and sensitive communications of every Chinese citizen.[114] Such governance simplifies the tasks of content moderation for censors and aids the government in compiling comprehensive databases of its populace.[115]

When it comes to foreign entities, this data governance employs coercive tactics, exemplified by the Social Credit System, which can penalize individuals by restricting their access to essential economic resources, such as freezing bank accounts or limiting credit card usage to specific transportation methods and accommodations.[116] The impending digital RMB currency embodies a similar, if not more stringent, approach to data governance, potentially deterring users from expressing views contrary to government preferences.[117] Under this governance framework, international companies have reportedly facilitated China's surveillance capabilities. For instance, U.S.-based companies, such as Ryan Technologies, have been implicated in transferring surveillance technologies to China's public security departments.[118] Additionally, Accelerated Nuclear DNA

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[111] *See* Nigel Cory, *Writing the Rules: Redefining Norms of Global Digital Governance*, *in* CHINA'S DIGITAL AMBITIONS: A GLOBAL STRATEGY TO SUPPLANT THE LIBERAL ORDER 73, 76–86 (Emily de La Bruyère et al. eds., 2022), *id*.

[112] Peiru Cai & Li Chen, *Demystifying Data Law in China: A Unified Regime of Tomorrow*, 12(2) INT'L DATA PRIVACY L. 75, 75 (2022).

[113] Sutter, *supra* note 111, at 29.

[114] *Id*. at 34.

[115] *See* Alex He, *State-Centric Data Governance in China*, CIGI Papers No. 282, 4, (September 2023), https://www.cigionline.org/static/documents/no.282.pdf.

[116] Drew Donnelly, *China Social Credit System Explained – What Is It & How Does It Work?*, HORIZONS (Feb. 11, 2024), https://nhglobalpartners.com/china-social-credit-system-explained/.

[117] James A. Dorn, *China's Digital Yuan: A Threat to Freedom*, CATO INSTITUTE (Aug. 25, 2021, 10:22 AM), https://www.cato.org/blog/chinas-digital-yuan-threat-freedom.

[118] Zoe Haver, *The Role of US Technology in China's Public Security System*, RECORDED FUTURE BY INSIKT GROUP (Nov. 1, 2022), at 11–13, https://go.recordedfuture.com/hubfs/reports/ta-2022-1101.pdf.

Equipment (ANDE) has allegedly supplied DNA testing machines to Chinese police, who then use this technology to surveil and monitor human rights activists.[119] Moreover, alongside concerns regarding TikTok's data collection practices in the U.S., a recent whistleblower disclosure revealed that Meta had also shared user data with entities linked to China.[120]

C. TECHNOLOGICAL MASTERY

1. LEVERAGING FOREIGN INNOVATIONS FOR SPEECH CONTROL

China's censorship framework has adeptly harnessed technologies emanating from leading global internet companies.[121] In its nascent stages of developing a censorship infrastructure, China utilized U.S. technologies for internet connectivity, surveillance, and content blocking.[122] U.S. companies, like Cisco Systems, have faced scrutiny for aiding the Chinese government in constructing the Golden Shield Project, a program designed for internet censorship and dissident monitoring.[123] Additionally, Chinese public security bureaus reportedly use big data platforms supported by databases from Oracle to centralize and analyze data via keyword searches, aiding the investigation of alleged "criminal" activities through de facto surveillance over citizens.[124] Recently, Meta has come under scrutiny for allegedly developing censorship tools tailored for the Chinese government, facilitating the removal of speech critical of the CCP, and banning the account

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[119] Katrina Northrop, *The DNA Distortion*, THE WIRE CHINA (Feb. 4, 2024), https://www.thewirechina.com/2024/02/04/the-dna-distortion-ande-china-biotechnology-dna-testing/.

[120] Naomi Nix, *Zuckerberg's Meta Considered Sharing User Data with China, Whistleblower Alleges*, WASH. POST (Mar. 9, 2025), https://www.washingtonpost.com/technology/2025/03/09/meta-china-censorship-facebook-mark-zuckerberg/.

[121] *See generally* Luke Hogg et al., *Web of Dependencies: A History of American Tech Companies' Complicity in China's Techno-Authoritarian Agenda*, FOUNDATION FOR AMERICAN INNOVATION (October 2025), https://cdn.sanity.io/files/d8lrla4f/staging/5fcadbbd88164de58e9122c1f12ad8ee15b1026c.pdf.

[122] Weber & Ververis, *supra* note 92, at 7.

[123] *Id*.

[124] Mara Hvistendahl, *How Oracle Sells Repression in China*, INTERCEPT (Feb. 18, 2021, 6:20 AM), https://theintercept.com/2021/02/18/oracle-china-police-surveillance/.

of a prominent Chinese dissident residing in the U.S. for the company to secure access to the lucrative Chinese market.[125] Meanwhile, the U.S. government is investigating whether semiconductor giant Nvidia has assisted China's DeepSeek in developing powerful AI chips capable of more efficiently performing censorship and propaganda functions.[126]

Furthermore, the Chinese government has rolled out regulations concerning cybersecurity reviews and data export security.[127] Foreign entities operating within China are mandated to allow the government access to and monitoring of data,[128] a stipulation that now underpins effective censorship.[129] Even if certain foreign companies aren't actively operational in China, Chinese firms might still harness their innovations to bolster the censorship apparatus.[130] However, in doing so, these Chinese firms meticulously filter and block sensitive content originating from such U.S. innovations.[131]

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[125] Lily Jamali, *Meta Whistleblower Alleges Company Worked with China on Censorship*, BBC (Apr. 9, 2025), https://www.bbc.com/news/articles/c4grrwvn1lyo.

[126] U.S. HOUSE SELECT COMMITTEE ON STRATEGIC COMPETITION BETWEEN THE U.S. AND THE CCP, DEEPSEEK UNMASKED: EXPOSING THE CCP'S LATEST TOOL FOR SPYING, STEALING, AND SUBVERTING U.S. EXPORT CONTROL RESTRICTIONS, 7–9, (Apr. 19, 2025), https://selectcommitteeontheccp.house.gov/sites/evo-subsites/selectcommitteeontheccp.house.gov/files/evo-media-document/DeepSeek%20Final.pdf.

[127] CAC, Cybersecurity Review Measures [网络安全审查办法], 2022, https://www.cac.gov.cn/2022-01/04/c_1642894602182845.htm. *See also* CAC, Measures for the Security Assessment of Data Outbound Transfer [数据出境安全评估办法], 2022, https://www.cac.gov.cn/2022-07/07/c_1658811536396503.htm.

[128] *See* Hunter Dorwart, *China and Global Data Transfers: Implications for Future Rulemaking*, *in* THE EMERGENCE OF CHINA'S SMART STATE 123, 133–35 (Rogier Creemers et al. eds., 2024) (illustrating China's data localization framework).

[129] *Id*. at 127–28 (conceptualizing the security-oriented aims of the "orderly flow of data").

[130] For instance, while OpenAI's ChatGPT restricts Chinese user registration, Chinese entities have utilized VPNs to bypass such limitations, integrating ChatGPT functionalities into their offerings. Helen Davidson, *'Political Propaganda': China Clamps Down on Access to ChatGPT*, THE GUARDIAN (Feb. 23, 2023, 06:24 EST), https://www.theguardian.com/technology/2023/feb/23/china-chatgpt-clamp-down-propaganda.

[131] *Id*. *See* Nicholas Welch & Jordan Schneider, *China's Censors Are Afraid of What Chatbots Might Say*, FOREIGN POL'Y (Mar. 3, 2023, 11:22 AM), https://foreignpolicy.com/2023/03/03/china-censors-chatbots-artificial-

The Chinese government has announced its ambitious project for the construction of a "Digital China," scheduled for short-term completion by 2025.[132] This initiative focuses on building an interconnected and efficient digital infrastructure, expanding data resource capabilities, and enhancing the digitization of government services.[133] However, data collection under this framework can pave the road to pervasive surveillance, utilizing devices such as smartphones, QR code readers, point-of-sale systems, air quality monitors, and RFID chips embedded in ID cards to store biometric information.[134] In line with these developments, the CAC has recently issued regulations governing the use of emerging digital tools, including Bluetooth and Apple AirDrop,[135] and, most notably, generative AI technologies.[136] These measures aim to tighten control over online speech, ensuring alignment with the ideological "values" promoted by the party-state.[137] In response, Chinese tech firms like DeepSeek have adapted and integrated U.S.-origin AI technologies to develop competitive platforms specifically designed to meet governmental demands for censorship and propaganda dissemination.[138]

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intelligence/. *See also* Vishwam Sankaran, *China Wants to Gives its AI Systems 'Socialist Values' and Bans Them from Criticising Country's Leaders*, INDEPENDENT (Apr. 25, 2023, 7:37 EDT), https://www.independent.co.uk/tech/china-ai-censor-socialist-values-b2326341.html.

[132] *China Unveils Plan to Promote Digital Development*, XINHUA (Feb. 28, 2023, 06:50), https://english.www.gov.cn/policies/latestreleases/202302/28/content_WS63fd33a8c6d0a757729e752c.html.

[133] *Id.*

[134] CECC, *supra* note 75, at 273–74.

[135] CAC, Provisions on the Management of Short-Range Ad-Hoc Network Information Services (Draft for Comments) [近距离自组网信息服务管理规定（征求意见稿）], art. 2 (promulgated Jun. 6, 2023, 6:00 PM), https://www.cac.gov.cn/2023-06/06/c_1687698272954687.htm. *See also* Kelly Ng, *Chinese Censors Take Aim at AirDrop and Bluetooth*, BBC (Jun. 8, 2023), https://www.bbc.com/news/world-asia-china-65830185.

[136] CAC, Interim Measures for the Administration of Generative Artificial Intelligence Services [生成式人工智能服务管理暂行办法] (July 13, 2023, 3:00 PM), https://www.cac.gov.cn/2023-07/13/c_1690898327029107.htm.

[137] CECC, *supra* note 43, at 236.

[138] Zeyi Yang, *Here's How DeepSeek Censorship Actually Works—and How to Get Around It*, WIRED (Jan. 31, 2025, 2:33 PM), https://www.wired.com/story/deepseek-censorship/.

2. OUTPACING THE EVASION TACTICS

The party-state's censors have consistently stayed a step ahead of the majority of internet users, swiftly adapting to technical evasion methods like VPNs, which are frequently employed by Chinese citizens to bypass information controls. While the 1990s saw the Chinese government introduce regulations to prohibit VPN usage, enforcement was lax at the time.[139] However, the emergence of the CAC, the CCP's modern censorship arm, has revitalized the enforcement of these regulations in collaboration with tech-centric government departments, such as the Ministry of Industry and Information Technology (MIIT).[140] Newer regulations now prohibit ordinary Chinese citizens from utilizing these evasion techniques to bypass the "Great Firewall."[141] In more recent times, Chinese authorities have clamped down on VPNs, further tightening control over online access.[142] Under this revamped censorship framework, security departments monitor specific key nodes linking China's internet to the global web and identify VPN users by their IP addresses,[143] leading to repercussions ranging

[139] The State Council, Interim Provisions of the PRC on the Administration of International Networking of Computer Information Networks (IPAINCIN) [中华人民共和国计算机信息网络国际联网管理暂行规定], Art. 6 (Feb. 1, 1996), https://www.cac.gov.cn/1996-02/02/c_126468621.htm.

[140] Yuxi Wei, *China's New Cybersecurity Regulations: Analyzing the Ban on VPN Services*, UNIV. WASH. E. ASIA CTR. (Apr. 17, 2017), https://jsis.washington.edu/news/chinas-new-cybersecurity-regulations-analyzing-ban-vpn-services/.

[141] MIIT [工业和信息化部], Notice on Cleaning up and Regulating the Internet Network Access Service Market [关于清理规范互联网网络接入服务市场的通知], (Jan. 23, 2017, 1:15 PM), https://www.cac.gov.cn/2017-01/23/c_1120366809.htm.

[142] Apple, for instance, was directed to purge all VPN applications from its App Store. Hannah Kuchler & Max Seddon, *Apple Removes Apps That Bypass China's Censors*, FIN. TIMES (July 30, 2017), https://www.ft.com/content/e83e8034-7543-11e7-90c0-90a9d1bc9691. Similarly, Amazon's cloud services adhered to Chinese mandates, refraining from offering software that would enable users to sidestep government-imposed internet restrictions. *Amazon China Partner Tells Users to Stop Using Illegal VPNs*, REUTERS (Aug. 2, 2017, 4:35 PM PDT), https://www.reuters.com/article/us-amazon-china-vpn-idUSKBN1AI0CM.

[143] Zeyi Yang, *Massive Leak Shows How a Chinese Company Is Exporting the Great Firewall to the World*, WIRED (Sept. 8, 2025, 11:00 PM), https://www.wired.com/story/geedge-networks-mass-censorship-leak/.

from fines to detainment in practice.[144] Reflecting this harsher approach, in Shanghai, an anonymous blogger with expertise in information security was recently sentenced to seven years in prison for "inciting subversion of state power" after teaching others how to bypass government censorship tools to access overseas information and for publishing articles on sensitive topics.[145]

IV. ASSESSING THE GLOBAL IMPACT OF CHINA'S TRANSNATIONAL CENSORSHIP LAWS ON FREE EXPRESSION

The codification of transnational censorship into legal norms carries dual implications: it shapes social realities through its "content-related function" and establishes a system linking law to politics through its "system-related function."[146] Even though China isn't formally bound by the ICCPR, its emerging transnational censorship over the past decade has significantly affected the freedom of expression as outlined in the ICCPR.[147] The party-state's extensive censorship rules, aimed at aligning with its policies, have the potential to redefine the "freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers" beyond China's borders.[148] Instead of facilitating "easy, prompt, effective and practical access" to China-centric information,[149] the party-state has established a transnational censorship order spanning political, commercial, and academic domains. Presently, China's censorship extends to political discourse, public affairs commentary, commercial advertising, human rights discussions, cultural and artistic expressions, and education—areas traditionally safeguarded under the right to

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[144] IPAINCIN, *supra* note 139, Arts. 14, 15. *China Detains Man for Service to Evade Internet Firewall*, PHYS ORG (Sept. 18, 2017), https://phys.org/news/2017-09-china-detains-evade-internet-firewall.html.

[145] *See*, *e.g.*, Vivien Wang, *China Took Her Husband. She Was Left to Uncover His Secret Cause.*, N. Y. TIMES, (July 10, 2023), https://www.nytimes.com/2023/07/05/world/asia/china-dissident-blog-program-think.html.

[146] Burchardt, *supra* note 16, at 411–14.

[147] For recent critical reflection on this, *see* Lewis, *supra* note 3, at 183–84 (documenting China's distancing performance in the protection of freedom of expression).

[148] ICCPR, *supra* note 2, Art. 19 (2).

[149] *See* Comm. on the International Covenant on Civil and Political Rights, Rep. of the Human Rights Comm. on its 102d Session, ¶ 19, U.N. Doc. CCRP/C/GC/34 (Sept. 12, 2011).

freedom of expression.[150] This approach underscores the party-state's ambition to challenge the globally accepted norms of freedom of expression covering political speech, commercial speech, and artistic speech, competing with foundational principles of liberal democracies.

A. IMPACTS ON INTERNATIONAL POLITICAL ENTITIES AND LEADERS

Foremost, China's transnational censorship zeroes in on political speech, particularly targeting foreign politicians and political factions. Over the past decade, the party-state has taken overt measures to restrict foreign governments, agencies, and politicians in their efforts to access or disseminate information deemed "harmful" by the Chinese government.[151] Beyond the aforementioned national security laws, China introduced a foreign NGO law following its "709 crackdown" on civil rights advocates, aimed at prohibiting foreign NGOs from activities that could threaten China's "national security."[152] Empowering the MPS with extensive investigative measures, this law has drawn criticism from UN human rights experts, who have called for its repeal.[153] Nevertheless, the party-state persists in its efforts to obstruct external access to or dissemination of politically sensitive information related to China. For example, German Federal Parliament's Human Rights Committee members were denied

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[150] *Id*. ¶ 11.

[151] To name but a few of the recent records, *see*, *e.g.*, *Lawmakers from 6 Countries Say Beijing Is Pressuring Them Not to Attend Conference in Taiwan*, ARAB NEWS (July 29, 2024), https://arab.news/266ej. Nusrat Ghani MP, *Parliament Won't Allow China to Bully MPs into Silence*, POLICY EXCHANGE (Mar. 26, 2021), https://policyexchange.org.uk/blogs/parliament-wont-allow-china-to-bully-mps-into-silence/. Aryeh Neier, *How China Silences Governments in Its Global War against Human Rights*, FREE MALAYSIA TODAY (Feb. 7, 2020), https://www.freemalaysiatoday.com/category/opinion/2020/02/07/how-china-silences-governments-in-its-global-war-against-human-rights.

[152] The Act of the PRC on the Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China, 2016, Art. 47(3) and (5).

[153] UN Hum. Rts. Off. of the High Comm'r, *China: Newly Adopted Foreign NGO Law Should Be Repealed, UN Experts Urge*, PRESS RELEASES/SPECIAL PROCEDURES, UN HUM. RTS. OFF. (May 3, 2016), https://www.ohchr.org/en/press-releases/2016/05/china-newly-adopted-foreign-ngo-law-should-be-repealed-un-experts-urge.

visas for planned visits to Tibet and Xinjiang.[154] Similarly, the U.S. embassy faced restrictions in disseminating sensitive political content via its official Chinese social media account.[155]

However, these are merely reactive censorship measures. Recent global studies have unveiled the party-state's aggressive tactics, including hindering political candidates in U.S. local elections,[156] influencing the UK legislature,[157] manipulating Canadian constituency nominations through donation influence or social media targeting,[158] attempting to sway Australian candidates,[159] securing influential parliamentary positions in New Zealand,[160] and amplifying disinformation campaigns in Taiwan's local nominations and elections through polarization efforts.[161]

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[154] Stuart Lau, *China Denies Visas to German Lawmakers over Their Human Rights Criticism*, S. CHINA MORNING POST (Aug. 21, 2019, 10:43 PM), https://www.scmp.com/news/china/diplomacy/article/3023683/china-denies-visas-german-lawmakers-over-their-human-rights.

[155] Siladitya Ray, *Chinese Social Media Platforms Censor US Embassy Posts*, FORBES (July 6, 2022, 9:44 AM), https://www.forbes.com/sites/siladityaray/2022/07/06/chinese-social-media-platforms-censor-us-embassy-posts/?sh=31e8d622224a.

[156] Joshua Kurlantzick, *China's Growing Attempts to Influence U.S. Politics*, COUNCIL ON FOREIGN RELATIONS (Oct. 31, 2022, 5:39 PM), https://www.cfr.org/article/chinas-growing-attempts-influence-us-politics.

[157] *Chinese Political Interference Has Western Spooks Worried*, THE ECONOMIST (Apr. 21, 2022), https://www.economist.com/china/2022/04/21/chinese-political-interference-has-western-spooks-worried.

[158] KEN HARDIE, A THREAT TO CANADIAN SOVEREIGNTY: NATIONAL SECURITY DIMENSIONS OF THE CANADA-PEOPLE'S REPUBLIC OF CHINA RELATIONSHIP, INTERIM REPORT OF THE SPECIAL COMMITTEE ON THE CANADA-PEOPLE'S REPUBLIC OF CHINA RELATIONSHIP, 44th Parliament, 1st Sess., 38–40 (May 2023), https://www.ourcommons.ca/Content/Committee/441/CACN/Reports/RP12430173/cacnrp03/cacnrp03-e.pdf.

[159] James Massola, *Labor Senator Sam Dastyari Quits over Chinese Donations Scandal*, THE SYDNEY MORNING HERALD (Sept. 7, 2016, 7:06 PM), https://www.smh.com.au/politics/federal/labor-senator-sam-dastyari-quits-over-chinese-donations-scandal-20160907-grb3p1.html.

[160] Derek Cheng, *National MP Jian Yang to Retire from Politics Following Election*, NEW ZEALAND HERALD (July 9, 2020, 3:33 PM), https://www.nzherald.co.nz/nz/national-mp-jian-yang-to-retire-from-politics-following-election/4K2OLLQA2PFANAKCAGLBXCLXQ4/.

[161] Ben Sando, *Taiwan Local Elections Are Where China's Disinformation Strategies Begin*, COUNCIL ON FOREIGN RELATIONS (Oct. 4, 2022, 12:31 PM), https://www.cfr.org/blog/taiwan-local-elections-are-where-chinas-disinformation-strategies-begin.

These actions are not isolated incidents, but systematic results of a legal framework that undeniably projects authoritarian influence on political discourse in democratic nations.[162]

B. IMPACTS ON INTERNATIONAL CORPORATIONS AND INVESTORS

China's expanding transnational censorship extends to commercial speech, especially those touching upon domestic policies. This not only curtails speech but also has ramifications for overseas commercial ventures. As previously highlighted, Beijing has introduced a slew of cybersecurity, data, and privacy laws to mandate organizations with extensive user bases to undergo evaluations and approvals for data management. Additionally, a comprehensive revision to China's counterespionage legislation has been enacted, prohibiting the dissemination of national security-related information and broadening the espionage definition to include all data and materials relating to national security and interest protection.[163] Business communities have raised concerns over the ambiguity of China's revamped counterespionage law, its stringent prohibitions on national security-related information transfer, the imposition of exit bans on foreign executives in China, and heightened scrutiny of due diligence firms.[164] A case in point is Wind Information Co., China's premier financial data provider, which recently notified its clientele of restrictions on overseas users accessing specific

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[162] *See*, *e.g.*, DAVID L. SLOSS, TYRANTS ON TWITTER: PROTECTING DEMOCRACIES FROM INFORMATION WARFARE AT 82–99 (2022) (illustrating China's global strategy of influencing political discourse on China). For the development of such an agenda in the digital context, *see* Mei Danowski, *Becoming a Cyber Superpower: China Builds Offensive Capability with Military, Government, and Private Sector Forces*, *in* THE EMERGENCE OF CHINA'S SMART STATE 171, at 133–35 (Rogier Creemers et al. eds., 2024) (illustrating China's data localization framework).

[163] *See*, *e.g.*, Jill Goldenziel, *China's Anti-Espionage Law Raises Foreign Business Risk*, FORBES (Jul 3, 2023, 8:21 PM), https://www.forbes.com/sites/jillgoldenziel/2023/07/03/chinas-anti-espionage-law-raises-foreign-business-risk/?sh=7d948777769e.

[164] Julie Zhu & Xie Yu, *China's Top Financial Data Provider Restricts Offshore Access Due to New Rules*, REUTERS (May 4, 2023, 3:38AM), https://www.reuters.com/business/finance/chinas-top-financial-data-provider-restricts-offshore-access-due-new-rules-2023-05-04/.

business and economic data, citing new directives from China's cybersecurity authority.[165]

Moreover, China's transnational censorship is increasingly influencing foreign investments and trade dynamics. The China Securities Regulatory Commission has recently directed law firms to moderate the language in Chinese companies' overseas listing documents that outline business risks tied to China,[166] cautioning that non-compliance could jeopardize their overseas IPO prospects.[167] Typically, Chinese firms eyeing overseas stock listings often flag shifts in China's socio-economic landscape, evolving government policies, and US-China trade tensions as potential "business risks."[168] However, China's updated overseas listing regulations, effective from early 2023, prohibit any content that could be perceived as distorting, misrepresenting, or maligning China's legal policies, business climate, or judicial stance in listing documents.[169] While these regulations remain ambiguous about what constitutes such remarks, the Chinese government has unequivocally instructed all law firms to adhere strictly to the new overseas listing guidelines, emphasizing their statutory obligations.[170] It's evident that non-compliance with these

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[165] Blocked Wind information so far accessed by overseas users includes business registration details such as the company's ownership structure and who it ultimately controls, as well as economic data such as home and land sales in certain cities. *Id*.

[166] Rebecca Feng & Dave Sebastian, *China's Economy Isn't Ailing—It's 'Evolving': IPO Lawyers Told to Watch Their Language*, WALL ST. J (Aug. 10, 2023, 12:06 AM), https://www.wsj.com/articles/chinas-economy-isnt-ailingits-evolving-ipo-lawyers-told-to-watch-their-language-4d388b23.

[167] Selena Li et al., *Heeding Beijing's Call, Law Firms Tone Down China Risks in IPO Applications*, REUTERS (August 15, 2023, 5:56 PM), https://www.reuters.com/world/china/heeding-beijings-call-law-firms-tone-down-china-risks-ipo-applications-2023-08-15/.

[168] *Id*.

[169] China Sec. Regul. Comm'n, Provisional Measures for the Administration of Overseas Issuance and Listing of Securities by Domestic Enterprises [境内企业境外发行证券和上市管理试行办法], 2023, art. 12.

[170] In practice, these descriptions could include: 1) there are uncertainties in the domestic legal system, which may come into effect without being announced to the public and may have retrospective effect; 2) it may be more difficult to go through administrative procedures, reach judicial decisions, and enforce agreements through courts or arbitration systems than in other countries and regions; 3) excessive government control of the economy and distorted resource allocation; 4) China's economic growth may not be sustainable; 5) the government's strict foreign exchange controls; 6) foreign court judgments and arbitration awards may be difficult to enforce in China; 7) the government may

censorship directives as part of China's "lawfare" will have repercussions—the so-called "negative" descriptions in prospectuses can significantly hinder project filings.[171]

C. IMPACTS ON INTERNATIONAL ACADEMIC, EDUCATIONAL, AND CULTURAL INSTITUTIONS

China's expanding transnational censorship has significantly encroached upon artistic speech in the academic, educational, and cultural domains, casting a shadow over academic and creative freedom worldwide. British universities, which derive substantial revenue from Chinese student tuition fees, have increasingly practiced self-censorship on sensitive topics.[172] This influence was evident when Chinese censors successfully pressured Cambridge University Press to retract numerous politically sensitive articles.[173] Furthermore, through the Confucius Institutes, the Chinese government exerted influence on French universities, nudging them to align their curricula with Beijing's ideological preferences.[174] In Germany, interventions from the Chinese embassy thwarted discussions in academic institutions about published works concerning China's top leadership.[175] Similarly, the American academic landscape is grappling with

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interfere with business operations. *[404 Document Library] Legal Search | Law Firms: Any Statements That "Distort or Slander China's Legal Policies, Business Environment and Judicial Situation" Are Prohibited in Overseas Listing Documents!* [*【404文库】法律检索丨各律所：禁止境外上市文件中出现任何"歪曲或诋毁中国法律政策、营商环境和司法情况"的表述！*], CHINA DIGITAL TIMES [中国数字时代] (July 26, 2023), https://chinadigitaltimes.net/chinese/698610.html.

[171] Jay Newman, *China's Coming Lawfare Offensive*, FIN. TIMES (Sept. 15, 2023), https://www.ft.com/content/b410e920-ecaf-44ab-b4c8-602f2c42bfd8.

[172] Freddie Hayward, *How the Chinese Government Is Buying Its Way into UK Universities*, NEW STATESMAN (July 13, 2021), https://www.newstatesman.com/politics/2021/07/how-chinese-government-buying-its-way-uk-universities.

[173] Maev Kennedy & Tom Phillips, *Cambridge University Press Backs down over China Censorship*, GUARDIAN (Aug. 21, 2017, 11:36 AM), https://www.theguardian.com/education/2017/aug/21/cambridge-university-press-to-back-down-over-china-censorship.

[174] *The Debate over Confucius Institutes Part II*, CHINAFILE (July 1, 2014), https://www.chinafile.com/conversation/debate-over-confucius-institutes-part-ii.

[175] Andreas Fulda & David Missal, *German Academic Freedom Is Now Decided in Beijing*, FOREIGN POL'Y (Oct. 8, 2021, 11:45 AM), https://foreignpolicy.com/2021/10/28/germany-china-censorship-universities-confucius-institute/.

escalating self-censorship pressures stemming from China.[176] Recent analyses indicate that the backlash against the Confucius Institute has merely led to a covert transformation of China's ideological outreach in American tertiary education.[177] Even at the primary education level in the U.S., the party-state's propaganda machinery has actively disseminated its ideological narratives via financial exchange programs.[178]

These instances underscore the defensive censorship pressures China exerts on foreign, academic, and educational entities. However, in several countries, the party-state is also spearheading more aggressive campaigns. For example, Chinese students and scholars' associations in Canadian universities, backed by the Chinese embassy, reported individuals critical of the CCP's treatment of Uyghurs.[179] They also gathered data on dissidents' family members, which was subsequently used to threaten those relatives residing in China, intimidate the dissidents, and in some cases, force their return to China.[180] In another incident, a young Tibetan activist faced a barrage of online threats, and her family was subjected to harassment after her election as the student body president at the University of Toronto.[181]

To amplify the deterrent effect of its censorship apparatus on overseas creative freedom and cultural production, China's transnational censorship laws have moved beyond traditional territorial limits: They now directly impose legal penalties on foreign publishers and writers who violate state

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[176] Isaac Stone Fish, *The Censorship Circus*, WIRE CHINA (Feb. 27, 2022), https://www.thewirechina.com/2022/02/27/the-censorship-circus/.

[177] Rachelle Peterson, Flora Yan, and Ian Oxnevad, *After Confucius Institutes: China's Enduring Influence on American Higher Education*, NAT'L ASS'N OF SCHOLARS (2022), https://www.nas.org/storage/app/media/Reports/After%20Confucius%20Institutes/After_Confucius_Institutes_NAS.pdf.

[178] U.S. HOUSE OF REPRESENTATIVES, PROMOTING RESPONSIBLE OVERSIGHT TO ELIMINATE COMMUNIST TEACHINGS FOR OUR KIDS ACT, 118TH CONG., 2D SESS., REP. 118–574, 4–5 (July 5, 2024), https://www.govinfo.gov/content/pkg/CRPT-118hrpt574/pdf/CRPT-118hrpt574.pdf (criticizing Confucious Institutes' conditional funding programs).

[179] HARDIE, *supra* note 160, at 18.

[180] *Id*.

[181] *'China Is Your Daddy': Backlash against Tibetan Student's Election Prompts Questions about Foreign Influence*, CBC NEWS (Feb. 15, 2019, 2:42 PM),https://www.cbc.ca/news/canada/toronto/china-tibet-student-election-1.5019648.

censorship guidelines..[182] Moreover, China has been making significant efforts to expand its global media presence and influence foreign perceptions of the country through expansion of state media,[183] content-sharing agreements with foreign media outlets,[184] and investments and acquisitions in international entertainment industries.[185] In the 2010s, Chinese companies invested heavily in Hollywood studios and production companies, which gave them a stake in the international film industry.[186] While this can lead to increased resources and funding for film production, it also means that Chinese investors may have a say in the content and direction of the films being produced.[187] Recently, widespread concerns about China's expanding media influence,

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[182] Sophie Richardson, *Sentenced Publisher Exposes Sweden's Flawed China Strategy*, HUMAN RIGHTS WATCH (March 2, 2020, 11:58 AM), https://www.hrw.org/news/2020/03/02/sentenced-publisher-exposes-swedens-flawed-china-strategy. *See also* Ben Doherty and Rafqa Touma, *Detained Australian Writer Fears He May Die of Kidney Condition in China Jail*, THE GUARDIAN (Aug. 27, 2023, 5:25 PM), https://www.theguardian.com/world/2023/aug/28/yang-hengjun-detained-australian-writer-fears-he-may-die-kidney-condition-china-jail.

[183] For example, China Global Television Network, China Radio International, and Xinhua News Agency have expanded their operations globally by opening more international bureaus, increasing their broadcasting in multiple languages, and enhancing their online presence. Merriden Varrall, *Behind the News: Inside China Global Television Network*, LOWY INSTITUTE (Jan. 10, 2020), https://www.lowyinstitute.org/publications/behind-news-inside-china-global-television-network.

[184] Chinese state media have entered into content-sharing agreements with foreign media outlets so that articles, videos, or other content produced by Chinese state media can appear in foreign publications or broadcasts. *See* Joshua Kurlantzick, *China Wants Your Attention, Please*, FOREIGN POL'Y (Dec. 5, 2022, 4:14 PM), https://foreignpolicy.com/2022/12/05/chinese-state-media-beijing-xi-influence-tools-disinformation/.

[185] Chinese companies, some with close ties to the government, have invested in or acquired stakes in foreign media companies or entertainment industries. This can potentially influence the content produced or the editorial stance of these entities. GLOBAL ENGAGEMENT CENTER, U.S. DEP'T OF STATE, *HOW THE PEOPLE'S REPUBLIC OF CHINA SEEKS TO RESHAPE THE GLOBAL INFORMATION ENVIRONMENT*, SPECIAL REPORT 7-8 (2023), https://www.state.gov/wp-content/uploads/2023/09/HOW-THE-PEOPLES-REPUBLIC-OF-CHINA-SEEKS-TO-RESHAPE-THE-GLOBAL-INFORMATION-ENVIRONMENT_Final.pdf.

[186] Christopher Grimes, *Hollywood Says Farewell to Chinese Investment Bonanza*, FIN. TIMES (Oct. 5, 2022), https://www.ft.com/content/6958a7c0-01b5-47f2-a7c3-df613b998ff7.

[187] *See* Shirley Li, *How Hollywood Sold Out to China*, THE ATLANTIC (Sept. 10, 2021), https://www.theatlantic.com/culture/archive/2021/09/how-hollywood-sold-out-to-china/620021/.

which lacks transparency and threatens journalistic independence and standards in host countries, have caused backlash from U.S. legislators.[188]

D. IMPACTS ON FOUNDATIONAL PRINCIPLES OF LIBERAL DEMOCRACIES

The party-state's transnational censorship extends beyond individual targets, aiming to challenge and rival global democratic institutions. By shaping public opinion, suppressing dissenting views, waging collaborative information warfare, and building international institutional initiatives, China's censorship apparatus seeks to undermine foundational principles of freedom of expression and the rule of law.[189] Recent manifestations of China's transnational censorship and propaganda offer insights into its strategic blueprint to redefine international political narratives in competition with liberal democracies.[190]

A primary narrative propagated by China's censorship and propaganda apparatus portrays the U.S. as the principal global agitator, promoting a purportedly "hypocritical" democratic model to undemocratic nations.[191] Within this framework, the U.S. is consistently depicted as a confrontational "hostile foreign political force" with intentions to destabilize the CCP's leadership.[192] This

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[188] Jiayun Feng, *U.S. Passes New Bill to Curb Beijing-Appeasing Edits in Hollywood Films*, THE CHINA PROJECT (Feb. 7, 2023), https://thechinaproject.com/2023/02/07/u-s-passes-new-bill-to-curb-beijing-appeasing-edits-in-hollywood-films/.

[189] Sarah Cook, *Beijing's Global Megaphone: The Expansion of Chinese Communist Party Media Influence since 2017*, FREEDOM HOUSE SPECIAL REPORT, 24, (January 2020), https://freedomhouse.org/sites/default/files/2020-02/01152020_SR_China_Global_Megaphone_with_Recommendations_PDF.pdf.

[190] Forum Staff, *The CCP's Global Censorship Campaign – And How Ned's Partners Break Through*, NATIONAL ENDOWMENT FOR DEMOCRACY (July 10, 2025), https://www.ned.org/the-ccps-global-censorship-campaign-and-how-neds-partners-break-through/.

[191] This narrative suggests that such U.S. influence results in hardships for its democratic allies, driven by the U.S.'s "selfish" motives. Ministry of Foreign Affairs of China, *Reality Check: Falsehoods in US Perceptions of China* (June 19, 2022, 16:57), https://www.mfa.gov.cn/eng/zy/jj/diaodao_665718/pl/202206/t20220619_10706059.html.

[192] *See generally* JAMIE J. GRUFFYDD-JONES, HOSTILE FORCES: HOW THE CHINESE COMMUNIST PARTY RESISTS INTERNATIONAL PRESSURE ON HUMAN RIGHTS (2022).

portrayal aligns with Xi's worldview that contrasts the ascendant East with a declining West.[193] During the COVID-19 pandemic, China leveraged its propaganda machinery to craft and disseminate narratives emphasizing the superiority of its authoritarian response over liberal democracies.[194] State media highlighted China's efficient mask production and the success of its "Zero-COVID" policy, contrasting it with the alleged systemic "disadvantages" and struggles faced by liberal democracies.[195] However, the abrupt shift from the "Zero-COVID" strategy showcased the party-state's agility in adapting its narrative, transitioning from a stance of firm policy implementation to one that seemingly embraced the unpredictability it had previously criticized in Western responses.[196]

This shift underscores China's strategic use of transnational censorship to craft divergent narratives about differing political systems. The CCP's propaganda extols the virtues of centralized governance and authoritarianism while simultaneously disseminating information highlighting the perceived shortcomings of liberal democracies.[197] This dual narrative was evident during the pandemic. A recurring theme suggests that the U.S. and its allies were responsible for creating and disseminating the virus to China.[198] Furthermore, while China championed its

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[193] Chris Buckley, '*The East Is Rising': Xi Maps Out China's Post-Covid Ascent*, N. Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/2021/03/03/world/asia/xi-china-congress.html.

[194] BEN DUBOW ET AL., CTR. FOR EUR. POL'Y ANALYSIS, JABBED IN THE BACK: MAPPING RUSSIAN AND CHINESE INFORMATION OPERATIONS DURING COVID-19 9–12 (2021), https://cepa.org/wp-content/uploads/2021/12/Jabbed-in-the-Back-12.2.21.pdf.

[195] Peter Rough, *How China is Exploiting the Coronavirus to Weaken Democracies*, FOREIGN POL'Y (Mar. 25, 2020, 7:09 PM), https://foreignpolicy.com/2020/03/25/china-coronavirus-propaganda-weakens-western-democracies/.

[196] Simon Leplâtre, *China's Propaganda Struggles to Find New Tone after Zero-Covid Policy Abandoned*, LE MONDE (Dec. 25, 2022, 1:19 PM), https://www.lemonde.fr/en/international/article/2022/12/25/china-s-propaganda-struggles-to-find-new-tone-after-zero-covid-policy-abandoned_6009051_4.html.

[197] *See*, *e.g.*, TINATIN KHIDASHELI ET AL., A WORLD SAFE FOR THE PARTY, CHINA'S AUTHORITARIAN INFLUENCE AND THE DEMOCRATIC RESPONSE: COUNTRY CASE STUDIES FROM NEPAL, KENYA, MONTENEGRO, PANAMA, GEORGIA AND GREECE 6–7 (David Shullman ed., 2021) (analyzing the popularization of China's authoritarian model), https://www.iri.org/wp-content/uploads/legacy/iri.org/bridge-ii_fullreport-r7-021221.pdf.

[198] Steven Lee Myers, *China Spins Tale That the U.S. Army Started the Coronavirus Epidemic*, N.Y. TIMES (July 7, 2021),

"vaccine diplomacy" during the pandemic to strengthen global ties,[199] its post-pandemic "wolf warrior diplomacy" was marked by a hawkish stance from its diplomats, reinforcing the narrative of the one-party system's superiority over liberal democracies.[200]

In collaboration with Russia, especially post the Russia-Ukraine war, China has engaged in extensive information warfare, employing disinformation and misinformation campaigns to sway domestic and international opinions.[201] The party-state has utilized both state and social media platforms to subtly, yet effectively, endorse Russia, portraying it as a victim and lauding Putin's leadership.[202] A notable instance includes the Chinese ambassador in France openly challenging the sovereignty of several EU members, subtly endorsing Russia's imperialistic ambitions.[203]

More recently, China's state-run media outlet, China Global Television Network (CGTN), has deployed generative AI to produce a series of animated videos titled "*A Fractured America*", disseminated via X and YouTube.[204] These videos depicted fabricated scenes of strikes and riots across the United

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https://www.nytimes.com/2020/03/13/world/asia/coronavirus-china-conspiracy-theory.html.

[199] Detlef Nolte, *Relativizing the Success of China's "Vaccine Diplomacy"*, GERMAN COUNCIL ON FOREIGN AFFAIRS (Feb. 1, 2022), https://dgap.org/en/research/publications/relativizing-success-chinas-vaccine-diplomacy#:~:text=How%20successful%20has%20China%20been,the%20beginning%20of%20the%20pandemic.

[200] Aidan Powers-Riggs & Eduardo Jaramillo, *Is China Putting "Wolf Warriors" on a Leash?*, THE DIPLOMAT (Jan. 22, 2022), https://thediplomat.com/2022/01/is-china-putting-wolf-warriors-on-a-leash/.

[201] Clothilde Goujard, *EU Warns China on Ukraine Disinformation and Cyberattacks*, POLITICO (Sept. 18, 2023, 6:45 PM), https://www.politico.eu/article/european-union-china-ukraine-disinformation-cyberattacks-war-russia/. *See also* David Bandurski, *China and Russia Are Joining Forces to Spread Disinformation*, BROOKINGS (Mar. 11, 2022), https://www.brookings.edu/articles/china-and-russia-are-joining-forces-to-spread-disinformation/.

[202] Li Yuan, *Why the Chinese Internet Is Cheering Russia's Invasion*, N.Y. TIMES (Feb. 28, 2022), https://www.nytimes.com/2022/02/27/business/china-russia-ukraine-invasion.html.

[203] Simone McCarthy, *Chinese Ambassador Sparks European Outrage over Suggestion Former Soviet States Don't Exist*, CNN (Apr. 25, 2023, 2:53 AM), https://edition.cnn.com/2023/04/24/china/china-ambassador-lu-shaye-baltic-soviet-states-europe-intl-hnk/index.html#:~:text=The%20remarks%20by%20China's%20ambassador,especially%20in%20the%20Baltic%20states.

[204] CECC, *supra* note 43, at 236.

States, allegedly triggered by income inequality and a lack of democratic accountability.[205] This marks the first known instance in which the Chinese party-state has successfully leveraged generative AI on a large scale to fabricate narratives aligned with its propaganda objectives within the context of the U.S.-China tech rivalry.[206]

Prior to this, a notorious network of automated social media accounts known as "Spamouflage"—believed to have been orchestrated by Chinese police—engaged in posting viral, inflammatory content.[207] These accounts were designed to convincingly impersonate Americans, with the aim of exacerbating political divisions, spreading conspiracy theories, and making unfounded accusations against political leaders.[208] At present, a broad array of Chinese-linked entities, often disguised as independent or non-Chinese news agencies, continue to engage in pro-CCP propaganda by publishing favorable reports and republishing content sourced directly from Chinese state media.[209] The persistence of these state-sponsored transnational censorship and propaganda campaigns—though frequently exposed after the fact—poses a significant risk to the integrity of international public

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[205] *Id*.

[206] Shaoyu Yuan, *AI Propaganda and the China-US Race for Influence*, THE DIPLOMAT (Sept. 23, 2025), https://thediplomat.com/2025/09/ai-propaganda-and-the-china-us-race-for-influence/.

[207] Tiffany Hsu, *Chinese Influence Campaign Pushes Disunity Before U.S. Election, Study Says*, N. Y. TIMES (Feb. 15, 2024), https://www.nytimes.com/2024/02/15/business/media/chinese-influence-campaign-division-elections.html.

[208] Christopher Bing & Katie Paul, *US Voters Targeted by Chinese Influence Online, Researchers Say*, REUTERS (Sept. 3, 2024, 11:20 AM GMT+1), https://www.reuters.com/world/us/us-voters-targeted-by-chinese-influence-online-researchers-say-2024-09-03/. *See also* Shannon Bond, *China Is Pushing Divisive Political Messages Online Using Fake U.S. Voters*, NPR (Sept. 3, 2024, 6:00 AM ET), https://www.npr.org/2024/09/03/nx-s1-5096151/china-tiktok-x-fake-voters-influence-campaign.

[209] *See, e.g.*, Giselle Ruhiyyih Ewing, *China-linked Influence Operation Tried to Overthrow Spain's Government, Report Says*, POLITICO (Jan. 30, 2025, 12:08 AM CET), https://www.politico.eu/article/china-influence-operation-overthrow-spain-government-valencia-floods-spamouflage-graphika/. *See also* Global Affairs Canada, *Rapid Response Mechanism Canada Detects Second 'Spamouflage' Campaign Targeting Canada-based Chinese-language Commentators and Their Families, Global Affairs Canada*, GOVERNMENT OF CANADA (Mar. 6, 2025), https://www.canada.ca/en/global-affairs/news/2025/03/rapid-response-mechanism-canada-detects-second-spamouflage-campaign-targeting-canada-based-chinese-language-commentators-and-their-families.html.

discourse.[210] Ultimately, such efforts have the potential to manipulate global public opinions, distort the free exchange of information, and undermine the open debate foundational to liberal democratic societies.[211]

Furthermore, China is proactively advancing its transnational censorship agenda within various international organizations and forums. At the UN Human Rights Council, it has successfully thwarted challenges to its censorship laws,[212] and garnered support for its controversial national security legislation in Hong Kong, which severely restricts free speech.[213] China's commitment to its narrative of "cyber sovereignty" is evident in its substantial investments in trade-related areas, particularly international data governance.[214] China introduced its Global Initiative on Data Security to engage globally, including through discussions within the United Nations.[215] This initiative presents an expansive digital agenda that integrates China's digital censorship rules, emphasizing the concept of "cyber sovereignty."[216] In bilateral trade negotiations, China frequently aligns its discussions with its stringent data policies, particularly those that oversee political content within the private sector.[217] These strategic moves in transnational censorship underscore China's broader ambition of

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[210] *See* Cate Cadell & Tim Starks, *Pro-China Influence Campaign Infiltrates U.S. News Websites*, THE WASHINGTON POST (July 24, 2023), https://www.washingtonpost.com/politics/2023/07/24/pro-china-influence-campaign-infiltrates-us-news-websites/.

[211] *See* ARTICLE 19, GOING GLOBAL: CHINA'S TRANSNATIONAL REPRESSION OF PROTESTERS WORLDWIDE 8 (June 2025), https://www.article19.org/wp-content/uploads/2025/06/Right-to-Protest-China-TNR_EN.pdf (summing up the impact of China's global campaigns).

[212] Sui-Lee Wee and Stephanie Nebehay, *At U.N., China Uses Intimidation Tactics to Silence Its Critics*, REUTERS INVESTIGATES (Oct. 6, 2015, 1:03 PM GMT), https://www.reuters.com/investigates/special-report/china-softpower-rights/.

[213] Dave Lawler, *The 53 Countries Supporting China's Crackdown on Hong Kong*, AXIOS (June 2, 2020), https://www.axios.com/2020/07/02/countries-supporting-china-hong-kong-law.

[214] Dorwart, *supra* note 128, at 133 (evaluating China's influence on global data transfer).

[215] *China Focus: China Proposes "Global Initiative on Data Security,"* XINHUA AGENCY (Sept. 8, 2020, 11:50 PM), https://web.archive.org/web/20201204152903/http://www.xinhuanet.com/english/2020-09/08/c_139353373.htm.

[216] *Id*.

[217] Sutter, *supra* note 111, at 40–47.

establishing global "digital authoritarianism" rooted in the party-state's political objectives.[218]

Last but not least, China's approach to transnational censorship is not confined to its borders but has potential global applicability in nations susceptible to authoritarian tendencies.[219] First, China has shared its digital censorship blueprint with close allies, notably Russia and North Korea.[220] Additionally, Chinese tech giant Huawei has made significant inroads in Central Asia, with countries like Uzbekistan, Tajikistan, and Kyrgyzstan benefiting from its technological advancements.[221] Further, China's influence is palpable in Latin America, where countries such as Ecuador and Venezuela have adopted Chinese censorship technologies and standards.[222] Finally, Africa has emerged as a pivotal region for China's pilot projects, where it seeks to integrate its restrictive legal standards and digital infrastructure.[223] Highlighting China's deepening engagement in Africa, the CCP has inaugurated its inaugural overseas Party School in Tanzania.[224]

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[218] Chen, *supra* note 18, at 568–70.

[219] *See, e.g.*, FREEDOM HOUSE, CHINA: TRANSNATIONAL REPRESSION ORIGIN COUNTRY CASE STUDY, SPECIAL REPORT 2021, 16–17, https://freedomhouse.org/sites/default/files/2021-02/FH_TransnationalRepressionReport2021_rev020221_CaseStudy_China.pdf (documenting China's "multi-faceted transnational repression bureaucracy").

[220] STAFF OF S. COMM. ON FOREIGN RELATIONS, 116TH CONG., THE NEW BIG BROTHER– CHINA AND DIGITAL AUTHORITARIANISM, T, S. PRT. NO. 116–47 (2020), https://www.govinfo.gov/content/pkg/CPRT-116SPRT42356/pdf/CPRT-116SPRT42356.pdf.

[221] *Id*. at 31.

[222] *Id*. at 29–33.

[223] For instance, countries like Kenya, Nigeria, Sierra Leone, and South Africa are contemplating the adoption of these Chinese technologies and methodologies. Nigel Cory, *Writing the Rules: Redefining Norms of Global Digital Governance*, *in* CHINA'S DIGITAL AMBITIONS: A GLOBAL STRATEGY TO SUPPLANT THE LIBERAL ORDER 73, 82 (Emily de La Bruyère, Doug Strub & Jonathon Marek eds., Nat'l Bureau of Asian Res. 2022), https://www.nbr.org/wp-content/uploads/pdfs/publications/sr97_chinas_digital_ambitions_mar2022.pdf

[224] Jevans Nyabiage, *China's Political Party School in Africa Takes First Students from 6 Countries*, S. CHINA MORNING POST (June 21, 2022, 9:00 AM), https://www.scmp.com/news/china/diplomacy/article/3182368/china-party-school-africa-takes-first-students-6-countries.

V. CONCLUSION

This research presents an analytical framework that elucidates the PRC's strategic deployment of transnational censorship laws to extend the influence of its authoritarian governance globally. At its core, China's transnational censorship seeks to fortify its narrative of political legitimacy. This is achieved through a dual normative approach. On the one hand, defensive censorship seeks to deter and dissuade voices critical of the Chinese government, thereby limiting audiences' access to dissenting viewpoints. On the other hand, the objective of offensive censorship is to craft and propagate a narrative that underscores the legitimacy and superiority of the authoritarian model, highlighting its broad political endorsement, sustained foreign investment appeal, and technological prowess. Central to this strategy is the party-state's endeavor to recalibrate the global discourse surrounding China. This involves reinterpreting and rebranding key concepts like human rights and democracy through the lens of "Chinese exceptionalism." The overarching implication of these transnational censorship laws is their multifaceted functionality. They not only influence the content of political discourse but also pose a formidable challenge to the global free speech paradigm by championing the purported systemic advantages of authoritarianism over democracy. In essence, the past decade has witnessed a concerning trajectory of China's transnational censorship, marking a significant expansion in its scope and influence.

PERSECUTION AS A CRIME AGAINST HUMANITY IN THE CONTEXT OF THE NAGORNO-KARABAKH CONFLICT

Gurgen Petrossian*

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I. INTRODUCTION

By the end of September 2023, over 100,000 Armenians residing in Nagorno-Karabakh were forcibly displaced from their ancestral homeland, where they had lived for centuries.[1] This displacement is attributed to Azerbaijan's longstanding state policy of fostering animosity and discrimination against the Armenian population in Nagorno-Karabakh, actions that potentially constitute persecution under Article 7(1)(h) of the Rome Statute. On November 14, 2023, the Republic of Armenia ratified the Rome Statute,[1] thereby extending the jurisdiction of the International Criminal Court not only to crimes committed within Armenia's territory but also to ongoing offenses connected to the Nagorno-

[1] See Armenia and Karabagh: The Struggle for Unity 73-103 (Christopher J. Walker ed., 1991).
[1] See Press Release, Int'l Crim. Ct., Armenia joins the ICC Rome Statute (Nov. 17, 2023) (on file with author).

Karabakh conflict, as will be explained in this article,[2] as it will be explained in this article. This ratification will facilitate the prosecution of crimes such as deportation and persecution of Armenians forced to relocate to Armenia, thereby enabling jurisdiction over these ongoing offenses.[3]

Persecution, as defined by established jurisprudence and Article 7(2)(h) of the Rome Statute, refers to the intentional and severe deprivation of fundamental rights contrary to international law based on the identity of a group or collective.[4] For over three decades, Azerbaijani authorities have systematically targeted Armenians, employing tactics such as spreading hate speech aimed at dehumanizing Armenians. While physical discrimination against Armenians within Azerbaijan proper was not permanent due to the Armenians in Nagorno-Karabakh living independently, those Armenians who came under Azerbaijani control in any capacity were subject to humiliation, torture, or loss of life. The persistent persecution of Armenians has a historical connection to the Armenian genocide and the underlying ideology of Pan-Turkism, which perceived Armenians as an impediment to the geographic unity of Turkic populations.[5]

This article will elaborate on the historical, political, and legal foundations that have driven and sustained such persecution against the Armenian population in the region. It is organized into four sections. The initial section will explore the historical background surrounding the concept of persecution and its evolution as a crime as developed by the jurisprudence of the International Military Tribunal. The second section will analyze the elements of persecution as outlined in the Rome Statute. Subsequently, the third section will investigate empirical evidence concerning discrimination and state-sponsored policies of hatred within the context of the Nagorno-Karabakh conflict, resulting in deportation. Finally, the fourth section will focus on applying these

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[2] Dr. Gurgen Petrossian, *Armenia as the 124th Member to the Rome Statute*, OpinioJuris Blog (Sept. 22, 2023), https://opiniojuris.org/2023/09/22/armenia-as-the-124th-member-to-the-rome-statute/.

[3] Cf. Prosecutor v. Bangladesh, ICC-RoC46(3)-01/18-37, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ¶ 76 (Sept. 6, 2018) (positing that the Court may have jurisdiction under Article 12(2)(a) of the Rome Statute for crimes against humanity of persecution for cross-border transfers).

[4] Prosecutor v. Du [Ko Tadi], Case. No. IT-94-1-T, Opinion and Judgment, ¶ 694 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

[5] See David Babayan, *The Artsakh Problem and the Ideology of Pan-Turkism*, 12 21st Century 2, 76-111 (2011).

defined concepts to the current scenario and to the proceedings before the International Criminal Court.

II. Historical Context Surrounding the Crime of Persecution

The evolution of the crimes of persecution and genocide, respectively, is closely intertwined with the evolution of the crime of genocide. This connection stems from the fact that genocide always involves a special intention to destroy a specific group of people based on discriminatory grounds. Throughout history, numerous genocides have occurred,[6] targeting identifiable groups due to individuals' membership in those groups. However, according to Article 2 of the Genocide Convention, genocide specifically entails the intent to destroy, in whole or in part, a racial, national, religious, or ethnic group. In contrast, the crime of persecution, as a crime against humanity, does not require specific intent to destroy, making its elements broader as long as the chapeau elements of crimes against humanity are satisfied.

Persecution, as a crime, is a relatively modern concept closely associated with discrimination. Although both involve the mistreatment or unjust treatment of individuals or groups, they differ in scope and severity. Discrimination embraces unfair treatment or bias against individuals or groups.[7] In contrast, persecution involves the systematic mistreatment or targeting of individuals or groups based on their identity, beliefs, or associations, often with the intent to suppress, intimidate, or eliminate them. It typically encompasses more severe and prolonged forms of discrimination, including acts of violence.[8] While discrimination may serve as a precursor to persecution,[9] the

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[6] Cf. Convention on the Prevention and Punishment of the Crime of Genocide, pmbl., Dec. 9, 1948, 78 U.N.T.S. 277.

[7] *Discrimination*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/discrimination (last visited Apr. 7, 2024).

[8] See, e.g., Council Directive 2004/83/EC, on Minimum Standards for the Qualification and Status of Third-Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12, ch. I, art. 9(2)(b), on legal, administrative, police, and/or judicial measures that are in themselves discriminatory and constitute acts of persecution.

[9] 2 Guénaël Mettraux, International Crimes Law and Practice 664 (2020); Beatriz Manz, Refugees of a Hidden War: The Aftermath of Counterinsurgency in Guatemala 191 (1987).

latter represents a heightened and amplified level of injustice and oppression.

Across history and geographies, many nations, groups, individuals and identities have experienced discrimination and persecution. The biblical tale of Cain and Abel[10] stands as among the inaugural portrayals of murder and persecution, stemming from jealousy and resentment provoked by God's favoritism towards Abel's offering.[11] During ancient times and the Middle Ages, persecution often arose from religious discrimination intertwined with political, social, economic, and cultural factors, leading to the targeting of Jews, Christians, Muslims, and other groups. For example, traditional polytheistic priests and temples faced persecution during Akhenaten's rule in 14th-century BCE Egypt,[12] as did Jews under Antiochus IV Epiphanes in the 2nd-century BCE Seleucid Empire,[13] in Roman Empire[14] and the Middle Ages.[15] Christians experienced persecution in the Roman[16] and Persian Empires[17] during the 1st to 4th centuries CE, and Pagans faced oppression after Christianity's spread across Europe.[18] Iconoclasm emerged in the Byzantine Empire during the 8th and 9th centuries.[19] Muslims and Jews encountered persecution during the Crusades[20] and the Inquisitions,[21] and witch hunts targeted

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[10] *Genesis* 4:8 (New Int'l Version).
[11] Samuel B. Schieffelin, The Foundations of History, a Series of First Things 62-63 (3rd ed. 1863).
[12] 66 T.E. Weckozicz & H.P. Liebel-Weckowicz, A History of Great Ideas in Abnormal Psychology 241 (G.E. Stelmach & P.A. Vroon eds., 1990).
[13] Chris Seeman, *Antiochus' Persecution in Josephus' War*, 1 Alpha 11-14 (2017); David Whitten Smith & Elizabeth Geraldine Burr, Understanding World Religions: A Road Map for Justice and Peace 60 (2007).
[14] Steven Leonard Jacobs, A Short History of Judaism and the Jewish People 115 (2024).
[15] *Id.* at 123.
[16] Elizabeth DePalma Digeser, *Breaking the Apocalyptic Frame*, *in* Heirs of Roman Persecution: Studies on a Christian and Para-Christian Discourse in Late Antiquity (Éric Fournier & Wendy Mayer eds., 2020).
[17] Kyle Smith, *Constantine and the Captive Christians of Persia* 4-12 (2016).
[18] Ramsay MacMullen, *Christianity and Paganism in the Fourth to Eighth Centuries* 1-31 (1997).
[19] Mike Himphreys, *"First Iconoclasm, ca. 700-780,"* in A Companion to Byzantine Iconoclasm 325 (Mike Himphreys ed., 2021).
[20] David Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages* 93 (2015).
[21] Mauricio Drelichman, Jordi Vidal-Robert & Hans-Joachim Voth, *"The Long-Run Effects of Religious Persecution: Evidence from the Spanish Inquisition,"* 118 Proc. Nat'l Acad. Sci. 33, 1-9 (2021).

primarily women accused of witchcraft across Europe and Colonial America.[22]

During periods dominated by colonialism and industrialization, political motives became increasingly influential in driving persecution compared to earlier periods. This resulted in a rise in colonial ambition, power struggles, and ideological conflict. This phenomenon shaped the intricacies and patterns of oppression during these eras. The persecution of Indigenous peoples across various continents, the transatlantic slave trade, oppression in the Ottoman Empire, political persecution in the Soviet Union, and the atrocities committed in Nazi Germany and other parts of the world all illustrate how hundreds of thousands of people have suffered throughout human history because of their beliefs and identities.

A. The Crime of Persecution before WWII

Throughout human history, alongside instances of persecution as previously highlighted, measures have also been taken to protect certain circles of individuals and groups at risk of persecution or discrimination. Before being officially recognized as a crime of persecution in the modern sense, different nations addressed the concept of equality in various ways within their legal systems. The examples, while not explicitly anti-discrimination as understood today, included provisions aimed at safeguarding vulnerable groups such as slaves, widows, and orphans, hinting at fostering a degree of equality within certain contexts. It is crucial to interpret these provisions considering the historical context and hierarchical, stratified social and cultural norms prevalent at those times. For instance, Laws 209 and 210 of the Code of Hammurabi from 18th-century BCE state:

> *"If a man strike a free-born woman so that she lose her unborn child, he shall pay ten shekels for her loss."*
> *"If the woman dies, his daughter shall be put to death."*

Although these laws may not initially appear to advocate for equality, they do assign a specific value to the harm suffered by a woman. This suggests a level of recognition regarding the rights and worth of individuals, regardless of gender.

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[22] Brian Pavlac, *Witch Hunts in the Western World* (2009).

Additionally, another form of minimal protection and acknowledgment was provided for slaves under Law 199 of the Code of Hammurabi.

> *"If he put out the eye of a man's slave, or break the bone of a man's slave, he shall pay one-half of its value."*

The Edicts of Ashoka, dating back to the 3rd century BCE in ancient India, provide a notable example of religious tolerance and anti-discrimination.[23] The seventh edict states:

> *"The beloved of the gods, king Piyadasi, desires that all religions should reside everywhere, for all of them desire self-control and purity of heart. But people have various desires and various passions, and they may practice all of what they should or only a part of it. But one who receives great gifts yet is lacking in self-control, purity of heart, gratitude and firm devotion, such a person is mean."*[24]

Within the framework of anti-discrimination norms, it's important to highlight the Constitutio Antoniniana, promulgated by Emperor Caracalla in 212 CE during the Roman Empire. Through this decree, the Emperor instituted a uniform citizenship status for people from various cultural backgrounds spanning three continents regardless of their origin.[25] While it eliminated the previous distinctions between Civies (Roman citizens) and Peregrini (non-citizens), historians suggest that it subsequently contributed to social discrimination within society as it ultimately deepened social discrimination by transforming citizenship into a fiscal tool that widened economic disparities and reinforced cultural hierarchies within the empire.[26]

The Magna Carta of 1215 provides another means of safeguarding individuals from discrimination, as seen in clauses 39

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[23] Cf. Robert Yelle, *"Was Aśoka really a secularist avant-la-lettre? Ancient Indian pluralism and toleration in historical perspective,"* 56 Modern Asian Studies 750-751 (2022).

[24] Ven Dhammika, *The Edicts of King Asoka* 21 (1993).

[25] Cédric Brélaz, "*Experiencing Roman Citizenship in the Greek East during the Second Century CE: Local Contexts for a Global Phenomenon*," in Roman and Local Citizenship in the Long Second Century CE 277 (Myles Lavan & Clifford Ando eds., 2021).

[26] Charles Whittaker, Rome and Its Frontiers 206 (2002); Wolf Liebeschuetz, *"Citizen Status and Law in the Roman Empire and the Visigothic Kingdom,"* in Strategies of Distinction 134 (Helmut Reimitz & Walter Pohl eds., 2023).

and 40, which granted people the right to restrain the authority of the government.[27]

> *"Clause 39: No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."*
> *"Clause 40: To no one will we sell, to no one will we refuse or delay, right or justice."*

The Bill of Rights, particularly Section 1 of the Fourteenth Amendment to the U.S. Constitution enacted in 1868, contains a similar provision interpreted by the U.S. Supreme Court as prohibiting government discrimination, applying to diverse forms of discrimination such as racial segregation, gender discrimination, and discrimination based on other protected characteristics.[28]

> *"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

In addition to being addressed through national regulations historically, protections for minorities and anti-discrimination norms also began to be indirectly implied in international treaties. For instance, the Treaty of Westphalia from 1648 laid down principles of sovereignty and affirmed states' rights to determine their own laws regarding religious freedoms under the principle of *cuius regio, eius religio*, thereby indirectly safeguarding minority rights.[29] On a bilateral level, the protection of minorities, aimed at providing them with security and safeguarding their rights, was

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[27] Maleiha Malik, *"Magna Carta, Rule of Law and Religious Diversity,"* in Magna Carta, Religion and the Rule of Law 254 (Robin Griffith-Jones & Mark Hill eds., 2015).
[28] Brown v. Board of Education, 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967); Obergefell v. Hodges, 576 U.S. 644 (2015).
[29] Tore Lindholm, *"Philosophical and Religious Justification of Freedom of Religion or Belief,"* in Facilitating Freedom of Religion or Belief: A Deskbook 29 (Tore Lindholm, Cole Durham, & Bahia Tahzib-Lie eds., 2004).

addressed in various treaties. For instance, Article VII of the Treaty of Küçük Kaynarca from 1774 obligated the Ottoman Empire to the Russian Empire to ensure continuous protection for the Christian religion and its churches.[30] The safeguarding of minority rights within the Ottoman Empire was further addressed in subsequent treaties, such as the Treaty of Adrianople of 1829, the Treaty of San Stefano of 1878, and the Treaty of Berlin of 1878. These agreements imposed additional obligations on the Ottoman Empire to provide increased rights and protections to minority groups.[31]

During World War I, the Allied powers of the Entente denounced the atrocities inflicted upon the Armenian population by the Ottoman Empire as crimes against humanity and civilization, holding individual members of the Ottoman government personally responsible.[32] Following the war, the Allies initiated preparations to fulfill their declaration. At the second plenary session of the Paris Peace Conference on January 25, 1919, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, commonly referred to as the "Commission of Fifteen," was formed with the objective of investigating and documenting the violations of international law committed by Germany and its allies during the war.[33] The commission's report outlined a catalog of crimes, which also encompassed offenses perpetrated by the Ottoman Empire against its own population. However, due to divergent perspectives within the commission regarding the legal classification of crimes against

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[30] The Sublime Porte promises to protect constantly the Christian religion and its churches, and it also allows the Ministers of the Imperial Court of Russia to make, upon all occasions, representations, as well in favour of the new church at Constantinople, of which mention will be made in Article XIV, as on behalf of its officiating ministers, promising to take such representations into due consideration, as being made by a confidential functionary of a neighboring and sincerely friendly Power, Treaty of Peace (Küçük Kaynarca), 1774, VII, Great Britain, 72 Parliamentary Papers, 171-179 (1854); see also similar protection in the Article XIII of the Treaty of Karlowitz from 1699, Treaty of Bucharest from 1812.

[31] Geoff Gilbert, *"Religio–nationalist Minorities and the Development of Minority Rights Law,"* 25 Rev. Int'l Stud. 397-400 (1999).

[32] France, Great Britain, and Russian, Joint Declaration, US Nat'l Archives Record Group 59, 867.4016/67 (May 28, 1915) cited in Paul Bartrop, Modern Genocide 164 (2019).

[33] *"Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties"* 14 Am. J. Int'l L., 1/2 95 (Jan. - Apr., 1920); David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I* 13 Fordham Int'l L.J. 1 87 (1989).

humanity, the report failed to arrive at a definitive conclusion but mentioned that the Central Powers and their allies have violated not only the established laws and customs of war, but also the elementary laws of humanity.[34] The Istanbul trials targeting perpetrators within the Ottoman Empire primarily adhered to the national criminal code, devoid of explicit acknowledgment of the nature of crimes against humanity.[35] Among the charges leveled against the perpetrators of the massacres in the Ottoman Empire during the Istanbul trials was one based on Article 56 of the Imperial Ottoman Penal Code, which states:

> *"Whoever dares to make the people of Ottoman dominions arm themselves against each other, to instigate or incite them to engage in mutual slaughter, or to bring about acts of rapine, pillage, devastation of the country, or homicide in various places, is, if the disorder takes effect entirely or if a commencement of the disorder has been made, likewise put to death."*[36]

This provision in the Ottoman Empire's penal system prohibited inciting individuals within its dominions to engage in mutual slaughter, pillage, devastation, or homicide, encompassing actions that could result in persecution of any group within the empire. Although this article did not explicitly reference minorities or offer direct protection for them, its broad interpretation allows for the understanding that instigating any group within the Ottoman Empire could lead to criminal prosecution, indirectly safeguarding minorities residing there. Thus, it corresponds with the concept of persecution by forbidding actions that could inflict harm or violence on any population within the empire.

The trials in Istanbul from 1919 to 1920, were declared null and void by the Grand National Assembly upon assuming political power in 1922. Subsequently, the Assembly abolished the occupation of the Allied powers.[37] Nevertheless, those trials constituted the initial stages in the establishment and conception of the legal framework for crimes against humanity.

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[34] "*Comm'n on Responsibility of the Authors of the War",* 14 Am. J. Int'l L. 123 (1920).
[35] Gurgen Petrossian, Staatenverantwortlichkeit für Völkermord 70-83 (2019); Vahagn Dadarian & Taner Akcam, Judgment at Istanbul 59 (2011).
[36] John Strachey Bucknill, Haig Apisoghom Utidjian, The Imperial Ottoman Penal Code (1913).
[37] Gurgen Petrossian, Staatenverantwortlichkeit für Völkermord 63 (2019).

B. THE CRIME OF PERSECUTION AFTER WWII

During World War II, the Allied powers began calling for the accountability of Nazi perpetrators for the atrocities committed against their own population, which went well beyond traditional war crimes. To address this, they established the United Nations War Crimes Commission, which was tasked with collecting evidence for the prosecution of criminals, in the name of mankind.[38] During the Legal Committee's meetings, it was proposed to extend the discussion to encompass the crimes perpetrated by Nazis against German Jews and Catholics, in addition to other atrocities rooted in religious or racial prejudice. These proposals underscored the significance of upholding principles of laws of humanity,[39] previously not accepted after World War I. During the drafting of the Charter for the Nuremberg Trials at the London Conference, the term "crimes against humanity" was introduced, linking these offenses to the context of war, where persecutions based on political, racial, or religious grounds were a separate offence as part of crimes against humanity.[40]

At the International Military Tribunal, the indictment charged the defendants with a "Common Plan or Conspiracy" spanning 25 years, describing the Nazi Party as the central tool for coordinating the aims of the conspiracy, which include consolidation of power, use of terror, suppression of trade unions, attacks on Christian institutions, persecution of Jews, and regimentation of youth were deliberate steps toward fulfilling this common plan. The Nazi government's persecution of Jews was meticulously detailed during the Tribunal's proceedings, depicting a consistent and systematic cruelty on an immense scale. Ohlendorf, a key figure in the RSHA[41] and Einsatzgruppen, testified to the methods employed in the extermination of Jews, including the use of firing squads.[42] The anti-Jewish policy was deeply ingrained in Nazi ideology, evident in the Party Program's

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[38] Cherif Bassiouni, Crimes Against Humanity 72-73 (2011).
[39] United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War 175 (1948).
[40] Robert Dubler & Matthew Kalyk, Crimes Against Humanity in the 21st Century: Law, Practice, and Threats to International Peace and Security 47 (2018); Cherif Bassiouni, Crimes Against Humanity 121-122 (2011).
[41] Reichssischerheitshauptamt (Reich Security Main Office).
[42] Trial of the Major War Criminals Before the International Military Tribunal, Judgment, Oct. 1, 1946 at 491.

declaration and its dissemination through publications like “Der Stürmer”. As the Nazis consolidated power, persecution against Jews intensified, resulting in the implementation of discriminatory laws and violent attacks such as pogroms.[43] As World War II progressed, this persecution escalated into a systematic campaign of extermination known as the "final solution," particularly in occupied territories.[44] The Einsatzgruppen, supported by the military, were responsible for carrying out mass killings of Jews in areas controlled by Germany. Notably, concentration camps like Auschwitz emerged as hubs for mass extermination, where millions of Jews were murdered in gas chambers and subjected to forced labor. Testimonies from figures like Hoess, the commandant of Auschwitz, shed light on the horrific methods used in these extermination processes.[45] Additionally, atrocities included inhumane experiments on camp inmates and the ruthless exploitation of victims' bodies and possessions. The persecution extended beyond Germany's borders, with German authorities orchestrating the deportation and extermination of Jews in countries under their influence. Estimates from figures like Adolf Eichmann suggest that around 6 million Jews fell victim to Nazi policies during this dark chapter of history.[46]

The tribunal concluded that prior to the onset of World War II, Germany witnessed extensive political assassinations and persecution, notably targeting political dissidents and Jewish individuals. While these actions were not definitively classified as crimes against humanity by the Tribunal due to their indirect connection with specific offenses, they nevertheless reflected the regime’s escalating brutality. With the outbreak of war in 1939, this brutality intensified, leading to a notable surge in war crimes and crimes against humanity, particularly linked to aggressive military operations.[47] As a result, the tribunal determined that of the 24 defendants, the following 16 key Nazi figures were culpable for

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[43] Gesetz zur Wiederherstellung des Berufsbeamtentums 1933 (Law for the Restoration of the Professional Civil Service) excluding Jews from public office, Gesetz zum Schutz des deutschen Blutes und der deutschen Ehre 1935 (Nuremberg Racial Law), stripping Jews of citizenship and prohibited intermarriage, Kristallnacht pogrom of 9–10 November 1938 marking a transition from legal discrimination to state-sponsored terror.

[44] Trial of the Major War Criminals Before the International Military Tribunal, Judgment, Oct. 1, 1946 at 493.

[45] *Id.* at 495.

[46] *Id.* at 496.

[47] *Id.* at 498.

crimes against humanity, specifically stemming from the crime of persecution:

- *Hermann Göring:* His involvement in the Nazi regime's persecution was extensive and undeniable, encompassing the use of slave labor and implementation of anti-Jewish laws.[48]
- *Rudolf Hess:* While evidence suggested Rudolf Hess might have been aware of crimes in the East and endorsed discriminatory laws, the tribunal did not find enough evidence to convict him of participation.[49]
- *Joachim von Ribbentrop:* He significantly contributed to the execution of Hitler's "final solution" by expediting the deportation of Jews to the East through diplomatic channels and participating in conferences advocating for their extermination or internment in concentration camps.[50]
- *Ernst Kaltenbrunner:* During Kaltenbrunner's tenure as head of the RSHA, he oversaw and facilitated the continuation of persecution through methods such as torture, confinement in concentration camps, and the implementation of the "final solution" of the Jewish question, with approximately 6 million Jews murdered under his supervision.[51]
- *Alfred Rosenberg:* Rosenberg, while acknowledging and occasionally objecting to the brutal treatment of Eastern peoples, actively participated in stripping territories of resources, implementing segregation policies against Jews, and overseeing the deportation and exploitation of laborers from the East, contributing to the persecution and suffering inflicted upon the population. Additionally, he helped to formulate the policies of Germanization, exploitation, forced labor, and extermination of Jews and opponents of Nazi rule, and he set up the administration which carried them out.[52]
- *Hans Frank:* Frank, as Governor General of occupied Polish territory, played a significant role in the persecution of Jews through the implementation of discriminatory laws, establishment of ghettos, and the systematic extermination

[48] *Id.* at 527.
[49] *Id.* at 529.
[50] *Id.* at 532.
[51] *Id.* at 538.
[52] *Id.* at 540.

of millions of Jews, while also overseeing policies of economic exploitation and deportation of slave laborers.[53]

- *Wilhelm Frick:* Frick, deeply involved in the administration of anti-Semitic laws, including the Nuremberg Decrees, actively enforced policies aimed at eliminating Jews from German life and economy, extending these measures to occupied territories, and overseeing the deportation and extermination of Jews, while also turning a blind eye to atrocities committed in concentration camps and facilitating Germanization efforts in various regions.[54]
- *Julius Streicher:* Streicher, known as "Jew-Baiter Number One," actively promoted anti-Semitic propaganda through his publication, "Der Stürmer", advocating for the persecution and extermination of Jews both within Germany and internationally.[55] *"Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination Streicher's relentless incitement to murder and extermination."*[56] Although vehemently denying awareness of mass Jewish executions, evidence indicated that he was well-informed about the progression of the Holocaust, receiving reports on atrocities and death tolls from Jewish publications.[57]
- *Walther Funk:* In his various roles, Funk actively participated in economic discrimination against Jews, facilitated the exploitation of occupied territories, and indirectly contributed to the utilization of concentration camp labor, implicating him in the persecution perpetrated by the Nazi regime.[58]
- *Baldur Von Schirach:* Von Schirach actively participated in the deportation of Jews from Vienna to the East, where he knew they faced extermination, and was informed of and complicit in the implementation of Nazi policies aimed at persecuting Jews and exploiting forced labor.[59]
- *Fritz Sauckel*: Sauckel, appointed Plenipotentiary General for the Utilization of Labor by Hitler, orchestrated a

[53] *Id.* at 543.
[54] *Id.* at 546.
[55] *Id.* at 547.
[56] *Id.* at 548.
[57] *Id.* at 549.
[58] *Id.* at 551.
[59] *Id.* at 565.

program of forced labor involving the deportation and exploitation of over 5,000,000 individuals, demonstrating overall responsibility for the systematic persecution and suffering inflicted upon them.[60]

- *Alfred Jodl:* Jodl, despite moral objections, facilitated the implementation of orders such as the Commando Order and directives for ruthless actions in occupied territories, demonstrating his involvement in policies contributing to persecution and brutality during World War II.[61]
- *Arthur Seyss-Inquart:* Seyss-Inquart, as Deputy Governor General of Poland and Reich Commissioner for the Netherlands, actively advocated and implemented harsh occupation policies, including the persecution and deportation of Jews, suppression of opposition through terrorism, and forced labor programs, making him complicit in War Crimes and Crimes against Humanity during the Nazi occupation.[62]
- *Albert Speer:* Speer, although not directly administratively responsible for the slave labor program, actively advocated and participated in its implementation, demanding labor from occupied territories, being aware of the coercion involved, and establishing mechanisms that, while somewhat less inhumane than deportation, still contributed to the exploitation of forced labor, thus implicating him in War Crimes and Crimes against Humanity.[63]
- *Konstantin von Neurath:* von Neurath, as Reich Protector for Bohemia and Moravia, von Neurath implemented Nazi policies of repression, exploitation, and anti-Semitism.[64]
- *Martin Bormann:* As Hitler's deputy and head of the Nazi Party Chancellery, Bormann wielded extensive authority over laws, directives, and Party agencies, actively participating in the implementation of ruthless policies, including the persecution of Jews and, exploitation of forced labor.[65]

In the subsequent Nuremberg Trials, also known as the Nuremberg Military Tribunals (NMT), which followed the

[60] *Id.* at 567.
[61] *Id.* at 570.
[62] *Id.* at 576.
[63] *Id.* at 578.
[64] *Id.* at 582.
[65] *Id.* at 586.

International Military Tribunal and encompassed twelve additional proceedings held before United States constituted tribunals between 1946 and 1949 under Control Council Law No. 10, the crime of persecution was examined in various contexts.[66] They included the systematic persecution under the Nazi regime encompassing Jews, Roma, and other ethnic groups for extermination or forced labor, as well as political dissidents, activists, and resistance members based on their beliefs. Additionally, religious persecution targeted Jews primarily, subjected to discrimination and extermination due to anti-Semitic policies. Persecution extended to marginalized groups like homosexuals, disabled individuals, Jehovah's Witnesses, and others deemed undesirable by the Nazi regime.

After the Nuremberg Trials and considering the impact of two world wars, the international community incorporated the term "persecution" into the Convention Relating to the Status of Refugees in 1951. This was done recognizing that persecution is a fundamental reason why individuals flee their home countries.[67] Article 1 A (2) of the Refugee Convention defines a refugee as someone who, due to a well-founded fear of being persecuted for reasons such as race, religion, nationality, membership in a particular social group, or political opinion, is outside their country of nationality and unable to receive protection from that country. Given the distinct mandates of international criminal law and refugee law, with the former focused on criminal retribution and the latter on addressing human rights violations, it's important to note that mass human rights abuses can also constitute international crimes.[68] This underscores the linkages and interconnectedness between the two fields at this stage. The determination of persecution in a refugee context does not automatically imply a

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[66] *Justice Case* (USA v. Altstötter et al.), *Medical Case* (USA v. Karl Brandt et al.), and *Ministries Case* (USA v. von Weizsäcker et al.), explored the crime of persecution in diverse settings, such as the judicial system, medical experimentation, and governmental policy, thereby expanding the legal interpretation of crimes against humanity beyond the direct acts of killing to encompass systematic oppression and discrimination.

[67] Terje Einarsen, *Drafting History of the 1951 Convention and the 1967 Protocol in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 44-70 (Andreas Zimmerman, Terje Einarsen, Franziska Hermann ed., 2024).

[68] See 15 YAO LI, *Persecution in International Criminal Law and International Refugee Law in* ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 301-302 (2020); cf. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, 694 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

corresponding crime against humanity, as additional elements are needed for the latter, but when a crime of persecution is established, it can often align with persecution within the refugee definition.[69] Beyond the Refugee Convention, numerous international human rights instruments established after World War II also address the prohibition of persecution and discrimination, including

the Universal Declaration of Human Rights,
the International Covenant on Civil and Political Rights,
the International Covenant on Economic, Social and Cultural Rights,
the Convention on the Elimination of All Forms of Racial Discrimination,
the Convention on the Elimination of All Forms of Discrimination against Women,
the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,
International Convention on the Suppression and Punishment of the Crime of Apartheid
the Convention on the Rights of the Child,
the Convention on the Rights of Persons with Disabilities,
the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,
the European Convention on Human Rights,
the American Convention on Human Rights,
the African Charter on Human and Peoples' Rights.

The crime of persecution was not widely discussed internationally as a criminal matter until the dissolution of the Soviet Union. It only gained significant attention within the conflicts of the Former Yugoslavia and Rwanda, where egregious human rights violations occurred. The International Military Tribunal did not extensively analyze the concept of persecution,[70] prompting newly established *ad hoc* tribunals to delve deeper into its understanding. However, it is noteworthy that during the drafting of the Nuremberg Charter, persecution was not regarded as an independent crime but rather linked to other offenses

[69] *Id.* at 310.
[70] ROBERT DUBLER & MATTHEW KALYK, CRIMES AGAINST HUMANITY IN THE 21ST CENTURY: LAW, PRACTICE, AND THREATS TO INTERNATIONAL PEACE AND SECURITY 59 (2018).

committed during World War II.[71] Given the longstanding consideration of anti-discrimination regulations and agreements throughout human history, the utilization of the concept of persecution *stricto sensu* in criminal matters represented a groundbreaking development at the International Military Tribunal. The concept of persecution was also hitherto not known to the major criminal justice systems.[72]

Observing the evolution of the crime of persecution as a crime against humanity reveals its foundation in intentional discrimination, which results in the violation of an individual's fundamental rights based on particular criteria. This discrimination directly denies individuals their human rights, contravening established international agreements. Persecution is differentiated from institutionalized discrimination by its focus on individual rights violations and the requirement for the discriminatory actions to be part of an organized system and policy. Ultimately, persecution stems from a significant breach of the right to equality that hinders the enjoyment of basic rights. It is possible to conceptualize the hierarchy of discrimination and its various manifestations according to the following levels:

Level 1 - Discrimination: This level encompasses acts of prejudice or bias against individuals or groups based on certain characteristics such as race, religion, ethnicity, gender, sexual orientation, or disability. Discrimination can manifest in various forms, including verbal harassment, social exclusion, unequal treatment, or violence. This type of discrimination is primarily individual and often occurs in isolated instances.

Level 2 - Institutionalized Discrimination: At this level, discriminatory practices or policies become embedded within the structures and institutions of society, such as the legal system, government policies, education, employment, and housing. These discriminatory practices may not necessarily target specific individuals but operate at a systemic level, perpetuating inequalities and disadvantages for certain groups. Institutionalized discrimination frequently stems from long-standing norms and may often be unintentional in nature.

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[71] U.N. War Crimes Comm'n, History of the United Nations War Crimes Commission and the Development of the Laws of War 175 (1948).
[72] M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 396 (2011).

Level 3 - Persecution: Persecution represents the most severe form of discrimination, involving systematic and targeted violations of individual rights based on certain inherent or innate characteristics, such as race, religion, ethnicity, or political beliefs. Persecution requires institutionalization, meaning that discriminatory actions are organized and implemented as part of a broader system or policy within a society or government. This level often involves widespread human rights abuses, including violence, torture, and forced displacement. At the level of persecution, clear intentionality is already evident.

Level 4 - Genocide: Genocide represents the most extreme and inhumane manifestation of persecution. In other words, when persecution reaches the level of deliberate and purposeful actions aimed at annihilating a group or a portion thereof, it can be categorized as genocide.[73]

Persecution, as evident from a brief historical overview, can manifest in various forms, including murder, sexual violence, assault, theft, and property destruction. As previously discussed, it may also involve other dimensions such as limiting access to certain professions, segregating society, creating ghettos, and perpetrating economic discrimination.[74] It is important to note that this list is not exhaustive; persecution can take on diverse appearances if done with the requisite discriminatory intent.

III. THE CRIME OF PERSECUTION

Following the onset of conflicts in the former Yugoslavia and Rwanda, the international community opted to draw upon the legacy of Nuremberg to address and punish the atrocities perpetrated within those conflicts. Consequently, the United Nations Security Council established the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). One of the concepts adopted from the International Military Tribunal was the classification of persecution as a crime against humanity.

Article 5 (h) of the ICTY Statute granted the tribunal authority to prosecute individuals accountable for persecution

[73] Prosecutor v. Kupreškić et al., Case No IT-95-16-T, Judgment, 636 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).
[74] See e.g. Carlos Santiago Nino, *The Human Rights Policy of the Argentine Constitutional Government: A Reply*, 11 Yale J for Int'l L. 217-229 (1985).

based on political, racial, and religious grounds[75] committed within armed conflicts, whether international or internal, and directed against any civilian population. Conversely, Article 3 (h) of the ICTR Statute empowers the tribunal to prosecute those responsible for persecution based on political, racial, and religious grounds when committed as part of a widespread or systematic attack against any civilian population due to national, political, ethnic, racial, or religious grounds. The primary contrast between the statutes lies in the constituent elements of crimes against humanity; one statute regards armed conflict as a prerequisite, while the other does not mention the necessity of armed conflict.

As the *ad hoc* tribunals grappled with cases and interpreted their statutes, the international community engaged in active discussions to establish a universal system for prosecuting international crimes. The goal was to move beyond the limited jurisdictions of the existing international criminal tribunals. In the negotiations concerning the Rome Statute, the foundational document for the International Criminal Court, several outlined aspects were accepted and integrated into the statute. Among these was a clearer and broader scope of the crime of persecution under crimes against humanity. Contrasted with the statutes of the *ad hoc* tribunals, Article 7 (1) (h) of the Rome Statute includes the following concept:

"Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court."

""Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." Article 7 (2)(g) of the Rome Statute.

A. General Principles

In its initial ruling, the ICTY Trial Chamber in the case of Tadić delineated that the crime of persecution encompasses acts or omissions that are persecutory in nature and based on

[75] Prosecutor v. Tadić. Case No. IT-94-1-T, Judgment 713 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

discriminatory grounds like race, religion, or politics. These acts must be intended to cause and result in the violation of an individual's fundamental rights.[76] The interpretation of persecution as a crime against humanity adds the requirement that the act must be carried out with discriminatory intent.[77] Examples of the accused's actions include attacks on specific areas, the seizure and relocation of civilians to camps, beatings, and killings, all of which infringed upon the fundamental rights of victims based on religious and political discrimination.[78] Accordingly, persecution involves acts or omissions that (1) discriminate in practice and deny or infringe upon fundamental rights as outlined in international customary or treaty law, and (2) are deliberately carried out with the intention to discriminate based on political, racial, or religious grounds.[79]

One key distinguishing element between the crime of persecution and other forms of crimes against humanity is that persecution necessitates the commission of other crimes with the specific intent of discrimination.[80] Therefore, it cannot be considered as a standalone crime; rather, it necessitates the presence of other crimes. Additionally, the ICTY has established that the prosecutorial acts outlined in the crime of persecution do not necessarily need to be explicitly prohibited under its statute, and their legality internationally or domestically is inconsequential.[81] However, their gravity should align with the crimes listed within the category of crimes against humanity and be assessed on a case-by-case basis.[82]

The persecutory acts identified by the *ad hoc* tribunals include such acts, as participation in attacks on civilians, including indiscriminate attacks on cities, towns, and villages, seizure, collection, segregation, and forced transfer of civilians to camps, calling out civilians, beatings, forms of sexual assault, attacks on

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[76] *Id.* at ¶ 715.
[77] *Id.* at ¶ 716.
[78] *Id.* at ¶ 717.
[79] Prosecutor v. Matrić ICTY Case No. IT-95-14-T, Judgement 113 (June 12, 2007); cf. Prosecutor v. Tuta, Stela ICTY Case No. IT-98-34-T, Judgment ¶ 634 (Mar. 31, 2003).
[80] Prosecutor v. Blaškić ICTY Case No. IT-95-14-A, Judgement 164 (July 29, 2004).
[81] Prosecutor v. Kupreškić et al. Case No. IT-95-16-A, Judgment, ¶ 614 (Jan. 14, 2000).
[82] Prosecutor v. Krnojelac ICTY Case No. IT-97-25-T, Judgment 435 (Mar. 15, 2002), cf. Prosecutor v. Nahimana et al. ICTR Case No. ICTR-99-52-A, Appeal Judgment ¶ 987 (Nov. 28, 2007).

property that destroy the livelihood of a certain population, destruction or willful damage to religious and cultural buildings, plunder of property, which can be serious due to its magnitude or the value of stolen property, unlawful detention of civilians, infliction of serious bodily and mental harm, withdrawal of voting rights, under specific circumstances,[83] "hate speech".[84]

The legal finding by the ICTR Appeals Chamber concerning hate speech indicates that in extreme circumstances, such as when hate speech is coupled with incitement to commit genocide and is part of a wider campaign of discriminatory acts, it may constitute the crime of persecution. The extreme situation in question involves hate speech that extends beyond verbal attacks, including direct incitement to commit genocide, as well as participation in a broader pattern of discriminatory actions, such as physical violence against individuals and property. This hate speech targets a specific group based on prohibited discriminatory grounds, intensifying its gravity and contributing to an environment of persecution against the targeted group.[85] In contrast, offensive speech alone typically does not result in convictions for crimes against humanity.

In order to qualify as crimes against humanity, the Elements of Crimes of the International Criminal Court stipulates that six elements must be satisfied within the context of the crime of persecution, namely:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, or gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

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[83] Prosecutor v. Nahimana et al. ICTR Case No. ICTR-99-52-A, Appeal Judgment ¶ 986 (Nov. 28, 2007).

[84] Lovell Fernandez, *Religious persecution as a crime against humanity*, in 6:1/2 IJRF 165 (2013); Prosecutor v. Kvocka et al. ICTY Case No. IT-98-30/1-T, Judgment ¶ 185 (Nov. 2, 2001).

[85] Fausto Pocar, *Persecution as a Crime Under International Criminal Law*, 2 J. Nat'l Sec. L. & Pol'y 260-261 (2010); Prosecutor v. Nahimana et al. ICTR Case No. ICTR-99-52-A, Appeal Judgment ¶ 987 (Nov. 28, 2007).

4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

B. ELEMENTS OF CRIME

1. SEVERELY DEPRIVING ONE OR MORE PERSONS OF FUNDAMENTAL RIGHTS, CONTRARY TO INTERNATIONAL LAW

Article 21 (1)(b) of the Rome Statute mandates that the International Criminal Court shall apply applicable treaties and the principles and rules of international law, including established principles from the international law of armed conflict. While there is ongoing debate about the application of international treaties and their relevance for the Court,[86] it remains within the Court's discretion to consider these agreements in the context of crimes of persecution and fundamental human rights.[87] This includes taking into account international agreements that establish the framework for protecting fundamental human rights, as previously mentioned.[88] Those fundamental rights may include variety of rights, whether derogable or not, such as the right to life, the right not to be subjected to torture or cruel, inhuman, or degrading treatment, freedom of expression, freedom of assembly and association, and the right to private property.[89] The determination of severe deprivation of rights should be made on a case-by-case basis, considering the cumulative impact of acts.[90] The requirement that the deprivation of rights must be contrary to international law

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[86] Margaret deGuzman, *"Article 21"* in Commentary to the Rome Statute ¶ 20-22 (Kai Ambos ed., 2020).
[87] Colin Flynn, *Is Article 21 of the Rome Statute an Impediment to the Development of Sentencing Principles at the International Development of Sentencing Principles at the International Criminal Court Criminal Court* in 32 Florida Journal of International Law 69-70 (2020).
[88] Situation in The Republic of Burundi, ICC-01/17-X Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp (Oct. 25 2017), ¶ 132 (Nov. 9 2017).
[89] *Id.* at ¶ 132.
[90] Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶ 992 (July 8, 2019).

means there is no justification for impeding the concerned right.[91] Acts falling under the list of crimes against humanity as defined in Article 7 of the Rome Statute automatically meet the threshold of severity.[92] In other cases where the acts do not fall under the listed crimes, the Court should assess the impact and severity of the violation of fundamental rights, taking into account the cultural, social, and historical contexts and complexities surrounding the conflict.

2. Targeting Such Person or Persons by Reason of the Identity of a Group or Collectivity, or Targeting the Group or Collectivity as Such

The Elements of Crimes elucidate that persecution encompasses both the targeting of individuals due to their group affiliation and the targeting of the group as a whole. Persecution, as defined by the Statute, extends beyond particular groups, necessitating that the group or collectivity and its members are "identifiable," whether through objective criteria or the subjective perceptions of the accused.[93] This concept finds support in indications of discriminatory intent in the commission of persecution.[94]

The "group" includes individuals sharing identifiable characteristics, such as ethnicity, nationality, or political affiliation. The "collectivity" expands this notion to include individuals from diverse groups who share common identities, such as ideology, thereby broadening the scope of protected populations under international criminal law. This broader concept of "collectivity" suggests that individuals from various groups can come together based on shared characteristics beyond traditional identifiers, forming a collective identity that transcends specific group boundaries.[95]

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[91] *Id.* at ¶ 993.
[92] *Id.* at ¶ 994; Prosecutor v. Ongwen, Case No. ICC-02/04-01/15 Judgment, ¶ 2845-2849 (Feb. 4, 2021).
[93] Valerie Suhr, Rainbow Jurisdiction at the International Criminal Court 196-197 (2022); Prosecutor v. Ongwen, Case No. ICC-02/04-01/15 Judgment, ¶ 2735 (Feb. 4, 2021).
[94] Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶ 1010 (July 8, 2019).
[95] Cf. Markus Wagner, *"The ICC and its Jurisdiction - Myths, Misperceptions and Realities"* 7 Max Planck UNYB 409, 445 (2003); Situation in The Republic of Burundi, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the

3. SUCH TARGETING WAS BASED ON POLITICAL, RACIAL, NATIONAL, ETHNIC, CULTURAL, RELIGIOUS, GENDER AS DEFINED IN ARTICLE 7, PARAGRAPH 3, OF THE STATUTE, OR OTHER GROUNDS THAT ARE UNIVERSALLY RECOGNIZED AS IMPERMISSIBLE UNDER INTERNATIONAL LAW

To qualify as persecution, it is essential to determine why the perpetrator deprived the victim of fundamental rights, distinguishing personal motives from discriminatory intent. The requirement here is that the targeted individuals, group, or collectivity share a specific identity, such as political, racial, national, ethnic, cultural, religious, or gender identity, or any other ground universally recognized as impermissible under international law. Assessing the identifiability of the group necessitates considering the cultural, political, and social context of the situation, along with the subjective perception of belonging by both the perpetrator and the victim.[96] Some chambers have argued that victims must be members of the intended persecuted group to constitute persecution, while others have interpreted it more broadly, considering discrimination based on the perpetrator's perception.[97] The disagreement lies in whether victims mistakenly targeted due to their perceived group membership can be considered to be persecuted. Tribunals such as the ECCC Supreme Court Chamber require victims to actually belong to the targeted group,[98] while others, like the ICTY, adopt a broad interpretation.[99] The ICC Statute leans towards the broader interpretation, suggesting that a person need not be part of the group as long as the group itself was targeted.[100] This perspective, which centers on discrimination rooted in perceived group affiliation rather than actual membership, showcases a nuanced comprehension of

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Situation in the Republic of Burundi" ICC-01/17-X-9-US-Exp (Oct. 25 2017), ¶ 133 (Nov. 9 2017).

[96] *See* ICC, Policy on Gender Persecution ¶ 44 (Dec. 2022).

[97] Prosecutor v. Duch, 001/18-07-2007/ECCC/SC, Judgment, ¶ 274-275 (Feb. 3, 2010); Prosecutor v. Krnojelac, IT-97-25-A, Judgment, ¶ 185-186 (Sept. 17, 2003).

[98] Prosecutor v. Duch, 001/18-07-2007/ECCC/SC, Judgment, ¶ 274-275 (Feb. 3, 2010).

[99] Prosecutor v. Krnojelac, IT-97-25-A, Judgment, ¶ 185-186 (Sept. 17, 2003).

[100] Situation in The Libyan Arab Jamahiriya, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al- Senussi, Case No. ICC-01/11, ¶ 42-65 (Jun. 11, 2011).

persecution. It underscores the perpetrator's intent and the broader ramifications, such as prompting members of the targeted group to vacate the territory, within the context of a systematic or widespread attack.[101]

An essential component here is the discriminatory intent of the perpetrator to target specific individuals, which should be distinguished from personal motives, such as individualized vendettas.[102] Discriminatory intent is evident when a perpetrator specifically aims to treat a targeted group unequally.[103] This intent can be shown through the disproportionate use of persecutory conduct against one group. Targeting may be based on beliefs of superiority or inferiority. However, personal motives lacking discriminatory intent do not negate the presence of discriminatory intent in persecutory acts.[104]

4. The Conduct was Committed in Connection with any Act Referred to in Article 7, Paragraph 1, of the Statute or any Crime Within the Jurisdiction of the Court.

As mentioned earlier, persecution is not considered a standalone crime but rather must be linked to other crimes within the jurisdiction of the Court.[105] These crimes may include crimes of war, genocide, or any other listed under crimes against humanity.

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[101] Robert Dubler, Matthew Kalyk, Crimes Against Humanity in the 21st Century: Law, Practice, and Threats to International Peace and Security, 894 (2018); Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment, ¶1011 (Jul. 8, 2019).

[102] Prosecutor v. Đorđević, Case No. IT-05-87/1-A, Judgment, ¶ 887 (Jan. 27, 2014).

[103] ICC, Policy on Gender Persecution ¶ 49 (November 2022).

[104] Prosecutor v. Kvočka et al., IT-98-30/1-A, Judgment, ¶463 (Feb. 3, 2005); Gregor Maučec, "*Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities—the Case for Intersectional Consideration of Mass Atrocities"* 12 Journal of International Dispute Settlement, 42, 71-73 (2021).

[105] Situation in The Republic of Burundi, ICC-01/17-X Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp (Oct. 25 2017), ¶ 131 (Nov. 9 2017).

5. THE CONDUCT WAS COMMITTED AS PART OF A WIDESPREAD OR SYSTEMATIC ATTACK DIRECTED AGAINST A CIVILIAN POPULATION.

The crime of persecution must be part of a widespread or systematic attack directed against a civilian population. According to Article 7(3) of the Elements of Crimes of the Rome Statute, such an attack refers to a course of conduct involving multiple acts listed in Article 7(1),[106] committed against any civilian population pursuant to, or in furtherance of, a State or organizational policy.[107] The acts need not constitute a military attack. It is understood that the 'policy to commit such an attack' requires that the State or organization actively promote or encourage such an attack against a civilian population.[108]

For the purpose of demonstrating the "multiple commission of acts" under Article 7, only those acts listed in Article 7(1)(a) to (k) of the Rome Statute may be considered. However, acts not included in Article 7(1) can still be relevant for other aspects, such as establishing the nature of the attack or the involvement of a State or organizational policy.[109] To determine who constitutes a civilian, Article 50 of Additional Protocol I to the Geneva Conventions (August 12, 1949) should be referred to. It defines a civilian as any person who does not belong to one of the categories of persons listed in Article 4A (1), (2), (3), and (6) of the Third Convention and Article 43 of the Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.[110] The presence of non-civilians within a civilian population does not negate its civilian character, and various factors are considered to determine if an attack was primarily directed towards civilians[111]. These factors include the means and methods used, the status and number of victims, the discriminatory nature of the attack, and compliance with the laws of war.[112]

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[106] Prosecutor v. Bemba, Case No. ICC-01/05-01/08 Judgment, ¶¶ 149-151 (Mar. 21, 2016).
[107] *Id.* at ¶¶ 152–156.
[108] *Id.* at ¶¶ 157–161.
[109] Prosecutor v. Bemba, Case No. ICC-02/05-01/08 Judgment, ¶ 151 (Mar. 21, 2016).
[110] *Id.* at ¶ 152.
[111] Prosecutor v. Stakić, Case No. IT-97-24/T, Judgment, ¶ 627 (Jul. 31, 2003); Prosecutor v. Katanga, Case No. ICC-01/04-01/07 Judgment ¶ 1104 (Mar. 7, 2014).
[112] Prosecutor v. Bemba, Case No. ICC-01/05-01/08 Judgment ¶ 154-155 (Mar. 21, 2016).

Another element that is necessary to fulfill in the context of the crimes against humanity is the State or organizational policy, which gives a distinct purpose to an organized body of people.[113] The notion of "policy" in crimes against humanity does not require formalization; instead, it can be deduced from several factors indicating a systematic assault on a civilian population, such as

i) the planning or direction of the attack;
ii) a recurring pattern of violence, such as repeated actions following the same sequence;
iii) the utilization of public or private resources to advance the policy;
iv) the participation of State or organizational forces in committing crimes;
v) statements, instructions, or documentation from the State or organization endorsing or encouraging crimes;
vi) an underlying motivation; and
vii) preparations or coordinated mobilization orchestrated by the State or organization.[114]

Evidence must establish that the conduct was executed in accordance with the State or organizational policy, demonstrating a connection between the perpetrators' actions and the overarching policy.[115] For an attack to be considered a crime against humanity, it must be either widespread or systematic in nature. In this context, "widespread" denotes an extensive assault affecting numerous individuals, typically demonstrating seriousness and collective execution, with the evaluation based on both quantitative measures and overall impact.[116] The term "systematic" in the context of crimes against humanity indicates a methodical and organized approach to acts of violence, suggesting that they are not random occurrences. It entails the presence of consistent patterns of criminal conduct, characterized by deliberate repetition of similar acts aimed at achieving specific effects on a civilian population. When assessing the systematic nature of an attack, factors such as the repetition of identical or similar acts, consistent modus

[113] *Id.* at ¶ 158.
[114] *Id.* at ¶ 160; Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶ 674 (Jul. 8, 2019).
[115] Prosecutor v. Bemba, Case No. ICC-01/05-01/08 Judgment ¶ 161 (Mar. 21, 2016).
[116] Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶ 691 (Jul. 8, 2019)

operandi, and uniform treatment of victims across a broad geographic area, are considered.[117]

The single acts, such as a crime of persecution under crimes against humanity, must be integral components of the widespread or systematic attack against a civilian population. This connection is established through an objective assessment of various factors including the characteristics, aims, nature, and consequences of the acts, with consideration given to their temporal and geographical proximity and the core of the attack.[118]

6. THE PERPETRATOR KNEW THAT THE CONDUCT WAS PART OF OR INTENDED THE CONDUCT TO BE PART OF A WIDESPREAD OR SYSTEMATIC ATTACK DIRECTED AGAINST A CIVILIAN POPULATION.

The perpetrator must be aware that an attack directed at civilian population is taking place and that their actions are part of that attack. However, this knowledge does not require awareness of all the characteristics of the attack nor the precise details of the plan or policy behind it. Instead, it is sufficient that the perpetrator knew or intended for their actions to be part of a widespread or systematic attack on a civilian population.[119]

IV. THE CRIME OF PERSECUTION AGAINST ARMENIANS IN RELATION TO NAGORNO-KARABAKH CONFLICT

Following the First World War and the Armenian Genocide, the collapse of the Russian and Ottoman Empires led to the emergence of three democratic republics in the Transcaucasian region in May 1918: Armenia, Azerbaijan, and Georgia. Meanwhile, Nagorno-Karabakh, historically inhabited by Armenians but falling within the borders of Azerbaijan, became a focal point of contention. Armenians in Nagorno-Karabakh convened assemblies in 1918, declaring it an independent administrative and political entity and expressing their desire to reunite with Armenia. This declaration was met with resistance from Azerbaijan, supported by the Turkish military. The situation escalated with Turkish military intervention in Baku and the

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[117] *Id.* at ¶ 692-693.
[118] *Id.* at ¶ 696; Prosecutor v. Bemba, Case No. ICC-02/05-01/08 Judgment ¶ 165 (Mar. 21, 2016).
[119] *Id.* at ¶ 167.

subsequent massacres of Armenians,[120] reminiscent of the Armenian Genocide of 1915.[121] Despite initial Armenian resistance and hopes for reunification with Armenia, the withdrawal of Turkish forces temporarily relieved tensions.[122]

The brief period of autonomy swiftly came to an end when the Red Army quickly took control of the regions. This communist party, through administrative reshuffling, assigned Nagorno-Karabakh to the Azerbaijan Socialist Soviet Republic.[123] A decree issued on July 6, 1921, granted the predominantly[124] Christian Armenian populace in Nagorno-Karabakh a heightened level of self-governance[125]. In 1923, the Soviet government of Azerbaijan SSR declared Nagorno-Karabakh an Autonomous Oblast (NKAO).[126] Throughout the Soviet era, tensions simmered between the Armenian and Azerbaijani populations in Nagorno-Karabakh. Armenians in NKAO felt marginalized and discriminated against by Azerbaijani authorities, who pursued policies aimed at diluting Armenian influence and identity in the region.[127] On this basis, Armenians often appealed to Moscow for help in reunification with the Armenian SSR,[128] despite facing restrictions and infrastructure discrimination from Baku's central authorities, particularly with regard to access to gas, water and electricity. Armenian protests continued into the 1960s and 1970s.[129] In the late 1980s, Armenians launched a petition

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[120] Robert Evan Ellis, The Fall of Communist and Ethnic Violence 62 (1995).
[121] Nikolay Hovhannisyan, The Karabakh Problem 21 (2004).
[122] Christian Mkhitaryan, *"Historische Darstellung in Berg-Karabach"* in Berg-Karabach 53-57 (Gurgen Petrossian, Sarah Babaian, Arlette Zakarian eds., 2022).
[123] See more in *id.* at 61-62.
[124] According to the 1923 census, 94.4% of the 157,800 residents were Armenians, see Dov Lynch, Engaging Eurasia's Separatist States 36-37 (2004).
[125] Claude Mutafian, *"The History & Geopolitcs of Nagorno-Karabagh"* in The Caucasian Knot 136-137 (Levon Chorbajian, Patrick Donabedian, Claude Mutafian eds., 1994).
[126] Svante Cornell, Small Nations and Great Powers 60 (2001).
[127] Emmanuel Karagiannis, Energy and Security in the Caucasus (2013) 137; Sarah Babaian, *"Das völkerrechtliche Selbstbestimmungsrecht Berg-Karabachs"* in Berg-Karabach 99-100 (Gurgen Petrossian, Sarah Babaian, Arlette Zakarian eds., 2021) 99-100.
[128] Sarah Babaian, *"Das völkerrechtliche Selbstbestimmungsrecht Berg-Karabachs"* in Berg-Karabach (Gurgen Petrossian, Sarah Babaian, Arlette Zakarian eds., 2021) 98; Gurgen Petrossian, *"Sezessionsrecht als Form des Selbsbestimmungsrechts"* in Jahrbuch der Öffentliche Sicherheit 821 (Martin Möllers and Robert van Ooyen eds., 2021).
[129] Michael Kembeck, Sargis Ghazaryan, *"Timeline 1918-2011"*, in Europe's Next Avoidable War 24 (Michael Kembeck, Sargis Ghazaryan 2011); Sarah

campaign for reunification with Armenia, which officially began in 1987.

The emergence of the "Karabakh Movement" in Armenia further strengthened the push to integrate the NKAO into the Armenian SSR and ultimately contributed to a myriad of factors that led to the dissolution of the USSR. Armenian demands and activism led to pogroms in Sumgait on February 27, 1988 and in Kirovabad in November 1989. This persecution extended to Baku, where Armenians were specifically targeted, compelling them to flee Azerbaijan.[130] The SSRs' independence from the USSR and the NKAO's 1991[131] proclamation as the Republic of Nagorno-Karabakh sparked a war that ended with the Bishkek Protocol ceasefire.[132] The ceasefire established in 1994 was breached for the first time in April 2016, leading to numerous war crimes committed against both Armenian soldiers and civilians.[133] Four years later, Azerbaijan initiated a large-scale war against Nagorno-Karabakh, leading to the withdrawal of Armenians from various regions within Nagorno-Karabakh and the recurrence of war crimes against Armenian soldiers and civilians.[134] Following the trilateral

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Babaian, *"Das völkerrechtliche Selbstbestimmungsrecht Berg-Karabachs"* in Berg-Karabach 98 (Gurgen Petrossian, Sarah Babaian, Arlette Zakarian eds., 2021).

[130] Kirril Shields, Nikki Marczak, Genocide Perspectives 188 (2020).

[131] See the analysis of the legal framework of the secession from USSR in Gurgen Petrossian, *"Sezessionsrecht als Form des Selbstbestimmungsrechts"* in Jahrbuch der Öffentliche Sicherheit 824-828 (Martin Möllers and Robert van Ooyen eds., 2021).

[132] Bishkek Protocol, U.N. Peacemaker (May 5, 1994).

[133] Human Rights Defender (Ombudsman), Interim Public Report Atrocities Committed by Azerbaijani Military Forces Against the Civilian Population of the Nagorno Karabakh Republic and Servicemen of the Nagorno Karabakh Defence Army On 2-5 April 2016 (Apr. 2016), https://www.eoi.at/wp-content/uploads/2018/09/Interim_Public_Report_NKR-Omb._FINAL-1.pdf (last visited May 3, 2024).

[134] Human Rights Watch, Azerbaijan: Unlawful Strikes in Nagorno-Karabakh (Dec. 11, 2020), https://www.hrw.org/news/2020/12/11/azerbaijan-unlawful-strikes-nagorno-karabakh (last visited May 3, 2024); Human Rights Watch, Azerbaijan: Armenian Prisoners of War Badly Mistreated (Dec. 2, 2020), https://www.hrw.org/news/2020/12/02/azerbaijan-armenian-prisoners-war-badly-mistreated (last visited May 3, 2024); Democracy Today: 44-Day War: War Crimes and International Law (2021), https://www.wfm-igp.org/wp-content/uploads/Democracy-Today-War-Crimes-and-International-Law.pdf (last visited May 3, 2024); Baroness Cox, Continuing Impunity: Azerbaijani-Turkish offensives against Armenians in Nagorno Karabakh (Apr. 21, 2021), https://www.hart-uk.org/baroness-cox-publishes-report-continuing-impunity-azerbaijani-turkish-offensives-against-armenians-in-nagorno-karabakh/ (last visited May 3, 2024); Ad Hoc Public Report Responsibility of Azerbaijan for

agreement between Russia, Armenia, and Azerbaijan on 10 November 2020, a fragile and unstable ceasefire was established — one that Azerbaijan has repeatedly violated. Since 2021, Azerbaijan has not only violated the ceasefire in Nagorno-Karabakh but also initiated aggression against the Republic of Armenia. Escalations in May 2021[135] and September 2022[136] led to Azerbaijan imposing a blockade on Nagorno-Karabakh, imposing famine from December 2022 to September 2023.[137] In September, Azerbaijan launched another attack on Nagorno-Karabakh, resulting in the exodus of the entire Armenian population from the region.[138]

From a historical standpoint, the emergence and accentuation of ideologies such as Pan-Turkism[139] worsened these tensions, prompting efforts to consolidate territory and assert dominance over ethnically diverse areas like Nagorno-Karabakh. Additionally, the collapse of the Ottoman Empire and the subsequent Armenian Genocide from 1915 to 1923 significantly influenced the region's dynamics, with the Armenian population in Nagorno-Karabakh striving to establish autonomy and safeguard their cultural identity in light of past persecution. The arbitrary

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Torture and Inhuman Treatment of Armenian Captives: Evidence-Based Analysis (Sept. 2021), https://ombuds.am/images/files/8f33e8ccaac978faac7f4cf10442f835.pdf (last visited May 3, 2024); Open Society Foundation Armenia, Human Rights Violations during the 44-Day War in Artsakh (2022), https://www.osf.am/wp-content/uploads/2022/06/Fact-Finding-Report_FINAL_web.pdf (last visited May 3, 2024).

[135] Vahe Sarukhanyan, *May 2021: Azerbaijani Troops Occupied 3,200 Hectares of Sovereign Republic of Armenia Territory*, Hetq (May 6, 2021), https://hetq.am/en/article/144181 (last visited May 3, 2024).

[136] The Human Rights Defender of the Republic of Armenia: Ad Hoc Public Report on Consequences of Azerbaijani Military Attack on the Republic of Armenia (2022), https://www.ombuds.am/images/files/fc7d77e1dcd3e0573173dfa7314e6c46.pdf (last visited May 3, 2024).

[137] Ronald Suny, *Nagorno-Karabakh blockade crisis: Choking of disputed region is a consequence of war and geopolitics*, The Conversation (Aug. 18, 2023), https://theconversation.com/nagorno-karabakh-blockade-crisis-choking-of-disputed-region-is-a-consequence-of-war-and-geopolitics-211717 (last visited May 3, 2024).

[138] Al Jazeera, *Armenia says more than 100,000 people fled Nagorno-Karabakh* (Sep. 30, 2023), https://www.aljazeera.com/news/2023/9/30/more-than-80-percent-of-nagorno-karabakhs-people-have-fled-armenia-govt, (last visited May 3, 2024).

[139] Gurgen Petrossian, Staatenverantwortlichkeit für Völkermord 121–123 (2019).

border decisions made by Soviet authorities in the early 20th century further heightened tensions, as they neglected to address the historical and demographic complexities of the area.

A. CONTEXT OF DISCRIMINATION AND VIOLENCE AGAINST THE ARMENIANS

1. ARMENIANS

Armenians are a distinct ethnic group indigenous to the Armenian Highlands, characterized by their ancient culture and history, and they communicate and script in their own language and alphabet. The Armenian language is categorized as a distinct branch within the Indo-European language family.[140] The predominant religious affiliation among Armenians is the Armenian Apostolic Church established as far back as the 4th century. In Azerbaijan, where the population is primarily composed of Turkic Azerbaijanis, state policy—reinforced by Turkish denialism[141]—rejects the notion that Armenians are indigenous to the Armenian Highlands. Instead, it claims that Armenians were relocated to the South Caucasus as part of Russian strategies following their acquisition of the region. Instead, it claims that Armenians were relocated to the South Caucasus as part of Russian strategies following their acquisition of the region."[142] Regarding Nagorno-Karabakh, Azerbaijani authorities assert that the region did not belong to historical Armenia but was instead a part of Caucasian Albania, the predecessor of the Republic of Azerbaijan.[143] Notably, the manipulation of history played a key

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[140] Simon Payaslian, The History of Armenia 4–10 (2007).

[141] Murat Sofuoglu, *Why Azerbaijanis and Armenians have been fighting for so long*, TRT World (2020), https://www.trtworld.com/magazine/why-azerbaijanis-and-armenians-have-been-fighting-for-so-long-38163 (last visited May 3, 2024); Armenian Claims and Historical Facts, Ministry of Foreign Affairs of the Republic of Türkiye, 7, https://www.mfa.gov.tr/data/DISPOLITIKA/ErmeniIddialari/ArmenianClaimsandHistoricalFacts.pdf (2005) (last visited May 3, 2024).

[142] Amina Nazarli, *Historian: Armenians are not native population of Asian continent*, Azernews (Nov. 6, 2016), https://www.azernews.az/nation/104479.html (Sep. 30, 2023) (last visited May 3, 2024); *History of Irevan*, Ministry of Defence of the Republic of Azerbaijan, https://mod.gov.az/en/the-history-of-iravan-410/ (last visited May 3, 2024).

[143] *"History of Garabagh"* in Ministry of Defense of the Republic of Azerbaijan, https://mod.gov.az/en/history-of-karabakh-075/ (last visited May 3, 2024).

role in the genocidal policies of Nazi Germany[144] and Rwanda,[145] where persecuted victims were portrayed as outsiders or implicated in conspiracy theories of other states. Within the Ottoman Empire's context of Pan-Turkism or Pan-Turanism, Armenians were viewed as significant impediments to achieving this objective.[146] Ziya Gölkalp, a pioneer of the ideology[147] who was later prosecuted before the Istanbul tribunal, testified in court in 1919 that Azerbaijani Turks had already commenced efforts toward realizing Turan. He emphasized that spreading the Turkish language and embracing Turkish literature would strengthen unity among all Turks.[148] Presently, Azerbaijani policy towards Armenians makes no distinction between those from Armenia, Nagorno-Karabakh or diaspora. It rejects the entirety of Armenian history and culture, asserting that Armenians did not inhabit Armenian regions with the aim of direct territorial bordering with Turkey.[149]

2. DISCRIMINATION AGAINST ARMENIANS IN AZERBAIJAN

In its initial report following Azerbaijan's accession to the Council of Europe in 2002, the European Commission against Racism and Intolerance (ECRI) highlighted the prevalent animosity towards Armenians due to the Nagorno-Karabakh conflict. It noted that Armenians living in Azerbaijan often conceal their ethnic identity to avoid discrimination, while hate speech and derogatory remarks against Armenians are commonly observed.[150]

In 2006, ECRI raised graver apprehensions about the treatment of Armenians, observing that despite recommendations, discrimination against them escalated, relegating them to a status akin to second-class citizens and the discrimination against Armenians, particularly in accessing public services, alongside inflammatory rhetoric, leads to the denial of basic rights, such as pension allowances and employment opportunities, prompting

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[144] Wolfgang Benz, Holocaust 16-18 (2014).
[145] Leonhard Bergmann, *Mission und Gewalt*, Kolonialismus 238 (Mihran Dabag, Horst Gründer, Uwe-K. Ketelsen 2004).
[146] Taner Akcam, Shameful Act 88 (2007).
[147] Michael Hesemann, Völkermord an den Armeniern 118-120 (2015).
[148] See Key Indictment in Gurgen Petrossian, Staatenverantwortlichkeit 74-77, 122 (2019).
[149] Galina M. Yemelianova, The De Facto State of Nagorno-Karabakh, 75 Europa-Asia Stud. 8, 1354-1356 (2023).
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[150] European Comm'n Against Racism & Intolerance, *First Report on Azerbaijan* ¶ 50-55 (June 28, 2002).

many Armenians to conceal their ethnicity, while Azerbaijani individuals and NGOs aiding Armenians also encounter threats and harassment.[151] In 2016 the ECRI notes that an entire population has been raised overtly exposed to the hateful rhetoric by political leaders, educational institutions and media. According to a survey conducted in 2012, 91% of Azerbaijanis considered Armenia as the greatest enemy of Azerbaijan.[152] Furthermore, the report particularly highlighted its dismay over the pardon and release of Ramil Safarov, convicted of murdering an Armenian army officer, by the Azerbaijani government, noting the risk of fostering impunity for perpetrators of serious racist crimes.[153] The discrimination based on the Ramil Safarov case was later confirmed by the European Court of Human Rights.[154] The court pointed out that the statements of a number of Azerbaijani officials glorifying Ramil Safarov, his actions, and his pardon were particularly concerning and a large majority of officials expressed special support for the fact that the crimes were specifically directed against Armenian soldiers and therefore congratulated Ramil Safarov for his actions, calling him a patriot, a role model, and a hero.[155]

In 2023, the ECRI similarly to Committee on the Elimination of Racial Discrimination (CERD)[156] was concerned by the presence of discriminatory language in Azerbaijani school textbooks, particularly targeting Armenians, which could fuel further hostilities among young people.[157] Moreover, ECRI expressed grave concerns, while monitoring the aftermath of the Second Karabakh War and examining video footages, including the inauguration of the Baku Trophy Park in April 2021 depicting Armenian military equipment and personnel in a highly negative

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[151] European Comm'n Against Racism & Intolerance, *Third Report on Azerbaijan* ¶¶ 106-115 (Dec. 15, 2006); European Comm'n Against Racism & Intolerance, F*ourth Report on Azerbaijan* ¶¶ 98- 101 (Mar. 23, 2011).
[152] European Comm'n Against Racism & Intolerance, *Fifth Report on Azerbaijan*, ¶ 25 (Mar. 17, 2016).
[153] Id.¶ 38; see also Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Azerbaijan* ¶ 15 (June 10, 2016).
[154] Minasyan & Makuchyan v. Azerbaijan & Hungary, App. No.17247/13, ¶¶ 213-221 (Eur. Ct. H.R. May 26, 2020).
[155] *Id.* ¶ 220.
[156] Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Tenth to Twelfth Periodic Reports of Azerbaijan* ¶ 34 (Sep. 22, 2022).
[157] European Comm'n Against Racism & Intolerance, *Sixth Report on Azerbaijan* ¶ 13 (Mar. 23, 2023).

light and widespread criticism regarding the aggressive language and frequent use of adversarial narratives, which propagate racist stereotypes and sustain animosities.[158]

CERD in its observations from 2022 expressed deep concerns regarding severe human rights violations against Armenian prisoners of war and civilians, such as extrajudicial killings, torture, arbitrary detention, and destruction of civilian infrastructure by the Azerbaijani forces. Additionally, the report highlighted damage to Armenian cultural heritage sites and the propagation of racial hatred and stereotypes against Armenians, both online and by public figures.[159]

Although there are numerous ongoing proceedings at the European Court of Human Rights (ECtHR) related to recent events,[160] judgments have already been rendered regarding incidents preceding the Second Nagorno-Karabakh war. In the Saribekyan, Balayan v. Azerbaijan case, a civilian was detained after crossing the northeastern Armenian-Azerbaijani border, with Azerbaijani authorities alleging him to be an Armenian spy planning a school attack. On 4 October 2010, the complainant's son was discovered hanged in his cell during detention, initially deemed a suicide by Azerbaijani medical reports. However, upon examination, injuries suggesting violence inflicted during detention were found, resulting in a violation of Article 2 of the European Convention on Human Rights.[161] Furthermore, although the court could not definitively determine if the victim was tortured during detention, evidence of pre-death mistreatment was confirmed, constituting a violation of Article 3 of the European Convention on Human Rights (ECHR).[162] In the case of Badalyan v. Azerbaijan the complainant disappeared near the northeastern

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[158] *Id.* ¶¶ 40, 57; see abuses, torture and mistreatment of Armenians in U.S. Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices: Azerbaijan (2021) 4, 18-19, https://www.state.gov/wp-content/uploads/2022/03/313615_AZERBAIJAN-2021-HUMAN-RIGHTS-REPORT.pdf (last visited May 6, 2024); see also Human Rights Violations during the 44-Day War in Artsakh (2022), https://hcav.am/wp-content/uploads/2021/12/Fact-Finding-Report_FINAL_web.pdf (last visited May 6, 2024).

[159] Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Tenth to Twelfth Periodic Reports of Azerbaijan* ¶ 4 (Sept. 22, 2022).

[160] Inter-State Applications Lodged by Armenia against Azerbaijan, App. Nos. 42521/20, 33412/21, 42445/21, 15389/22 (Eur. Ct. H.R.).

[161] Saribekyan & Balayan v. Azerbaijan, App.No. 35746/11 ¶¶ 67-70 (Eur. Ct. H.R. Jan. 30, 2020).

[162] *Id.* ¶¶ 85-87.

border between Armenia and Azerbaijan and was later detained by Azerbaijani forces. He was held captive for 22 months during which he endured mistreatment, including insufficient food, denial of toilet access, physical torture, and psychological abuse. Upon his return to Armenia, he was diagnosed with chronic delusional disorder, persistent reactive paranoia, and a herniated disc, which the European Court of Human Rights concluded were primarily or partially a result of his detention conditions, constituting a violation of Article 3 ECHR.[163] In the Petrosyan v. Azerbaijan case another civilian crossed the Armenian-Azerbaijani border and entered an Azerbaijani village, where he was initially seen drinking tea in civilian attire before being detained by Azerbaijani forces. Azerbaijan later reported his sudden death due to acute heart and lung failure after being forced to wear military clothing. While Azerbaijan claimed the person was part of a subversive group and died during an operation, the complainant alleged that Azerbaijani forces killed or beheaded him. The ECtHR found violations of Article 2 and Article 3 of the European Convention on Human Rights due to discrepancies in autopsy reports, lack of investigation by Azerbaijan, and evidence suggesting pre-death mistreatment.[164] In the case of Khojoyan and Vardazaryan v. Azerbaijan, an elderly man was detained by Azerbaijani forces at the northeastern Armenian-Azerbaijani border and later released to Armenia with injuries consistent with torture. Despite evidence of mistreatment, including gunshot wounds and the presence of petroleum and Apaurin in his blood, Azerbaijan failed to provide a reasonable explanation for the cause of the injuries or the need to shoot a 77-year-old man. The European Court of Human Rights found violations of Article 2 and Article 3 of the European Convention on Human Rights due to lack of medical attention, failure to investigate the detainee's status, and evidence suggesting torture.[165]

In the ongoing legal proceedings at the International Court of Justice (ICJ), within the context of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Azerbaijan has faced three preliminary measures designed to confront the imminent risk of racial discrimination

[163] Badalyan v. Azerbaijan, App. No. 51295/11 ¶ 48 (Eur. Ct. H.R. July 22, 2021).
[164] Petrosyan v. Azerbaijan, App. No. 32427/16 ¶¶ 59-61 (Eur. Ct. H.R. Nov. 4, 2021).
[165] Khojoyan & Vardazaryan v. Azerbaijan, App. No. 62161/14 ¶ 55 (Eur. Ct. H.R. Nov. 4, 2021).

against Armenians.[166] However, Azerbaijan has failed to comply with these orders.[167]

Not only Armenian individuals are being targeted by the Azerbaijani hate policy but also Armenian cultural heritage. In its resolution on destruction of cultural heritage in Nagorno-Karabakh, the EU Parliament condemned Azerbaijan's ongoing policy of erasing Armenian cultural heritage in Nagorno-Karabakh, noting deliberate damage to monuments and religious sites and recognized this as part of a wider pattern of state-promoted Armenophobia and historical revisionism.[168]

The pervasive evidence from international institutions regarding the hate policies of Azerbaijani authorities against Armenians is notably evident in the rhetoric of the President of Azerbaijan. Throughout history, military leaders have employed language to vilify the enemy, aiming to prepare soldiers for combat and instill a merciless attitude. This phenomenon is particularly pronounced in autocratic regimes where leaders are revered. Children often mimic the behavioral patterns of their parents, while individuals in state structures emulate the language and conduct of their superiors. In autocratic contexts, subordinates often feel compelled to meet or surpass the expectations of their leaders,

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[166] Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), (I.C.J.), Provisional Measures, Order ¶¶391-393 (Dec. 7, 2021); Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), (I.C.J.), Provisional Measures, Order ¶¶28-30 (Feb. 22, 2023); Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), (I.C.J.), Provisional Measures, Order ¶¶ 66-74 (Nov. 17, 2023).

[167] Sarah Babaian & Gurgen Petrossian, *Alle Macht den Staaten?: Wie Anordnungen des Gerichts ausgehebelt werden,* Völkerrechtsblog (Mar. 6, 2023), https://voelkerrechtsblog.org/de/alle-macht-den-staaten/ (last visited May 6, 2024).

[168] European Parliament Resolution on the Destruction of Cultural Heritage in Nagorno-Karabakh, ¶2, 2022/2582 (RSP) (Mar. 10, 2022); Fernando Camacho Padilla, *Azerbaijan's attacks on Armenian Heritage Aim to Erase an Entire Culture,* The Conversation (Feb. 7, 2024), https://theconversation.com/azerbaijans-attacks-on-armenian-heritage-aim-to-erase-an-entire-culture-222655 (last visited May 6, 2024); Armenian Bar Ass'n & The Mother See of Holy Etchmiadzin, Report and Urgent Call to Action: Erasure of Armenian Heritage by Azerbaijan and Denial of Armenians' Right to Exercise their Christian Religion (2022), https://armenianbar.org/wp-content/uploads/2022/04/Safegurding-Armenian-Culture-and-Religious-heritage.pdf (last visited May 6, 2024).

sometimes resulting in the perpetration of international crimes.[169] State-sanctioned hate speech becomes especially perilous when it assumes a systematic nature, as witnessed in the vilification of Armenians in Azerbaijan, leading to instances of discrimination and violence against them. During the 2020-armed conflict, President Aliyev referred to Armenians in dehumanizing terms, further fueling hostility. This rhetoric permeates through government institutions, media, and education, fostering widespread hatred and culminating in mass demonstrations calling for war and death to Armenians. This phenomenon has been observed in various speeches delivered by the president and other officials, wherein derogatory descriptions of Armenians were employed:[170]

- Animalistic Language: President Aliyev refers to Armenians as "animals" and "dogs" during the September-November 2020 armed conflict, suggesting they are less than human.
- Denying Basic Humanity: President Aliyev and government institutions use derogatory terms and deny the occurrence of the Armenian genocide, stripping Armenians of their dignity and historical suffering.
- Portrayal as Subhuman: President Aliyev, other officials and media consistently portray Armenians in negative terms, such as "bandits," "vandals," and "fascists," depicting them as uncivilized and inferior.
- Reducing to Stereotypes: Children are taught to view Armenians as enemies from a young age, perpetuating stereotypes and fostering prejudice against them throughout Azerbaijani society.
- Objectification: The production of military drones with the inscription "Iti Qovan" (dog chaser) by Azerbaijan's Ministry of Defense reduces Armenians to the status of animals, objectifying them as targets of aggression.

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[169] *See* Gurgen Petrossian, Mariana Amoyan & Christian Mkhitaryan, *Hassrede als Staatspolitik*, in *Berg-Karabach: Eine völkerrechtliche Analyse des Konflikts um Arzach* 197, 197–224 (Sarah Babaian & Arlette Zakarian eds., 2022).

[170] *Anti-Armenian Xenophobia and Racism in Azerbaijan*, 18 (2021), https://transparency.am/assets/documents/1646637425-52831-785.pdf; Open Society Found. Armenia, *Human Rights Violations During the 44-Day War in Artsakh*, 38 (2022), https://hcav.am/wp-content/uploads/2021/12/Fact-Finding-Report_FINAL_web.pdf.

In summary, the persistent animosity towards Armenians in Azerbaijan, exacerbated by the glorification of figures like Ramil Safarov, who was celebrated for decapitating an Armenian, has influenced younger generations. This has influenced a horrendous reality where Armenians who were captured by Azerbaijanis were subjected to instances of torture or even beheading. Cases presented before the ECtHR indicate that even prior to the Second Nagorno-Karabakh war, human rights violations were not isolated incidents but rather part of a consistent discriminatory policy implemented targeting the Armenians. The dissemination of videos depicting brutal killings and beheadings on various social media platforms during and after the war shows the consequences of the established trend of hate towards Armenians and glorifying of those who have killed them. However, another phenomenon is not solely limited to the act of killing and beheading; rather, it involves the deliberate dissemination of footage on social media platforms. This act serves to convey a message to the entire Armenian population that anyone falling under Azerbaijani control could face similar fate, irrespective of their individual identities or circumstances. The publication and distribution of these video recordings not only induced fear and terror among the impacted population but also likely generated widespread insecurity due to the utilization of advanced military technology and brutality of Azerbaijani soldiers. This transformed social media into yet another arena for conflict, where individuals intimidated one another using the disseminated content, exacerbating psychological warfare. As the conflict transitioned to the digital domain, the intensity of the confrontation heightened, as adversaries were immune to physical harm, resulting in a feeling of gratification from engaging with the enemy in a digital space.[171] The publication of these video materials and the use of new military technology have had a psychological impact on society. This parallels the utilization of the Jericho Trumpets on Nazi Stuka aircraft[172] due to their psychological impact on the enemy, inducing feelings of insecurity or prompting them to flee.

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[171] *See also* Max Bergmann & Gurgen Petrossian, *Psychologische und digitale Kriegsführung durch die informelle Verbreitung von Kriegsverbrechen*, in *Handbuch Cyberkriminologie* 402, 402–08 (Thomas-Gabriele Rüdiger & Saskia Bayerl eds., 2023).

[172] Jericho Trumpets were the sirens of Nazi combat aircraft that emitted a distinctive noise during attacks.

The Nagorno-Karabakh blockade initiated in December 2022, followed by Azerbaijan's latest aggression in September 2023, compelled the complete Armenian population to flee Nagorno-Karabakh. Human Rights Watch reported that Armenians fled their homes out of fear and panic, citing concerns about the restrictions on corridor traffic from Armenia and alleged atrocities committed by Azerbaijani forces during previous conflicts, leading to widespread fear and distrust among the population.[173]

B. JURISDICTION UNDER THE ROME STATUTE

Given the question regarding whether the ICC has jurisdiction over the crimes committed in Nagorno-Karabakh, further analysis of jurisdiction is warranted. Under Article 53(1)(a) of the Rome Statute, the first criterion to be examined is whether the facts available provide a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed. The Republic of Armenia became a member of the International Criminal Court as of February 1, 2024. However, through its declaration of accession to the Rome Statute, Armenia retroactively acknowledged the jurisdiction of the Court effective from May 10, 2021, at 00:00.[174] The ICC may assert jurisdiction pursuant to the Article 12(2)(a) of the Rome Statute if at least one element of a crime within the jurisdiction of the Court is committed on the territory of the State Party.[175]

The following crimes may potentially fall within the jurisdiction of the Court:

- Deportation as a crime against humanity under Article 7(1)(d) of the Rome Statute.
- Persecution on ethnic and/or religious grounds as a crime against humanity under Article 7(1)(h) of the Rome Statute, including acts of deportation and violation of the right to return.

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[173] Human Rights Watch, *Guarantee Right to Return to Nagorno Karabakh* (Oct. 5, 2023), https://www.hrw.org/news/2023/10/05/guarantee-right-return-nagorno-karabakh.

[174] Letter of the Ministry of Foreign Affairs of the Republic of Armenia to the Registrar of the International Criminal Court (Nov. 15, 2023), https://www.icc-cpi.int/sites/default/files/2023-11/Letter_MFA.pdf (last visited May 6, 2024).

[175] ICC Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18 ¶ 72 (Sep. 6, 2018).

- Other inhumane acts as crimes against humanity as defined in Article 7(1)(k) of the Rome Statute, specifically the infliction of significant suffering or severe injury through deliberate and serious breaches of the customary international law right of displaced persons to safely and humanely return to their home of origin with which they have a sufficiently close connection.

Crimes being perpetrated in Nagorno-Karabakh, including murder, sexual violence, and torture as crimes against humanity or other war crimes, are likely beyond the jurisdiction of the Court due to temporal and territorial constraints, however, these crimes could still be considered as cumulative incidents.

1. Territorial and Temporal Scopes

For the ICC to have jurisdiction over conduct under Article 5 of the Rome Statute, the criteria must be met, including those related to *ratione materiae*, which encompasses international crimes such as war crimes, crimes against humanity, genocide, and the crime of aggression, as well as requirements regarding *ratione temporis* specified in Article 11 of the Rome Statute, and one of the two criteria outlined in Article 12(2) of the Rome Statute, either *ratione loci* or *ratione personae*. The fundamental question revolves around the examination of the territorial scope of the commission of the crimes, given that Nagorno-Karabakh lies beyond the Court's jurisdiction.

As per Article 12(2)(a) of the Rome Statute, the relevant conduct should take place within the territory of the State Party. In the context of the Bangladesh/Myanmar situation, the Court has emphasized the need to interpret the term 'conduct', suggesting that it may also include the outcomes, such as the actions of victims in response to the perpetrator's behavior.[176] Consequently, in case of the crime of deportation, it is being "completed" when the victims left the area where they were lawfully present.[177] Additionally, customary international law does not forbid states from asserting jurisdiction over acts happening beyond their borders, as long as

[176] ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19 ¶ 50 (Nov. 14, 2019).
[177] *Id.* at ¶ 53.

there's a connection with their territory.[178] The Rome Statute does not restrict when the Court can assert jurisdiction over transboundary crimes based on territoriality. Thus, as long as a part of the actus reus takes place within a State Party's territory, the Court can exercise territorial jurisdiction within customary international law boundaries.[179]

When analyzing the temporal scope of crimes within the Court's jurisdiction, it is crucial to distinguish between completed, continuing, and composite crimes. A completed crime breaches a primary international obligation without ongoing activity. Once a murder is committed, the crime concludes with the death of the victim. Composite crimes encompass multiple instances of violating a single primary obligation, contrasting with completed crimes, such as the crime of apartheid which spans across a prolonged period and encompasses numerous acts, rather than a single event. Continuing crimes involve ongoing breaches of a primary obligation, sustaining a potentially persistent situation beyond its initial occurrence. [180]

Continuing crimes involve a sustained pattern of behavior that results in harm lasting for as long as the harmful effects endure.[181] In the ICTR jurisprudence it was established that a crime is considered continuing if it "continues after an initial illegal act has been consummated; a crime that involves ongoing elements […] (such as driving a stolen vehicle) that continues over an extended period.[182] As per the definition established by the ICTR, the crime of deportation should be classified as a continuing crime because although it involves a discrete and immediate act of removal, the aggravated harm it causes—namely, relocation to another state—endures until the victims are allowed to return.[183] Deportation begins with coercive acts that force displacement and

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[178] *Id.* at ¶ 57-58.
[179] *Id.* at ¶ 59-61.
[180] Alan Nissel, *"Continuing Crimes in the Rome Statute"* in 25 Mich. J. Int'l L. 661 (2004).
[181] Jeffrey Boles, *"Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine"* 7 Nw. J. L. & Soc. Pol'y. 228 (2012).
[182] Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Judgment, ¶ 721 (Nov. 28, 2007); in regard to child soldiers, the Trial Chamber has found that enlistment of children under the age of 15 if continuing crime, Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶ 618 (Mar. 14, 2012).
[183] Cf. Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 307 (Mar. 22, 2006) "deportation does not require an intent that the deportees should not return".

is only consummated upon crossing an international border. Responsibility for these coercive acts must persist until the point of crossing the border. Even after crossing the border, deportation may continue if the coercive acts prevent victims from returning[184] to their original territory.

Given the ongoing impact of the crime of deportation, another question arises regarding whether the crime, which commenced before the retroactive acknowledgment of the Court's jurisdiction through declaration, would fall within the Court's jurisdiction. International criminal justice typically acknowledges the significance of considering continuing crimes that occurred beyond its jurisdiction if it can be demonstrated that these crimes persisted into the relevant jurisdictional period.[185] The ICC is not confined to exercising temporal jurisdiction only within dates recognized by a state party; it can also investigate ongoing crimes occurring before the acknowledged time limit, as long as the contextual elements remain unchanged.[186]

Armenians from different parts of Nagorno-Karabakh have been forcibly removed at various times and are unable to return. It remains unclear whether the ICC will consider jurisdiction to address the crime of deportation arising from the conflict spanning from September 2020 to May 2021. However, it will need to regard the crime of deportation in light of the cumulative evidence at hand.

a. *During Second Nagorno-Karabakh War Between September and November 2020:* As Azerbaijani forces advanced during the Second Nagorno-Karabakh war, Armenians found themselves unable to return to their homes in cities and villages like Hadrut, Shushi, and others,

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[184] Cf. e.g. psychological harm Christoph Safferling, Gurgen Petrossian, Victims Before the International Criminal Court 168 (2021).

[185] Prosecutor v. Nsengiyumva, Case No. ICTR-96-12-I, Decision on the Defence Motions Objecting to the Jurisdiction of Trial Chamber on the Amended Indictment, ¶ 27-28 (Apr. 13, 2000); Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, ¶ 872 (Jun. 10, 2010); cf. ICC, Situation in Côte d'Ivoire, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire ¶ 179 (Nov. 15, 2011).

[186] Victor Tsilonis, The Jurisdiction of the International Criminal Court, (2024) 65; Alan Nissel, *"Continuing Crimes in the Rome Statute"* in 25 Mich. J. Int'l L. 687 (2004).

which came under Azerbaijani control, compelling them to flee the regions.[187]

b. *After Second Nagorno-Karabakh War between December 2020 and September 2023:* As per the trilateral agreement, the regions of Nagorno-Karabakh were mandated to come under Azerbaijani control, leading to the displacement of the Armenian population from those areas, including Lachin and Qelbajar.[188]
c. *Blockade and last aggression against Nagorno-Karabakh:* Following the Azerbaijani attack on Nagorno-Karabakh in September 2023, a 100,000 Armenians were compelled to flee their homes across the entirety of Nagorno-Karabakh.[189]

The crimes mentioned, including deportation, persecution through deportation, and other inhumane acts as crimes against humanity, were perpetrated partially within the territory of Nagorno-Karabakh, falling outside the jurisdiction of the Court, and partially within the territory of Armenia, within the Court's jurisdiction. The attacks on Nagorno-Karabakh involved coercion of Armenians from those areas in Nagorno-Karabakh to cross into Armenia. This cross-border conduct forms the basis for the mentioned crimes.

2. DEPORTATION AS CRIMES AGAINST HUMANITY

Using a variety of coercive measures, Azerbaijani authorities displaced more than 100,000 Armenians from Nagorno-Karabakh, where they were legally residing, to Armenia. As per footnote 12 of Article 7(1)(d) of the Elements of Crimes, the term "forcibly" extends beyond physical force and encompasses threats, coercion, fear of violence, duress, psychological oppression, or abuse of power against individuals, or exploitation of a coercive environment. This means that the displacement of the person is involuntary in nature, where the relevant persons had no genuine

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[187] Siranush Sahakyan, *Hadrut: A Community in Exile Committed to Cultural Preservation*, Armenian Wkly (May 16, 2023), https://armenianweekly.com/2023/05/16/hadrut-a-community-in-exile-committed-to-cultural-preservation.

[188] Statement by the Prime Minister of the Republic of Armenia, the President of the Republic of Azerbaijan and the President of the Russian Federation (Nov. 10, 2020).

[189] Partick Reevell, *"Over 100,000 Armenians have now fled disputed enclave Nagorno-Karabakh" in* abc News (Sep. 30, 2023).

choice but to leave.[190] The mere expression of consent does not necessarily indicate genuine choice, especially if the circumstances surrounding the consent involve coercion, threats, or fear and it is essential to consider the broader context, including factors like coercion, and vulnerability of the individuals involved.[191] Coercive acts encompass a range of acts, such as killings, sexual violence, physical and psychological violence intended to cause significant suffering or injury to mental or physical health, as well as the destruction of property, including homes and entire villages.[192] The Armenians' exodus from Nagorno-Karabakh to Armenia was not a matter of genuine choice; instead, they were compelled to abandon their homes resulting from the coercive acts.[193]

These coercive acts included:[194]

- Unlawful killings of the civilians who remained under the control of Azerbaijani forces.[195]
- Torture and mistreatment of civilians and prisoners of war.[196]
- Mutilation of bodies.[197]

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[190] Prosecutor v. Krnojelac, ICTY Case No. IT-97-25-T, Judgment ¶ 474 (Mar. 15, 2002); Prosecutor v. Prlić, ICTY Case No. IT-04-74-T, Judgment ¶ 50-51 (May 29, 2013); Prosecutor v. Karadžić ICTY Case No. MICT-13-55-A, Judgement ¶ 585 (Mar. 20, 2019); Prosecutor v. Kenyatta and Hussein Ali, Case No. ICC-01/09-02/11 Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 244 (Jan. 23, 2012).

[191] Prosecutor v. Krnojelac, ICTY Case No. IT-97-25-A, Judgment ¶ 229 (Sep. 17, 2003).

[192] *Id.*

[193] Cf. Prosecutor v. Ruto, Kosgey, Sang, Case No. ICC-01/09-01/11 Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 245 (Jan. 23, 2012); Davit Khachatryan, *"Transboundary Elements of Crime: A Case of Armenian Ethnic Cleansing before the ICC? "* in Völkerrechtsblog (Nov. 23, 2023), https://voelkerrechtsblog.org/de/transboundary-elements-of-crime/ (last visited May 6, 2024).

[194] Cf. ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19 ¶ 104-108 (Nov. 14, 2019); ICC, Situation in Georgia, Decision on the Prosecutor's request for authorization of an investigation, No. ICC-01/15 ¶ 22 (Jan. 27, 2016).

[195] Human Rights Violations during the 44-Day War in Artsakh 67-78 (2022), https://hcav.am/wp-content/uploads/2021/12/Fact-Finding-Report_FINAL_web.pdf (last visited May 6, 2024).

[196] *Id.* at 49-66.

[197] *"Torture, mutilation cases reported amid Azerbaijan's September aggression against Nagorno-Karabakh-Armenian Ombudsperson"* in

- Sexual violence committed against Armenian women.[198]
- Acts of physical and psychological violence causing great suffering or serious injury to the body or to mental or physical health, such as a nine-month blockade of Nagorno-Karabakh and a policy of imposing intentional starvation.[199]
- The policy of hatred towards Armenians, which includes the dissemination of video footage depicting violence against Armenians, as described earlier.
- Destruction of Armenian cultural heritage.[200]
- Destruction of property.[201]
- Impunity for those actions.

The catalogue of coercive acts only scratches the surface of the broader campaign of terror inflicted upon Armenians in Nagorno-Karabakh from 2020 to 2023. There is no indication to suggest that an "evacuation" of the civilian population was necessary, or carried out, for genuine reasons of population security or "imperative" military necessity.[202] Rather, based on the coercive methods used to displace them, and the discriminatory context, the arbitrary and discriminatory displacement of the Armenian population was impermissible under international law. Armenians

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Armenpress (May 2, 2024), https://armenpress.am/eng/news/1136212/ (last visited May 6, 2024).

[198] *"(18+) Desecration of female Armenian soldier by Azerbaijani troops"* in azeriwarcrimes (Sep. 19, 2022), https://azeriwarcrimes.org/2022/09/19/desecration-of-female-armenian-soldier-by-azerbaijani-troops/ (last visited May 6, 2024).

[199] Luke Harding, *"They want us to die in the streets': inside the Nagorno-Karabakh blockade"* in The Guardian (Aug. 22, 2023), https://www.theguardian.com/world/2023/aug/22/inside-nagorno-karabakh-blockade-armenia-azerbaijan (last visited May 6, 2024).

[200] Armenian Bar Association, The Mother See of Holy Etchmiadzin, Report And Urgent Call To Action; Erasure of Armenian Heritage by Azerbaijan and Denial of Armenians' Right to Exercise their Christian Religion (2022), https://armenianbar.org/wp-content/uploads/2022/04/Safegurding-Armenian-Culture-and-Religious-heritage.pdf (last visited May 6, 2024).

[201] Amos Chapple, *"Church, Entire Village 'Erased' In Azerbaijan's Recaptured Nagorno-Karabakh"* in RadioFreeEurope (Apr. 24, 2024), https://www.rferl.org/a/azerbaijan-armenia-nagorno-karabakh-heritage-destruction-karintak-dasalti/32918998.html (last visited May 6, 2024); see e.g. William Schabas, *"Al Mahdi Has Been Convicted of a Crime He Did Not Commit"* 49 Case Western Reserve J Intl Law 1, 100 (2017).

[202] Article 49 of the Geneva Convention IV; Prosecutor v. Blagojević, Jokić ICTY Case No. IT-02-60-T, Judgment ¶ 597-600 (Jan. 17, 2005).

residing in Nagorno-Karabakh had been living there for decades and were legally established in the region.

3. PERSECUTION ON GROUNDS OF ETHNICITY AND/OR RELIGION

If individuals are forcibly removed from a non-member state to a member state based on any of the grounds outlined in Article 7(1)(h) of the Statute, the Court could potentially exercise jurisdiction over the crime against humanity of persecution. This is because one aspect of this crime in the case of a cross-border transfer occurs within the territory of a State Party.[203]

Severe deprivation of fundamental rights: Deportation constitutes a severe deprivation of human rights, including the right of individuals to live in their communities and homes, and may amount to persecution.[204]

Targeting by reason of identity: The individuals were targeted because of their association with the Armenian community, characterized by its ethnic and religious composition. Although religion may not be the sole motive for their targeting, the distinctive religious beliefs and cultural heritage of Armenians are also being threatened, as evidenced by the destruction of Armenian cultural landmarks detailed previously. The Azerbaijani perpetrators, in targeting Armenians, showed no discrimination based on whether the victims were Catholics, Evangelicals, or members of the Apostolic Church; their primary objective was simply to target individuals of Armenian descent. This is exemplified by an incident during the 2016 war, where one of the perpetrators decapitated an Armenian Yazidi soldier and shared the footage and pictures on social media platforms.[205] It was only later realized that the victim was not Armenian but Yazidi.[206] Nevertheless, the perpetrator's primary intent was to target

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[203] ICC Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18 ¶ 76 (Sep. 6, 2018).
[204] Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 218 (Sept. 17, 2003).
[205] *"Karabakh conflict: Azerbaijani soldiers behead Ezidi from Armenia"* in Ezidi Press, (Apr. 4, 2016), https://www.ezidipress.com/en/karabakh-conflict-azerbaijani-soldiers-behead-ezidi-soldier-from-armenia/ (last visited May 6, 2024).
[206] *Id.*

Armenians, and as the Yazidi soldier was fighting in the Armenian army, he fell victim to this brutal act.

Discriminatory intent: The discriminatory intent is reflected in public statements made by the Azerbaijani officials and perpetrators on the ground, as well as in the social media posts and statements, as mentioned above.[207] The discriminatory intent is further illustrated by the deliberate targeting and destroying of Armenian churches and Armenian cultural heritage,[208] falsely labeling them as Albanian churches and distorting religious historical truths.[209]

4. OTHER INHUMANE ACTS

Preventing Armenians from returning may come under the jurisdiction of the Court under Article 7(1)(k) of the Rome Statute, provided that the necessary threshold conditions are met.[210] The compelled displacement of Armenians was a central component of violence, accompanied by a deliberate and severe denial of the right for recently displaced Armenians from Nagorno-Karabakh to

[207] Xenophobia and racism in Azerbaijan Anti-Armenian (2021), https://transparency.am/assets/documents/1646637425-52831-785.pdf (last visited May 6, 2024) 17-22; Center for Truth and Justice, Conclusive Evidence Of Ilham Aliyev's Intention To Invade And Occupy Armenia (2024), https://www.cftjustice.org/wp-content/uploads/2024/04/Catalogue-of-Evidence-State-Official-Media.pdf (last visited May 6, 2024).

[208] Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 207 (Feb. 26, 2001); Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 1024 (Sept. 1, 2004); cf. Prosecutor v. Gotovina et al, Case No. IT-06-90-T, Judgment, 1843 (Apr. 15, 2011); Pablo Gavira Diaz, *The Liability for Attacks Against Immovable Cultural Objects*, INT'L CRIM. L. 360 at 393 (2022).

[209] Jasmine Dum-Tragut, Jost Gippert, *"Caucasian Albania in Medieval Armenian Sources (5th–13th Centuries),"* in Caucasian Albania 77 (Jasmine Dum-Tragut, Jost-Gippert eds., 2023); Jasmine Dum-Tragut *"One or two? On Christological and Hierarchical Disputes and the Development of the 'Church of Albania' (4th–8th centuries),"* in Caucasian Albania 320 (Jasmine Dum-Tragut, Jost-Gippert eds., 2023); Armenian Bar Association, The Mother See of Holy Etchmiadzin, Report And Urgent Call To Action; Erasure of Armenian Heritage by Azerbaijan and Denial of Armenians' Right to Exercise their Christian Religion, 19 (2022), https://armenianbar.org/wp-content/uploads/2022/04/Safegurding-Armenian-Culture-and-Religious-heritage.pdf (last visited May 6, 2024); ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19 ¶¶ 109-111 (Nov. 14, 2019).

[210] ICC Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18 ¶ 78 (Sept. 6, 2018).

return, resulting in significant suffering or substantial harm to their mental or physical well-being. This cross-border transfer serves as the foundation for the crime of other inhumane acts by violating the right to return of the right to return. The arbitrary refusal to allow the right to return may amount to conduct resembling the crime of persecution, as outlined in Article 7(1)(k) of the Rome Statute. [211] This is applicable if the act is characterized by the perpetrator's grave behavior and leads to considerable suffering or serious harm to the victim. The implementation of specific regulations, laws and actions targeting housing and property, alongside deportation, amounts to persecution, driven by discriminatory motives as was found in relation to Krajina Serbs.[212] In certain regions under Azerbaijani control, entire Armenian villages have been erased, preventing Armenian individuals from returning.[213]

According to the Statute, the inhumane act should impose a sufficient degree of harm upon a person, qualified as great suffering or serious injury to the body, mental or physical health. Preventing someone from returning to their own country can meet the threshold for persecution due to several factors. Firstly, it exacerbates the anguish experienced by individuals who have been uprooted from their homes and forcibly displaced from their country. This exacerbation of suffering adds weight to the severity of the persecution. Secondly, it intensifies the uncertainty surrounding the victims' future, as they are unable to reclaim their homes and livelihoods. Consequently, they are forced to live under deplorable conditions, further contributing to their hardship and suffering.[214] This suffering encompasses residing in temporary and substandard housing, the breakdown of family ties, unemployment, severe poverty, hunger and malnutrition, poor health, loss of legal status and corresponding rights, and experiencing additional

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[211] *Id.* ¶ 77.

[212] Prosecutor v. Gotovina et al., Case No. IT-06-90-T, Judgment, ¶ 1843 (Apr. 15, 2011).

[213] Amos Chapple, *Church, Entire Village 'Erased' In Azerbaijan's Recaptured Nagorno-Karabakh,* RADIOFREEEUROPE (Apr. 24, 2024), https://www.rferl.org/a/azerbaijan-armenia-nagorno-karabakh-heritage-destruction-karintak-dasalti/32918998.html (last visited May 6, 2024); *Satellite images show Azerbaijan's destruction of village in Artsakh,* PANORAMA.AM (Apr. 8, 2023), https://www.panorama.am/en/news/2023/04/08/destruction-village-Artsakh/2818095 (last visited May 6, 2024).

[214] ICC Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC-RoC46(3)-01/18, ¶ 77 (Sept. 6, 2018).

victimization through further criminal acts, all of which exacerbate their distress.

Similar nature of the act: the right to return enshrined in Article 13(2) of the Universal Declaration of Human Rights states that everyone has the right to leave any country, including his/her own, and return to his/her country. The right to return is embedded within various legal frameworks and is an essential component of international customary law.[215] In the context of the Nagorno-Karabakh conflict, the ECtHR addressed the issue of the right to return in *Sargsyan v. Azerbaijan*. The Court, referring to International Humanitarian Law, affirmed that displaced persons have the right to voluntarily and safely return to their homes or habitual residences once the causes of their displacement cease to exist.[216] The ruling also enforced the principle of non-discrimination and the government's obligation to protect the property rights of all individuals, regardless of their ethnicity or displacement status.[217] Therefore, the deliberate infringement of the right to return by state agents by its nature constitutes an act falling within the category of inhumane acts.

Gravity: It is crucial to note that the gravity test hinges on a detailed assessment of individual cases, considering all contextual factors of the conflict. Despite Azerbaijani authorities' claims regarding Nagorno-Karabakh Armenians' citizenship,[218] there is a lack of proactive measures to alleviate anti-Armenian sentiments. Instead, they continue an aggressive campaign, labeling the Republic of Armenia under an irredentist vision and conception as western Azerbaijan.[219] This not only obstructs Armenians' right to return

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[215] Hurst Hannum, The Right to Leave and Return in International Law and Practice 57-58 (2021); Sargsyan v. Azerbaijan, App. No. 40167/06, ¶ 95 (ECtHR June 16, 2015).
[216] *Id.* ¶¶ *231-232.*
[217] *Id.* ¶ 240.
[218] *The Armenian population of Karabakh citizenship dilemma - Analysis from Baku,* JAMSNEWS (Oct. 10, 2022), https://jam-news.net/the-armenian-population-of-karabakh-citizenship-dilemma-analysis-from-baku/ (last visited May 6, 2024).
[219] Center for Truth and Justice, Conclusive Evidence Of Ilham Aliyev's Intention To Invade And Occupy Armenia (2024), https://www.cftjustice.org/wp-content/uploads/2024/04/Catalogue-of-Evidence-State-Official-Media.pdf (last visited May 6, 2024); Thomas de Waal, *The End of Nagorno-Karabakh,* FOREIGN AFFAIRS (Sept. 26, 2023), https://www.foreignaffairs.com/armenia/end-nagorno-karabakh (last visited May 6, 2024).

but also engaging in actions that lead to the forced displacement of Armenians from Armenian territory.[220] Additionally, as mentioned earlier, the intentional destruction of entire villages serves as another grave obstacle to Armenians' ability to return. Therefore, the impediment to a safe and humane return to Nagorno-Karabakh carries a gravity similar to other inhumane acts.

A differentiation exists between the crime of deportation and the prevention of safe and humane return, which constitutes an inhumane act. While deportation involves forcing an individual to leave the region, the latter is akin to metaphorically "locking the door behind" them.

5. Contextual Elements of Crimes Against Humanity

In order to fall under the jurisdiction of the Court, the identified crimes must fulfill the contextual elements of crimes against humanity.

Attack directed against any civilian population: The crimes outlined above, including civilian killings, sexual violence, and property destruction, are not sporadic occurrences; rather, they exhibit common traits in terms of the nature of the acts, the targeted population, and the alleged perpetrators. Despite Azerbaijani authorities' assertion that their actions targeted the political leadership of Nagorno-Karabakh, it is challenging to distinguish this, as the animosity towards Armenians extends beyond political figures to encompass the entire Armenian population, both in Nagorno-Karabakh and those residing in Armenia and the diaspora. Therefore, it is clear that the contextual element of an attack directed against any civilian population is present.

State policy: The course of conduct described above, which includes various crimes, along with the campaign against Armenians, a systematic institutional oppression, public statements by senior officials portraying Armenians as enemies, and the failure to take effective action to hold perpetrators accountable or prevent future crimes, unmistakably demonstrates distinct patterns of violence involving Azerbaijani state actors.

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[220] Armenian government confirms Azerbaijani forces occupy 31 Armenian villages, 301.am (Mar. 3, 2024), https://www.301.am/armenian-government-confirms-azerbaijani-forces-occupy-31-armenian-villages/ (last visited May 6, 2024).

Widespread and systematic nature of the attack: The threshold for an attack, whether conducted over a vast geographical expanse or confined to a smaller area but affecting a significant number of civilians,[221] is satisfied by the mass deportation of the entire population of Nagorno-Karabakh. The criterion of organized acts of violence and the unlikelihood of their random nature, often demonstrated through recurring patterns of similar criminal conduct,[222] is also fulfilled, as attacks against the civilian population occurred regularly from 2020 to 2023.

Nexus: The acts described above are part of a widespread and systematic attack against the civilian population, rather than isolated or sporadic incidents that vary significantly in context and circumstances.

V. POSSIBLE PROCEEDINGS BEFORE THE INTERNATIONAL CRIMINAL COURT

In 1998, the Republic of Armenia showed intent by signing the Rome Statute, yet its formal ratification hit a roadblock in 2004. This pause was prompted by the Constitutional Court's identification of conflicts between the Statute and Armenia's own constitution. As the conflict unfolded, non-governmental organizations took proactive steps by invoking universal jurisdiction. They filed criminal complaints under the principle of universal jurisdiction in countries like Argentina, Sweden, and Germany,[223] targeting those accountable for grave atrocities committed during the hostilities. Additionally, amidst the turmoil,

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[221] Prosecutor v. Bemba, Case No. ICC-02/05-01/08, Judgment, ¶ 163 (Mar. 21, 2016).

[222] Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, ¶ 223 (June 12, 2014).

[223] Criminal complaint to the Federal Prosecutor General in Karlsruhe for war crimes committed against persons in the current Karabakh war by Azerbaijani soldiers (Oct. 21, 2020), https://dearjv.de/criminal-complaint-to-the-federal-prosecutor-general-in-karlsruhe-for-war-crimes-committed-against-persons-in-the-current-karabakh-war-by-azerbaijani-soldiers/ (last visited May 6, 2024); Ergänzung zur Strafanzeige beim Generalbundesanwalt in Karlsruhe wegen Kriegsverbrechen gegen Personen im Zusammenhang mit dem bewaffneten Konflikt um Berg-Karabach (Oct. 21, 2021), https://dearjv.de/ergaenzung-zur-strafanzeige-beim-generalbundesanwalt-in-karlsruhe-wegen-kriegsverbrechen-gegen-personen-im-zusammenhang-mit-dem-bewaffneten-konflikt-um-berg-karabach/ (last visited May 6, 2024).

there emerged discussions regarding whether the Republic of Artsakh, Nagorno-Karabakh, should emulate the State of Palestine's strategy.[224] This strategy involved initiating proceedings to accept the jurisdiction of the International Criminal Court. Post-2020 war, these NGOs intensified their efforts, seeking innovative avenues to address the egregious war crimes that transpired. The aggression of the Republic of Azerbaijan against the Republic of Armenia in 2021 intensified those efforts by the NGOs to advocate for ratification of the Rome Statute. In late 2022, the government expressed its readiness to join the ICC and initiated an application process for review at the Constitutional Court.[225] This move was prompted by several amendments to the Constitution since 2004.

The Court reexamined its earlier decision on the ICC's role in Armenia's criminal justice system, finding it lacks the capacity to supplement national jurisdiction. It compared the purposes of the Armenian Constitution and the Rome Statute, emphasizing a shared commitment to universal values in combating serious crimes. Consequently, it deemed Armenia's inability to effectively address such crimes as unconstitutional. Additionally, it ruled that the ICC's complementary jurisdiction to restore adherence to constitutional obligations does not interfere unconstitutionally with Armenia's sovereignty.[226] Furthermore, the Court concluded that obligations under Article 105 of the Statute are voluntary and arise only upon ratification, not automatically.[227] The Republic of Armenia officially deposited the instrument of ratification of the Rome Statute of the ICC on November 14, 2023.

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[224] Gurgen Petrossian, *"International Prosecution of Macro-Crimes Committed During the Third Artsakh War,"* in 3 Sci. Artsakh at 98, 100 (2021).
[225] *Armenian government starts process of ratifying Rome Statute over Azeri war crimes, risk of new aggression*, ARMENPRESS (Dec. 29, 2022), https://armenpress.am/eng/news/1100784/ (last visited May 6, 2024).
[226] See the decision of the Court on The Case Concerning the Constitutionality of the Obligations Prescribed by the Rome Statute of The International Criminal Court Signed On 17 July 1998 (Mar. 23, 2023) https://www.concourt.am/decision/full_text/64b67c71ee311_1680e.pdf (last visited May 6, 2024); Gurgen Petrossian, *"Armenia as the 124th Member to the Rome Statute,"* Opinio Juris (Sept. 22, 2023) https://opiniojuris.org/2023/09/22/armenia-as-the-124th-member-to-the-rome-statute/ (last visited May 6, 2024).
[227] Arnold Vardanyan, *"From an Unconstitutional Rome Statute to Its Constitutionality: Why It Took Over 20 Years for Armenia to Join the ICC?"* EJIL:Talk! (Feb. 8, 2024), https://www.ejiltalk.org/from-an-unconstitutional-rome-statute-to-its-constitutionality-why-it-took-over-20-years-for-armenia-to-join-the-icc/ (last visited May 6, 2024).

Armenia's ratification opens two potential avenues for the Court's jurisdiction regarding the conflict:

- International crimes committed within the territory of the Republic of Armenia since May 10, 2021.
- Transboundary international crimes committed within the territory of Nagorno-Karabakh since May 10, 2021, as previously outlined.

Armenia faces political pressure from neighboring countries such as Turkey, Russia, and Azerbaijan; therefore, it is improbable that Armenia will invoke jurisdiction under Article 14 of the Rome Statute in the near future, given the ongoing peace negotiations. If other states do not make a referral in this regard, the only option is for the ICC Prosecutor to initiate proceedings *proprio motu*.

Based on this, the ICC Prosecutor should also assess admissibility in accordance with Article 17 of the Rome Statute, which requires proof of complementarity, gravity and interests of justice. Therefore, the Prosecutor should assess whether potential cases against perpetrators for crimes such as deportation, persecution, and other inhumane acts would be admissible.

A. COMPLEMENTARITY

To determine if a potential case is inadmissible under Article 17 of the Statute, the Prosecutor must ascertain if there are current or previous investigations or prosecutions or if the state with jurisdiction has opted not to prosecute the individual in question. Only if these conditions are met, will the Prosecutor further need to investigate the issues of unwillingness and inability.[228] The failure of the state to investigate or prosecute renders a case admissible before the Court, contingent upon an evaluation of gravity under Article 17(1)(d) of the Rome Statute.

[228] Prosecutor v. Katanga and Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 78 (Sept. 25, 2009); Situation in The Republic of Burundi, ICC-01/17-X, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi," ICC-01/17-X-9-US-Exp, (Oct. 25 2017), ¶ 146 (Nov. 9, 2017).

Position of Azerbaijan: Azerbaijan refutes allegations of deportations of Armenians from Nagorno-Karabakh, and the Author cannot confirm any ongoing investigations into such deportations. Although Azerbaijani prosecutors have announced charges against four Azerbaijani soldiers for crimes against Armenians back in 2020, no additional information is available.[229] However, Azerbaijani authorities have initiated unlawful arrests and prosecutions of Armenian prisoners of war and civilians.[230] It is unlikely that Azerbaijan will investigate any crime committed against Armenians.

Position of Armenia: Armenia initiated investigations against the Azerbaijani military and political leadership since September 2020, and these investigations are still ongoing.[231] However, there is currently no public information available regarding the stage of these investigations. It is only known that, in response to Armenia's request, one of the alleged perpetrators was arrested in Russia but later released for unspecified reasons. Given that the deportation victims reside in Armenia, investigative authorities should continue their investigations based on the principle of complementarity. However, unlike Ukraine, Armenia does not recognize trials conducted *in absentia*, making it unlikely and unable that Armenia will effectively prosecute the perpetrators who are residing in Azerbaijan.

B. GRAVITY

In assessing gravity, it is important to consider perspectives such as the degree of responsibility for the alleged crimes, as well as the nature, scale, manner of commission, and impact of alleged

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[229] Ulkar Natiqqizi, *"One year after arrests for war crimes, Azerbaijan remains silent,"* Eurasianet (Dec. 15, 2021), https://eurasianet.org/one-year-after-arrests-for-war-crimes-azerbaijan-remains-silent (last visited May 6, 2024).
[230] Ulkar Natiqqizi, Ani Mejlumyan, *"Armenian soldiers on trial in Azerbaijan,"* Eurasianet, (Jul. 1, 2021), https://eurasianet.org/armenian-soldiers-on-trial-in-azerbaijan (last visited May 6, 2024); Joshua Kucera, *"Concerns About Victor's Justice As Nagorno-Karabakh's Leaders Are Behind Bars And Facing Trial In Azerbaijan,"* RadioFreeEurope, (Oct. 11, 2023), https://www.rferl.org/a/karabakh-leaders-arrested-azerbaijani-victor-justice-armenia-courts/32633354.html (last visited May 6, 2024).
[231] *"Armenia Investigative Committee launches criminal prosecution against Azerbaijan military, political leadership,"* News.am (Nov. 6, 2023), https://news.am/eng/news/791121.html (last visited May 6, 2024).

crimes.[232] Regarding greatest responsibility, the potential case of deportation implicates high authorities of Azerbaijan, who are alleged to have established institutionalized discriminatory and hateful policies against Armenians. In terms of nature, the crime of deportation is highly serious. The coercive acts underlying the crime committed during 2023 involved multiple offenses, as described above. Concerning scale, the entire territory of Nagorno-Karabakh was impacted by the crime of deportation, resulting in the forced removal of over 100,000 Armenians from the region. The manner of the commission involved targeting victims based on ethnic and/or religious affiliations as members of the Armenian group. As for impact, the alleged crimes have had profound repercussions on both individual victims and the broader Armenian population, affecting not only those from Nagorno-Karabakh but Armenians as a whole.

C. INTERESTS OF JUSTICE

Under Article 53(1) of the Rome Statute, while jurisdiction and admissibility are prerequisites for proceeding, the "interests of justice" serve as a potential counterbalance that may justify not proceeding. The Prosecution need not demonstrate that an investigation serves the interests of justice but rather assess whether circumstances exist that argue against conducting an investigation at the present time.[233] The severity and extent of the alleged crimes, involving the deportation of Armenian people and denial of their right to return to Nagorno-Karabakh, along with patterns of criminality and involvement of senior military and government officials, strongly support the need for an investigation. The Prosecutor must still consider the interests of justice, which includes crime prevention and security concerns, while recognizing that broader issues of international peace and security fall outside the ICC's mandate and decisions not to proceed based on the interests of justice should be seen as a last resort.[234]

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[232] Situation in The Republic of Burundi, ICC-01/17-X, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi," ICC-01/17-X-9-US-Exp (Oct. 25 2017), ¶ 184 (Nov. 9 2017).
[233] *Id.* ¶ 190.
[234] ICC-OTP, Policy Paper on the Interests of Justice 8-9 (2007); Drazan Đukic, *"Transitional justice and the International Criminal Court – in "the interests of justice"?"* 89 International Review of the Red Cross 696-700 (2007).

V. CONCLUSION

Due to the limited international media coverage of the Nagorno-Karabakh conflict, the anti-discriminatory actions taken by Azerbaijani authorities often go unnoticed. This silence can lead to misconceptions that nothing significant is occurring in Nagorno-Karabakh and that Armenians are leaving voluntarily. However, this is not the case. Armenians have been forced to leave Nagorno-Karabakh due to persecution, a fact frequently emphasized by Armenians but often ignored by the international community. The patterns of oppression originating from the Armenian Genocide of 1915 persist against the Republic of Armenia. The covert policy of Pan-Turkism, as highlighted in Ziya Gökalp's testimony during the Istanbul Trial, illustrates this reality. Azerbaijan's aims to conquer Armenia and deport Armenians, as regularly promoted through its media channels. The International Military Tribunal emphasized in its judgment that Julius Streicher's propaganda was akin to poison for German society, fueling anti-Semitism. Similarly, the youth in Azerbaijan have been indoctrinated with hatred towards Armenians, with instances like the glorification of Ramil Safarov's beheading of Armenians serving as examples to be emulated and to gain recognition. The inauguration of a trophy park in Baku featuring Armenian puppets is yet another contemporary example of how Azerbaijan treats Armenians. These actions collectively represent a vivid display of animosity towards Armenians. Referring to the Nuremberg Principles, those accountable for international crimes must face consequences. Failure to hold individuals responsible would signify another instance of the international community's inability to combat impunity for such crimes.

In pursuing accountability before the International Criminal Court, the Office of the Prosecutor could adopt a jurisdictional strategy similar to that used in the *Bangladesh/Myanmar* situation. There, the Court established jurisdiction over the crime of deportation on the basis that part of the conduct—the victims' crossing of the border—occurred on the territory of a State Party. By analogy, the forced displacement of Armenians from Nagorno-Karabakh to Armenia engages the Court's territorial jurisdiction under Article 12(2)(a) of the Rome Statute. The OTP could therefore prioritize documenting the cross-border elements of deportation and persecution, demonstrating that the actus reus was completed within Armenian territory.

BORROWED PLUMES: TAKING ARTISTS' INTERESTS SERIOUSLY IN ARTIFICIAL INTELLIGENCE REGULATION

Guido Westkamp*

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I. INTRODUCTION

Creators fear generative AI.[1] And so should society, by and large. The appropriation and recombination of creative elements, properties, and features by callous machines inescapably will hurt creators' feelings—and yet appears to be permitted under both Article 5 (3) (k) EUCD[2] and Article 17 (7) DSMD[3] (caricature, parody and pastiche) that now reflect the fundamental right to freedom of expression and art.[4] The AI Act similarly permits an understanding that AI can rely on copyright exceptions.[5] It is an open matter whether, as such, only humans may rely on the relevant exceptions. In any case, and in turn, ascribing legal personhood to AI is the key to eschewing any cause of action potentially applicable to oppose AI uses. In academic literature, and as will be explained throughout here, broad proposals are being made. AI should, accordingly, be considered an entity to be ascribed personhood, ranging from areas such as liability in tort law to fundamental rights. The central assertion here holds that AI[6] by its very definition, can do things that humans do—such as

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[1] Currently pending lawsuits include (in the UK) Getty Images (US) Inc. et al v. Stability AI Ltd. [2023] EWHC 3090 (Ch). In the US: Getty Images (US), Inc. v. Stability AI, Inc., No. 1:23-cv-00135 (D. Del. Feb. 3, 2023); DOE1 v. GitHub, Inc. et al, No. 4:22-cv-06823 (N.D. Cal. May 11, 2023); Kadrey et al v. Meta Platforms, Inc., No. 3:23-cv-03417 (N.D. Cal. July 7, 2023); Silverman et al. v. OpenAI, Inc., No. 3:23-cv-03416 (N.D. Cal. July 7, 2023). *See also* Artists Rts. All., 200+ Artists Urge Tech Platforms: Stop Devaluing Music, Medium (Apr. 1, 2024), https://artistrightsnow.medium.com/200-artists-urge-tech-platforms-stop-devaluing-music-559fb109bbac.

[2] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, O.J. (L 167), 10-19.

[3] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, O.J. (L 130), 92.; Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM (2016) 593 final (Sept. 14, 2016).

[4] Charter of Fundamental Rights of the European Union, O.J. (C 326), 391-407 (Oct. 26, 2012).

[5] *See* Artificial Intelligence Act Regulation (EU), O.J. (L 106), Recital 107 ("…unless relevant copyright exceptions and limitations apply…"), though this only relates to data mining.

[6] The article exclusively considers fully automated AI creations. The complexities that arise where AI is employed as a mere tool for creativity - for example, whether the "deployer" of AI would then become a joint author - are not discussed herein.

participating in public discourse or indeed "creating" something that would fit any definition of art—and that therefore it is capable of holding subjective rights.[7] Such a line of argument easily allows AI developers a convenient pattern of argument: pastiche, or freedom of expression, can be exercised by AI, and consequently such as in the context of copyright law[8], no further restrictions on the AI industry should be imposed so as not to prevent technological development and innovation. In turn, any transformative or referential use of copyright-protected works on platforms can constitute the exercise of freedom of art, opinion, or expression. Any shift from one context, genre, or mode of presentation to another suffices, potentially, to constitute pastiche. However, ascribing personhood—a central tenet discussed across virtually all fields of law in the current debate on AI—in the absence of clarity on the function of the legal norm in question and the interests that the norm and system in question reflect is a fallacious position to take.[9] AI, ultimately, has the capacity to hurt feelings because it is made out, subjectively, as an attack on artistic self-perceptions. It can and will substitute creative endeavors. Nevertheless, copyright exceptions such as those for data mining and pastiche exist. In particular, as will be argued here, the extensive notion of pastiche as it especially applies in the context of platform liability and user freedoms must be strictly distinguished from the use of AI. In short, the effects of AI probably require nothing short of a deconstruction of the law and

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[7] *See* Stefan Neuhöfer, *Grundrechtsfähigkeit Künstlicher Intelligenz* [*Fundamental Rights of Artificial Intelligence*], 203 (2023) (Ger.); Jens Kersten, *KI-Kunst- Künstliche Intelligenz und Künstlerische Freiheit*, *in* Territorialität und Personalität, Festschrift für Moris Lehner [*AI Art - Artificial Intelligence and Artistic Freedom*, *in* Territoriality and Personality, Commemorative Publication for Moris Lehner],437 (Roland Ismer et al., 2019); for copyright law, *see* Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author* 5 Stan. Tech. L. Rev. 49, 49 (2012).

[8] The US publicity right can be seen as a complementary or parallel form of protecting artists' interests. Tennessee, for example, extended their publicity rights law so as to give artists such as actors or singers a dedicated right to oppose the use of AI under certain conditions in the Ensuring Likeness Voice and Image Security (ELVIS) Act, *see PHOTOS: Gov. Lee Signs ELVIS Act Into Law: Tennessee First in the Nation to Address AI Impact on Music Industry*, Tenn. Gov. (Mar. 21 2024), https://www.tn.gov/governor/news/2024/3/21/photos--gov--lee-signs-elvis-act-into-law/.

[9] For a much more refined approach to personhood as a functional concept *see* Anna Beckers & Gunther Teubner, Three Liability Regimes for Artificial Intelligence, *passim* 12-16, 163-65 (2021).

how it relates to personality interests. The notion of an artist's personality rights—including the libertarian "negative" dimension of such rights—can, it is proposed, provide a "basic norm" for a future evolution of the law.

The exploitation of copyrightable subject matter (or other features such as an artist's voice or likeness) begins with using content for purposes of data mining to train AI systems, to the use of AI-generated output on social media. The AI industry sees much commercial potential and unsurprisingly demands unrestricted access and use rights for the purpose of fostering innovation; any right to oppose AI is considered as an obstacle standing in the way of a brave new world of AI creativity—most conspicuously, of course, copyright.[10] Commercial logic dictates that a favourable outcome is to replace human creativity in large sectors, such as in music and art, and to control the use of AI-created Artifacts based on extended copyright claims, or a novel "sui generis" right to protect AI creations. In the academic debate, across the various fields of law affected, virtually any conceivable position is reflected. In the UK particularly, it is an open issue whether training an AI model could qualify as an infringing copy of its training data, and whether the subsequent act of making available (such as on social media platforms) can qualify—if the training is undertaken abroad—as secondary infringement (importing, possessing or dealing with an infringing copy) because the types usually only pertain to tangible copies.[11]

The debate, as it stands, neglects potential claims by creators—demands that are ultimately rooted in a sense of unease and a need to defend positions that are only partially covered by copyright. Instead, the debate appears to plainly focus on disagreements between the AI industry on the one hand and copyright exploiters, and their property rights (Article 17 EU-Ch.) on the other.

This article argues for rediscovering personality rights as a basis for objecting to AI uses. It presents an artistic personality right that complements copyright protection and derives from the negative dimension of libertarian fundamental rights. More specifically, it frames this right as a negative right to art, enforceable against AI. This right allows creators both to prohibit

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[10] Brad Smith, *Microsoft Announces New Copilot Copyright Commitment for Customers*, Microsoft (Sept. 7, 2023), https://blogs.microsoft.com/on-the-issues/2023/09/07/copilot-copyright-commitment-ai-legal-concerns/.

[11] As raised by the court in Getty Images (US) Inc. et al v Stability AI Ltd. [2023] EWHC 3090 (Ch)

AI uses and which includes both a right to prohibit whilst concurrently allowing creators to claim remuneration[12] at their discretion.[13] Such subjective right—or at least some discourse concerning the possibility of such right—appears necessary considering the current state of the AI debate, which intensively focuses on the commercial interests of the AI industry and, concurrently, on collective expectations of AI users. Conversely, the concept of an artistic personality right, which can function as a countermeasure in any proportionality assessment vis-à-vis the permissibility of appropriating and using creative output, encompasses any imaginable use and permits further differentiations.

From the perspective of creators, however, there is a threefold problem that this article will consider in turn. The AI industry is lobbying for a much more generous, and indeed unrestrained, exception for data mining purposes, ostensibly relying on freedom of research. Second, and much more devious from the perspective of artists, the AI industry may effortlessly rely on the existing pastiche exception under Article 5(3)(k) EUCD,[14] specifically so in the context of the new German Authors Rights Service Provider Act (UrhDAG),[15] in force since 2022 and transposing Article 17 DSMD—as a separate piece of legislation —in a manner that appropriately emphasises communicative freedom rather than the interests of copyright owners.[16]

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[12] *See* Cristopher Geiger & Vincenzo Iaia, *The Forgotten Creator: Towards a Statutory Remuneration Right for Machine Learning of Generative AI*, 52 Comput. L. & Sec. Rev. (2023) (in relation to machine learning).

[13] *See* Martin Senftleben, *Generative AI and Author Remuneration*, 54 Int'l Rev. of Intell. Prop. and Competition L. 1535, (2023).

[14] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, O.J. (L 167) (hereinafter EUCD).

[15] Act on the Copyright Liability of Online Content Sharing Service Providers [Urheberrechts-Diensteanbieter-Gesetz] [UrhDaG], May, 31 2021, BGBl I, 1204, 1215(Ger.), https://www.gesetze-im-internet.de/englisch_urhdag/englisch_urhdag.html#:~:text=Act%20on%20the%20Copyright%20Liability,%2DDiensteanbieter%2DGesetz%20–%20UrhDaG).

[16] Article 17 DSMD leaves two basic options as regards the "value gap": either a general licensing solution or the adoption of a more right holder-friendly approach based on deterring platforms from permitting uploads so as to secure existing markets, as is preferred in France and Spain. For criticism on the approach adopted in Germany, *see* Axel Nordemann, *Upload Filters and the EU Copyright Reform*, 50 Int'l Rev. of Intell. Prop. and Competition L. 275, (2019).

That exertion is exacerbated when considering the function of the pastiche exception in the context of salient uses on social media platforms—as a right that, in and of itself, must be understood as a direct reflection of *subjective* user rights[17] under the EU Charter on Fundamental Rights that broadly safeguards communicative freedoms for the very purpose of sustaining transformative or referential user creativity, a right with the capacity to allow any recombinant use of works—without *expressly* clarifying that such creative reuse requires any human input at all.[18] Claims to more freedom in the commercial use of copyright works for AI purposes can rely on a whole range of fundamental rights, from freedom to research and the right to conduct a business (Article 16 EU-Ch.) to any communicative freedom embracing freedom of art as such (Articles 11 and 13 EU-Ch.). A line of reasoning that can conveniently refer back to and inform questions of AI authorship and ownership; and, in that case, the view is maintained that copyright requires human input indeed, such perceptions of romantic authorship should at least be overcome via a new sui generis or neighbouring right that would provide a much-needed incentive for the AI industry[19] to innovate and create ever more creative systems to replace any need for human creativity over time. However, creators would also need to defend their position vis-à-vis exploiters, who may seek to profit from, especially, using licensed content for data mining purposes by way of a new set of licensing agreements.

Countering these patterns of argument is arduous. A first issue that arises concerns the insufficient scope of copyright law. If "hurt feelings" are taken seriously, it soon becomes clear that any notion of a personality right must, initially and subject to defining and formulating re-exceptions, take into account the potential ability of the law to protect aspects that are not part and parcel of traditional copyright law. The idea that a right may exist

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[17] See Case 469/17, Funke Medien NRW GmbH v Bundesrepublik Deutschland, ECLI:EU:C:2019:623, (Jul. 29, 2019); Case 516/17, Spiegel Online GmbH v Volker Beck, ECLI:EU:C:2019:625, (Jul. 29, 2019).

[18] In other words, essentially the same argument put forward in favour of ascribing authorship to AI, see Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 5 Stanford Tech. L. Rev. 1, 20 (2012).

[19] Tim W. Dornis, *Artificial Creativity: Emergent Works and the Void in Current Copyright Doctrine*, 22 Yale J. L. & Tech. 1, 21-22 (2020); Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma*, 57 IDEA 431 (2017); for the opposite view under US law - creativity, under copyright law, means human creativity - see only Daniel J. Gervais, *The Machine as Author*, 105 Iowa L. Rev. 2053, 2069 (2020).

that, on balance, encapsulates to a certain degree of control over a specific artistic oeuvre (or representative properties or elements thereof)[20] by and large, and which inadvertently must encompass what is, in some contemporary academic literature, usually dismissed as irrelevant: training the systems[21] to eventually emulate a particular distinctive artistic style, which in turn reflects the most restricted notion of pastiche.[22]

A much more complex issue arises when considering the idea that AI output should be treated as a general blueprint and/or as a consequence of exercising a fundamental right ascribed to the AI system itself. The relevance of pastiche in the context of platform liability[23] is not simply a matter of overcoming the rigidity of the EUCD as a piece of legislation that, first and foremost, is based on a high level of protection[24] for the benefit of exploiters; it is also not a mere aspect of rendering copyright law more flexible by way of introducing a "disguised" general fairness clause for courts to handle flexibly. The magnitude of the exception lies in its function as a mediator of fundamental rights as regards new media in a very general sense, to be perceived as—as will be analysed in more detail herein—supra-individual fundamental rights,[25] against which individual and negative dimensions of freedom of art will be

[20] See Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 9, 2023, I ZR 203/22, (Ger.) (rejecting such extensive scope of copyright towards a creators' oeuvre).

[21] See also Andrés Guadamuz, *A Scanner Darkly: Copyright Liability and Exceptions in Artificial Intelligence Inputs and Outputs*, SSRN (2023), http://dx.doi.org/10.2139/ssrn.4371204.

[22] Frédéric Döhl, *The concept of "pastiche" in Directive 2001/29/EC in the light of the German case Metall auf Metall*, 2 Media in Action: Interdisc. J. on Coop. Media 37 (2017).

[23] The intricacies raised by platform liability for copyright cannot be covered here in detail. Fundamentally, these arise because of various interests that the legislator must recognize and which often cancel each other out, including those of (established) authors, copyright exploiters, platform users and the operator of the platform itself. See Martin Husovec, *Remedies first, liability second. Or why we fail to agree on optimal design on intermediary liability*, The Oxford Handbook of Online Intermediary Liab. 92 (Oxford Univ. Press 2018).

[24] See EUCD, Recital 9.

[25] See generally Andreas Fischer-Lescano, *Der Kampf um die Internetverfassung* (2014) Juristenzeitung (JZ) 965 (discussing the complexities associated with constitutionalizing "user rights" as rights without a subject, as reflections of claims to freedom in relation to internet governance).

much more difficult to enforce in any sense of proportionality.[26] Overall, those advocating AI—and thus marginalizing the interests of human creators—can rely on a convenient pattern of arguments that can be made: AI represents a medium of communication, and so should be ascribed personhood. If so, it can rely on freedom of art, as reflected specifically in the pastiche exception. In turn, AI applications can be characterised as mediators of freedom of communication altogether, just as platforms. From here, it is only a small step to persuasively advocate for greater freedom in the context of data mining (and other copyright exceptions that may become necessary to safeguard any preparatory input of protected content).

The article will address the most imperative concerns in turn, in a dialectic manner. After a brief discussion on the new transparency rule in the (proposed) AI Act and the potential scope of a new data mining exception, a more detailed exegesis of the pastiche exception and related notion of AI as a medium exercising fundamental rights will be undertaken. These references to fundamental rights are of crucial importance because, obviously, a general permission to use artistic works and to appropriate qualities of an artist's legacy immediately reinforces claims for a far-reaching autonomy to use such material for training data. The pastiche exception will be analyzed by reference to, first and foremost, the recent decision rendered by a German Higher Regional Court[27] in the ongoing litigation between members of the German electronic music pioneers *Kraftwerk* and hip hop producer *Pelham*. In that decision, the court considered the reproduction of a sound sample as covered under the pastiche exception. The sample taken was, according to the court, protected both as a work of music and as a phonogram.

The chief line of argument presented here is: the threats of AI vis-à-vis human creativity require a specific approach and calibration of legal rules and principles, and that the function of freedom of art vis-à-vis AI is therefore contingent upon other factors that do not apply as such in dissimilar constellations: in short, the construction of liberties can differ because it is

[26] On the EU proportionality requirement see generally Jonas Christoffersen, in: Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham, 2017), pp. 19 et seq.; Caterina Sganga, *The Research Handbook on Human Rights and Intellectual Property Fundamental Rights Saga in EU Copyright Law: Time for the Boundary-Setting Season?* (2019) Medien und Recht International (MuR Int.) 56.
[27] OLG Hamburg (2022), GRUR-RS 27172.

contingent upon the environment in which, for example, exceptions such as pastiche apply—in "ordinary" copyright disputes, as a matter of platform regulation, or indeed vis-à-vis AI.

The concept of negative freedom[28] of art permits a differentiated approach that can result in affording creators, ultimately, a right to either object or ask for payment (as a right to elect); from a legislative point of view, the scope of such right applied vis-à-vis generative AI necessarily depends on the preliminary question whether AI itself can, and if so, for what reasons, can be understood to be a bearer of fundamental rights at all.

The central argument pursued herein is: the functions of freedom of art and expression, as reflected particularly in pastiche, must be further differentiated according to whether the use in question is made by a human (even partially, such as in cases where AI is used as an artistic tool) or whether human creativity is appropriated by the machine exclusively. Accordingly, the regulatory environments demand a more differentiated and nuanced treatment—the expansion of user freedoms as a means to sustain and promote freedom of expression on platforms cannot simply be applied to a general freedom to use AI for the same purpose.

A. MACHINE OWNERSHIP, TRANSPARENCY RULES, AND DATA MINING: THE STATE OF PLAY

[28] On the negative dimension of fundamental rights as rights to object see generally Isaiah Berlin, *Two Concepts of Liberty*, in: Isaiah Berlin, Four Essays on Liberty, 1-54 (Oxford 1969); Johannes Hellermann, *Die sogenannte negative Seite der Freiheitsrechte* (Berlin 1993); Karl-Heinz Ladeur, *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation* (Berlin 2000); Karl-Heinz Ladeur, *Die Beobachtung der Grundrechte durch eine liberale Grundrechtstheorie* 50 (4) Der Staat, 493 (2011); Hugh T. Miller, *Negative Freedom* 25 (4) Administrative Law & Theory 571(2003); Stuart Doyle, *A Defense Against Attacks on Negative Liberty* 24 Journal of Libertarian Studies 317 (2020).

The present debate on AI orbits around rather disjointed issues. As regards copyright law, much of the debate is informed by essentially contrasting positions. On the other hand, positions highlight the need for retaining notions of romantic authorship,[29] thus positing that copyright law cannot, for being anthropocentric, incorporate new forms of "machine creativity"—or, and because of that, new neighbouring or sui generis rights tailored to the needs of the AI industry must be adopted to close that gap. UK copyright law, as will be seen, stands somewhere in between. Concurrently, there is much debate that considers whether, and if so why, AI should be ascribed personhood as a matter of fundamental rights law,[30] or for purposes of reconstructing liability rules, or whether —much in the same vein—AI can "own" works or inventions to achieve a complete equilibrium between humans and machines, barely disguised as mechanisms to foster innovation as highlighted not only by the industry but also policy makers.[31]

Oftentimes, assessments in both academic and policy debates, if analyzed more closely, convey the impression that the central tenet—ascribing personhood—is simply a matter of comparing the output generated by AI with what could have been created by human artists. Personhood is thus implied by "reading" legal rules into the machines' behavior,[32] a view that, by extension,

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[29] See only Jane C. Ginsburg & Luke A. Budiarjo, *Authors and Machines* 34 (2) Berkeley Tech. LJ 343 (2019); Enrico Bonadio & Luke McDonagh, *Artificial Intelligence as Producer and Consumer of Copyright Works: Evaluating the Consequences of Algorithmic Creativity* IPQ 112 (2020); for German law see Karl-Nikolaus Peifer, *Roboter als Schöpfer – Wird das Urheberrecht im Zeitalter der künstlichen Intelligenz noch gebraucht?*, in: Silke von Lewisnki & Heinz Wittmann, Urheberrecht! Festschrift für Michel M. Walter zum 80. Geburtstag, 222 (Vienna 2021).

[30] See discussion infra, Section [correct section label].

[31] For the debate in the UK, see *Artificial Intelligence and Intellectual Property: copyright and patents. Government response to consultation* (London, June 22, 2022), at 3 ("Intellectual property (IP) gives researchers, inventors, creators, and businesses the confidence to invest their time, energy and money in doing something new").

[32] This – ostensibly superficial – view has been seemingly adopted by the European Parliament, see European Parliament, Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics, 2015/2103(INL); European Commission, *Artificial Intelligence for Europe* COM (2018) 237 final. This was not pursued further. Instead the EP then highlighted human liability, see European Commission, *Report on the Safety and Liability Implications of Artificial Intelligence, The Internet of Things and Robotics*, COM (2020) 64 final. On the role of intellectual property rights as means to foster AI innovation see European Parliament Resolution of 20 October 2020 on intellectual property rights for the development of artificial

looks at the resulting artifact rather than the process of creating it.[33] From that perspective, AI *is*, simply, an author. It can then, without much contradiction and by easy extension, be considered as a bearer of fundamental rights, and hence—and here the different strands in the otherwise disenfranchised debates conflate—fully exercise any exceptions under copyright law (including, notably, the central pastiche exception discussed below) made for incentivising human creative reuses. The relevant exception, in addition, constitutes a subjective right,[34] which in turn can be ascribed to the machine as an autonomous creative decision maker.

B. TRANSPARENCY RULES UNDER THE AI ACT: TRANSPARENCY FOR WHOSE BENEFIT?

The most recent legislative installment concerning AI and copyright is the new transparency clause in the (proposed) EU Artificial Intelligence Act (AI Act).[35] Until recently, the efforts in

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intelligence technologies (2020/2015/(INI)). The U.S. Copyright Office, following the decision in *Stephen Thaler v. Shira Perlmutter, Register of Copyrights and Director of the United States Copyright Office, et al.*, No. 22-1564 (BAH), has asserted, from a more or less identical perspective as the UK, that "generative AI systems have the ability to produce material that would be copyright protectable if it were created by a human author," see United States Copyright Office, *Artificial Intelligence and Copyright* (Washington DC 2023), https://www.copyright.gov/ai/docs/Federal-Register-Document-Artificial-Intelligence-and-Copyright-NOI.pdf. For a similar approach see Amir H. Khoury, *Intellectual Property Rights for 'Hubots': On the Legal Implications of Human-Like Robots as Innovators and Creators*, 35 (3) Cardozo Arts & Ent. LJ 635 (2017). See further (on issues of liability) *Software Solutions Partners Ltd. v. HM Customs & Excise*, EWHC (Admin.) 971, paras. 66-67 (2007).

[33] See, related to this point, the reference for preliminary ruling to the Court of Justice in *BGH*, Dec. 21, 2023, I ZR 96/22, *USM Haller*, which raises the question whether the notion of creation is a matter of the process and subjective intentions of the author or whether subsequent appreciation of the object by the public is decisive in establishing originality.

[34] Funke Medien v. Bundesrepublik Deutschland, ECLI:EU:C:2019:623; Spiegel Online v. Beck, ECLI:EU:C:2019:625.

[35] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139, and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797, and (EU) 2020/1828, *Artificial Intelligence Act*, 2024 O.J. (L 146) 1, at Recitals 104-107, (Text with EEA relevance). Transparency obligations are stipulated in Article 53(1)(d) AI Act, formerly Article 28 (4)(c) of the proposed AI Act. The European Parliament adopted Amendments on 14 June 2023 to the proposal for a regulation of the European Parliament and the Council laying down harmonized rules on

the EU on the regulation of AI disregarded any implication of AI on copyright—it was indeed only the emergence of ChatGPT that prompted a closer political discussion. This changed with the proliferation of generative AI and subsequent criticism by rights holders. The final version of the AI Act, in short, contains a specific clause dealing with copyright as a matter of transparency—in keeping with the overall approach that considers AI as a consumer law matter.[36] Transparency thus means that certain policies are put in place, that the use of copyrighted material is documented, and that, in addition, providers of AI systems "generating synthetic audio, image, video or text content, shall ensure the outputs of the AI system are marked in a machine-readable format and detectable as artificially generated or manipulated."[37]

Accordingly, AI developers are obliged to provide information on works and other subject matter used for training AI applications, and that information must be machine-readable. In more detail, the new provision foresees that developers must centrally provide detailed summaries allowing rights holders to identify which works have been used. The Act will also clarify that AI development must be conducted in a manner compatible with copyright law. The inclusion of a copyright-specific clause follows the general "nature" of the AI Act as a piece of legislation concerned with transparency and "product liability".[38] As such, nothing much changes: the AI Act does not extend copyright expressly towards a right to prohibit the use of protected content upfront. The clause would only allow rights holders to enter into licensing negotiations post factum. Specifically, creators will see the transparency clause as insufficient because its central assertion is that copyright infringement must be accepted, and if (licensed) exploiters agree on licensing contracts to be agreed with the AI industry, it is more than doubtful whether such income would benefit authors. Evidently, this is an intended outcome: exercising

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artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206). See further Recitals 104-107, which outline obligations regarding copyright. Other than imposing transparency obligations, the AI Act is "without prejudice" to copyright (Recital 107).

[36] Katharina de la Durantaye, *Garbage In, Garbage Out: Regulating Generative AI Through Copyright Law* (2023), ZUM 645, SSRN 1, http://dx.doi.org/10.2139/ssrn.4572952.//dx.doi.org/10.2139/ssrn.4572952.

[37] See also Article 50(1)(a) Artificial Intelligence Act and Recital 106, concerning the obligation to respect an "opt out" under Article 4(3) of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSMD).

[38] De la Durantaye, *supra* note 36, at 7.

copyright would undermine the incentive to invest in AI systems, and innovation in the AI market (a market dominated by big U.S. and Chinese technology corporations) is at the heart of the AI Act, which overall focuses on AI applications that are deemed as high risk. Predictably, AI developers have pointed out that even the transparency obligations regulated under the AI Act would be too burdensome to implement and would thus hinder innovation. In practice, it also appears difficult to imagine if and how creators would use the transparency clause vis-à-vis technology giants so as to enforce rights. Finally, and predictably, the AI Act remains silent on personality rights—the appropriation of one's voice, to give but one example, has not been considered. In short, the AI Act does not provide protection—indeed, the contrary is true: once transparency obligations are met, it may effortlessly be argued that eschewing substantive copyright or personality rights issues reflects a central legislative objective.

II. COMMERCIAL DATA MINING: NO OPT-OUT?

Perhaps the most contested issue concerns the potential extension, for the benefit of the AI industry in training their machine applications, of the existing (general) data mining exception. As a matter of copyright, it has always been an open issue whether typical data mining is permissible in both the EU and UK., There are currently two types of copyright exceptions that may apply. First, where existing digitised works are fed into training applications, at least a temporary copy of these works will be created during the process, but such temporary copies are exempt from copyright infringement in the case that such temporary copies are transient and do not conflict with a normal exploitation.[39]

The (mandatory) exemption of such transient copies was introduced in Article 5(1) EUCD. In general, the objective of the exemption is to permit uses where transient copying is unavoidable and cannot be influenced by human users, most importantly with regard to acts such as internet browsing. Whether it applies in the context of data mining remains largely unanswered, and much here depends on whether the transient copies in question are considered

[39] See Article 5(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0029.

to affect the legitimate interests of the right holder. More importantly, the so-called text and data mining exceptions may apply.

The text and data mining (TDM) exceptions are intended to promote research in general (especially as regards "big data") and were initially not considered to regulate activities in the AI sector as such. At present, EU law recognizes two different concepts relating to text and data mining exceptions. Article 3 of the Digital Single Market Directive (DSMD)[40] exempts acts of reproduction (or extractions from a database) by certain research organisations and cultural heritage institutions, such as a publicly accessible library or museum, or a film or audio archive. This exception is largely based on the pre-existing and non-mandatory general research exception[41] and is limited to non-commercial uses. As such, the research exception (in most member states) allows certain institutions, as the case may be, to make copies for purposes of preservation. Where the data mining exception applies, its benefit must not be overridden by contractual agreements. However, it is also made clear that rights holders may still use technological measures to "ensure the security and integrity of the networks where the works or other subject matter are hosted," but that re-exception should not be misunderstood as providing a right to object for commercial gain; as the DSMD clarifies, the purpose is to allow rights holders only to maintain the integrity of the system. In the UK, a fair dealing data mining exception for non-commercial purposes was introduced in 2014,[42] which essentially covers identical non-commercial uses. The DSMD leaves it to member states to require compensation for such uses. It should be noted that the primary purpose of the data mining exception was not geared towards AI, but to promote non-commercial research in general. The provision would, however, rarely apply to training data given the commercial character of such use outside of relevant institutions.

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[40] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, 2019 O.J. (L 130) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790 (hereinafter DSMD).

[41] Article 5(3)(a) Article 5(3)(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0029.

[42] *Copyright, Designs and Patents Act 1988* § 29A (Eng.).

In addition, Article 4 (1) DSMD introduces a more generous exception applicable to anyone, this permits data mining for any purpose. The provision—which was not made with AI in mind but reflects freedom of science[43] - not only covers the processing of data (or works) but also allows the user to retain these for (future) data mining. However, in this case, right holders retain the right to—proactively—reserve rights if they opt out. Such an objection must be expressed before the use, and Article 4 (3) DSMD thus refers to "an appropriate manner," which includes machine-readable means, for example, metadata or terms and conditions indicated on websites. The reservation may also be included in a contractual agreement. However, there remains much uncertainty regarding the precise obligations of the TDM user, such as when the existence of an opt-out must be checked (continually?) or who bears the burden of proof in regards to the appropriate manner of declaring an opt-out.

Above and beyond these general problematic issues, opinions are divided regarding the application of data mining for AI purposes in particular: whilst, in general, freedom of research is certainly deemed as a necessary exception to copyright, creators have pointed out the potentially extensive and unknown consequences that AI (and, consequently, the use of creative works for training) may have on human creativity and artists' markets. Conversely, and evidently, large technology corporations consider copyright protection as the most serious threat to the development of the AI industry. The EU opt-out solution, indeed, is much less generous than in the U.S. or Japan, where data mining is considered either a fair use or generally as an activity that does not violate any exclusive economic rights, respectively. In Japan, using works as training data is generally permitted, i.e., data mining is seen as an act of "non-enjoyment" of the work which does not, as a matter of principle, affect any protected rights.[44] Political views also highlight the alleged need for a broader data mining exception so as to promote AI and remove disadvantages in global competition.

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[43] See Christophe Geiger, Giancarlo Frosio & Oleksandr Bulayenko, *Text and Data Mining: Articles 3 and 4 of the Directive 2019/790/EU*, in *Propiedad Intelectual y Mercado Único Digital Europeo* 27,38 (C. Saiz García & R.E. Llorca eds., Tirant lo Blanch 2019), Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2019-08, http://dx.doi.org/10.2139/ssrn.3470653.

[44] Tatsuhiro Ueno, *The Flexible Copyright Exception for 'Non-Enjoyment' Purposes – Recent Amendment in Japan and Its Implication*, 70 GRUR Int.'l 145, 145 (2021), https://doi.org/10.1093/grurint/ikaa184.

In the UK, the issue of whether an all-embracing data mining exception for anyone should be introduced is now being discussed afresh.[45] That general data mining exception, however, and most importantly, was never intended to deal with AI or to foster the AI industry in particular. Its function is to foster research, and as such, Article 4 DSMD may well be considered as too narrow and misguided as a clause that presupposes, mistakenly, ownership of pure data.[46] The introduction of a statutory remuneration right replacing the opt-out approach may be proposed[47] - albeit, as will be seen, such a solution would not fully embrace the potential threats to artists' personality rights.

III. AI ARTIFACTS AND COPYRIGHT SUBJECT MATTER IN THE UK: ALLOCATING ECONOMIC PREROGATIVES

In the UK, finally, the debate very much appears to centre around the "old" clause concerning computer-generated works, which essentially presupposes the existence of copyright in such output. The consensus—as regards statutory copyright law as it stands - is that AI Artifacts that have been "created" in a fully automated fashion do not attract copyright protection because such creations cannot be considered a personal or own intellectual creation in accordance with the case law of the Court of Justice concerning originality. In turn, the references to an "own" or

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[45] Patrick Vallance, *Pro-innovation Regulation of Technologies Review*, (Mar. 2023), https://assets.publishing.service.gov.uk/media/64118f0f8fa8f555779ab001/Pro-innovation_Regulation_of_Technologies_Review_-_Digital_Technologies_report.pdf;
UK Gov't, *A pro-innovation approach to AI regulation*, pt. 8, (Mar. 2023), https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach/white-paper. The UK government has back-tracked from its initial policy to introduce a general data mining exception for anyone, see House of Commons Culture, Media and Sport Committee, Connected tech: AI and creative technology: Government Response to the Committee's Eleventh Report of Session 2022–23, Third Special Report of Session 2023–24 , https://committees.parliament.uk/publications/42766/documents/212749/default/. A working group, led by the IPO, was established in May 2023 with the express aim of agreeing on a code of conduct by the summer of 2023. Discussion have continued long past the original target date.

[46] Thomas Margoni & Martin Kretschmer, *A Deeper Look into the EU Text and Data Mining Exceptions: Harmonisation, Data Ownership, and the Future of Technology* 71 GRUR Int. 685,_ (2022).

[47] Martin Senftleben, *Generative AI and Author Remuneration* 54 IIC 1535,_ (2023).

"personal" creation highlight the long-standing consensus that only humans can be owners of copyright. This principle (which is derived mainly from the personality-rights based approach in civil law countries) has also, as regards AI, now been adopted by a U.S. court: in *Thaler,*[48] the court clarified that human contribution is a minimum requirement, and consequently the court upheld a decision by the U.S. Copyright Office to reject an application for registration on behalf of the DABUS system.[49]

For UK copyright law, much depends on how the salient provision in Sec. 9 (3) CDPA 1988 is understood. Therein, the law expressly states that copyright in a work that has been generated by a computer is owned by the person (or entity) that made the "necessary arrangement."[50] This could indeed mean that the law expressly recognizes copyright protectability. However, there are major counterarguments. The provision, first, expressly and solely governs questions of ownership. Secondly, it presupposes the existence of a work, which in turn requires the presence of an "own intellectual creation" following an anthropocentric approach to copyright. However, the consequences of European originality for the general viability of that clause have never been fully considered in the current debate. Nevertheless, these interpretative and doctrinal predicaments can perceptibly be overcome by UK courts in the future.

In sum: the debate surrounding AI and copyright—as regards both issues of data mining and ownership of AI output—are a certain reflection of quests towards a purely economic solution, and indeed all concepts and criticisms point towards a monolithic understanding of, on the one hand, copyright as a right protecting investments and a perceived need to also protect AI development as well as any AI output, either by way of tweaking 1copyright law or, failing that, via a new neighbouring right. As regards data mining in particular, the scope of freedom under that

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[48] Stephen Thaler v. Shira Perlmutter, Register of Copyrights and Director of the United States Copyright Office, et al. Case No. 1:22-cv-01564-BAH, (D.D.C.), https://fingfx.thomsonreuters.com/gfx/legaldocs/lbvgooeoqvq/AI%20COPYRIGHT%20LAWSUIT%20thalerdecision.pdf.>.

[49] In a similar fashion, the UK Supreme Court had previously arrived at the same conclusion (and for the same claimant) regarding the notion of inventorship under patent law. Thaler (Appellant) v Comptroller-General of Patents, Designs and Trade Marks (Respondent) [2023] UKSC 49.

[50] The only decision unrelated to AI is Nova Productions v Mazooma Games Ltd. [2006] EWHC 24 (Ch.), which held that the program developer is considered the owner.

exception reflects—as the first step in the chain of exploitation—the most crucial obstacle for artists to retain control. There is an apparent danger for artists for several reasons. First, the data mining exception itself is questionable as such because much depends on the vexed question whether, in fact, the mining process requires the making of copies; second, extending the exception in favour of an entirely free use of works for training AI systems relies on an overbroad notion of freedom of commercial research, disregarding personality interests. An opt-out model would allow licensing solutions, but it seems doubtful whether it would (to say the least) be authors or exploiters who would benefit from such income. The same problem arises in case a statutory remuneration scheme is preferred, though this will be considered in more detail later here. Lastly, tweaking and adjusting individual copyright norms in a piecemeal fashion with a view to fostering generative AI necessarily leads to entirely ignoring the real and essential interests at stake. These interests, above and beyond discrete aspects of modifying copyright doctrine, emerge more clearly only when considering the implications of communicative freedoms as reflected in the notion of pastiche.

IV. AI AND PASTICHE: A TELEOLOGICAL DEAD END STREET?

Once the Artifact arrives on a platform, questions pertaining to pastiche arise. The pastiche exception was first, as a matter of EU secondary, introduced in Article 5(3)(k) EUCD, which allows member states to maintain or introduce an exception for "caricature, parody and pastiche".[51] The text was lifted from pre-existing French and Belgian statutory models, and apparently inserted into the catalogue of exceptions and limitations (Article 5 EUCD) at a late stage. Implementation of the pastiche exception was left to member states. The exception was then rendered mandatory for the platform used (Article 17 (1) DSMD).[52] A first aftermath was the growing and undisputable insight that the notion

[51] The following is limited to references to pastiche as the most extensive representation of freedom or expression.

[52] Article 17 (7) DSMD, referring to the exceptions for quotations and parodies, pastiches and caricature under Articles 5 (3) (h) and 5 (3) (k) EUCD respectively. See further J Quintais/G Frosio/S van Gompel/PB Hugenholtz/M Husovec/ M Jütte/M Senftleben, "Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics" SSRN (2019), https://ssrn.com/abstract=3484968.

of pastiche applied to any constellation where infringement by way of—technically—reproduction or adaptation had been established, way above and beyond the standard construction of pastiche as describing appropriations of uncopyrightable artistic styles and mannerisms. Obviously, the exception would be obsolete otherwise. In terms of implementation, differences exist. In the UK, the pastiche exception is subject to the traditional fair dealing test.[53] In Germany, no further restrictions apply.

A. PASTICHE: EUROPEAN AND DOMESTIC FRAMEWORKS

In Germany, a dedicated and express reference to pastiche was introduced only following the decision by the Court of Justice in *Pelham,*[54] according to which the existing "free use" clause (§ 24 UrhG) was considered incompatible with secondary EU law. The facts of the case are well known, given that this litigation commenced in 2001. Its implications on copyright law have been deliberated *ad nauseam* but are so forthright that a brief exposé should suffice. In short, the defendant had used a sound snippet (the sound of metal banging on metal) from a recording by the claimants. Whilst the first wave of litigation, up to the German Supreme Court (BGH), considered only the potential protection of the sound snippet under the neighbouring right for sound recordings and concluded that the defendants could have avoided any infringement by recreating the sound (considered not to be a work of authorship then but rather a protected sound recording) themselves. Following a constitutional complaint by the defendant, the German Constitutional Court (BVerfG) referred the matter

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[53] Sec. 30A (2) CDPA 1988. See *Shazam v. Only Fools The Dining Experience,* [2022] EWHC 1379 (IPEC), paras. 150-155. On the notion of fairness in UK copyright law applicable to Article 5(3)(k) EUCD see M Cameron, "Copyright exceptions for the digital age: new rights of private copying, parody and quotation" 9 (2014) JIPLP 1002; J Griffiths, 'Fair dealing after Deckmyn – the United Kingdom's defence for caricature, parody & pastiche' in: Richardson/Ricketson (eds), Research Handbook on intellectual property in media and entertainment (Edward Elgar 2017), 64, 73: A Lay, *The Right to Parody. Comparative Analysis of Copyright and Free Speech* (Cambridge 2019), 130 et seq.; G Westkamp, Licensability as Property, in: G Ghidini & V Falce, Reforming Intellectual Property (Cheltenham 2022), 266 (2021) SSRN http://dx.doi.org/10.2139/ssrn.4061033.

[54] BVerfGE 142, 74; Case 476/17 - Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben, ECLI:EU:C:2019:624. There exist, in total, twelve decisions in this litigation, which commenced in 1999. These will not be discussed here in detail.

back,[55] asserting that the BGH had disregarded the implications of freedom of art and, more precisely, demanded a proportionality assessment that had to take into account an art-specific analysis to be conducted under the (now defunct) free use clause - in particular as regards the shift in context from one musical genre to another. The matter then was presented to the Court of Justice for preliminary ruling, since the "art-specific" approach taken by the BVerfG was inadvertently founded upon fundamental rights considerations that had no immediate reflection in the "closed" list of limitations and exceptions under secondary EU law.

The Court of Justice thus basically eschewed the thorny question—asking how domestic fundamental rights can be applied in a copyright context—and asserted that infringement of the neighbouring right in question was a matter of its recognisability and/or audibility to the human ear. Further, the Court of Justice held that the German "free use" clause under § 24 (1) of the Authors' Right Act was incompatible with the closed enumerations of exceptions and limitations under Article 5 EUCD, and in consequence that rule was repealed.[56] When the case returned to the OLG, that court was tasked with assessing whether such recognisability, as a matter of fact, was present, but instead shifted the focus of the assessment into an entirely different direction: inter alia[57]. The court held that the sounds in question were the result of a creative process, and thus protectable as a musical work, but that the defendant could rely on pastiche. The case is currently pending before the Court of Justice following an order by the BGH.[58]

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[55] See M Mimler, "Metall Auf Metall' – German Federal Constitutional Court Discusses the Permissibility of Sampling of Music Tracks" 7 (2017) 1 Queen Mary Journal of Intellectual Property (QMJIP) 119; for a full portrayal of the saga see JP Quintais & BJ Jütte, "The Pelham Chronicles: sampling, copyright and fundamental rights" 16 (2021) 3 Journal of Intellectual Property Law & Practice, 213.

[56] For a full explanation of the intricate consequences of repealing § 24 UrhG and replacing the free use clause with an exception for caricature, parody and pastiche see T Kreutzer, The Pastiche in Copyright Law: Expert Opinion on a Copyright-Specific Definition of Pastiche in According to Sec. 51a German Copyright Act (Berlin 2022), pp. 33 et seq., https://freiheitsrechte.org/uploads/documents/Englische-Dokumente/Democracy/Pastiche_in_Copyright_Till_Kreutzer_GFF_english.pdf

[57] Federal Supreme Court (BGH), Order of 14.9.2023, I ZR 74/22 - „Metall auf Metall V"; Court of Justice, pending Case C-590/23 (23.9.2023).

[58] Case C-476/17, Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben, ECLI:EU:C:2019:624.

The irritations that ensued from the *Pelham* case, in turn, are a direct consequence and effect of the particular status that is ascribed to (re-)creative uses on social media platforms—the German legislator had made it clear that the implementation of Article 17 DSMD ought not result in decreasing fundamental rights of users, including freedom of art in particular, to sustain creative liberties in accordance with archetypal social media phenomena such as mash-up, memes and similar techniques considered culturally relevant. The recognition of such uses as covered under fundamental rights law was inevitable not only as a consequence of increasing social expectations as regards user freedom—a general tenet in the incremental evolution of copyright towards more generous access rules developed by courts[59] - but also as a matter of primary EU law: the Court of Justice had generally asserted that copyright exceptions must be construed in light of fundamental rights in general, thus turning social expectations into subjective rights. The Court of Justice also clarified that the EU-Ch. demands an implementation of Article 17 DSMD that respects user freedoms as a matter of proportionality, albeit without providing much guidance on how such balancing of interests is to be achieved in detail[60], at which point reliance on economic rights for the benefit of copyright industries vis-à-vis pastiches, etc. was removed from the equation. One particularly significant effect of the pastiche and parody exception, as introduced expressly in Germany, was, consequently, that an anti-thematic treatment of the original work[61] for parody could no longer be upheld—the "new" exception, anchored in fundamental rights law, eradicated reliance on property.

In Germany, accordingly, a two-tier regulatory approach was adopted: for platform uses that fall within the remit of Article 17 DSMD, a dedicated new Copyright Service Provider Act was introduced, under which authors receive statutory remuneration for any use that falls under the caricature, parody, and pastiche exception. Liability for such payments lies only with the platform operator—for traditional disputes outside the platforms covered

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[59] D Wielsch, Zugangsregeln: Die Rechtsverfassung der Wissensteilung (Tübingen 2008), passim.

[60] Case C-401/19 Republic of Poland v European Parliament and Council of the European Union, ECLI:EU:C:2022:297.

[61] BGH, 11.03.1993 - I ZR 264/91, (1994) GRUR 191 – Asterix Persiflage; the requirement of anti-thematic treatment was abandoned, as a consequence of the Court of Justice decision in Deckmyn , in BGH, 28.07.2016 - I ZR 9/15, BGHZ 211, 309 – "Trimmed to Fat".

under the Act, i.e., those which are governed by the new exception in § 51a UrhG, no such payment obligation exists. There is, however, no material distinction between the statutory meaning of pastiche as applied in the context of platform uses and other transformative or recombinant uses. The term pastiche, thus, remains identical. Indeed, the reference to caricature, parody and pastiche describes a single and dedicated metaphor through which fundamental rights are rendered directly applicable in a copyright context; freedom of art, encompassing standard social media uses and techniques, therefore is ascribed a status that is indistinguishable from traditional constitutional notions of art and creativity, and necessarily and concurrently those art forms upon which copyright protection and the notion of creativity that underpins the copyright system by and large rests.

B. Over-spilling Effects and the Void in the Proportionality Test: An All-embracing Freedom of Re-Use?

The effect of the legislative recognition of an absolute equilibrium between social media uses and traditional expressions of artistic creativity is twofold. As regards platform uses, the potency now attributed to freedom of art has led to a complex regulatory scheme, under which users may flag any content uploaded as falling within the remit of pastiche, and it is up to right holders to instigate proceedings should they disagree, which drastically reduces the threats to fundamental communicative rights that otherwise arise where content can be immediately removed by way of applying filtering software. Yet authors, who can expect financial income in case their works are used for the purpose of pastiche, would manifestly have very little interest in having such content removed, as in such a case no payment is due. Notably, such a claim to remuneration applies irrespective of whether the uploaded Artifact had been created by autonomous AI or by a human, and creators still have the opportunity to instigate proceedings should they wish to have AI-created content on platforms removed. At this stage, however, the potential knock-on effects of a novel understanding of freedom of art exercisable via the pastiche notion become apparent—from the perspective of any creator who feels his or her identity and personality has been unduly appropriated by an AI application relying on pastiche as a

subjective right.[62] It will rapidly be noticed that attempts to exercise rights under copyright may well be a futile struggle. In short, the notion of freedom of art as applicable to pastiche leaves very little room for manoeuvre. Once a recombinant, transformative, or referential purpose is established, freedom of art or communication will usually prevail, and thus the artist has no further redress.

Claims to such redress appear, however, relevant specifically as regards AI.[63] The OLG Hamburg considered that the use of sounds protected as musical *works* by the defendant constitutes pastiche, and thus no further proportionality assessments had to be undertaken. The decision rests particularly on the shift in context and genre (from electronic music to hip hop), the self-perception of the hip hop community as regards sampling and the previous guidance in that matter as asserted by the Constitutional Court, according to which the "genre" (or art)-specific use had to be considered in light of the freedom of art enjoyed by the defendant. This leaves a void as regards the hypothetical interests. Evidently, the litigation is not motivated by the prospect of receiving licensing fees but by the desire to prevent precisely the use of their sounds not as an element of a sound recording but as a reflection of their artistic oeuvre by and large. In other words, the true aspiration of the claimants was to be given protection as a reflection of artistic self-perception, precisely as a right to oppose the act of appropriation of the sounds which represent that self-perception.

Can, then, an overbroad notion of pastiche be barricaded in some way? Technically, a range of potential rights to object may be distilled from copyright law and, more so, beyond. These can be further segregated between teleological approaches and the applicability of extrinsic parameters, most importantly as regards aspects of fairness, especially where the AI Artifact interferes with the authors' market. The first would require a strenuous exegesis

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[62] See further below, C. I.

[63] OLG Hamburg (2022) GRUR-RS 27172 paras. 43 et seq. – "Metal on Metal III". The decision is now pending before the Court of Justice after it was referred to the BGH. The BGH asked, most importantly, whether the pastiche exception can be considered as a general clause for any engagement with pre-existing subject-matter and whether there must be an intention of the user to engage in pastiche. See also LG Berlin, 2.11.2021 - 15 O 551/19 (any recombinant use and representation in a different context constitutes a pastiche).

as regards an ontological meaning (what *is* pastiche?)[64]—such as to restrict the term to acts of appropriations of non-protectable subject matter - which would cause inconsistencies with the legislative objective. The second requires detecting potential extrinsic constraints, which in turn can be classified as pertaining to either ideational or commercial expectations. Technically, this results in a proportionality test, though it remains unclear how precisely such a "practical concordance" test can or should be framed.

The current debate on pastiche thus refers broadly to different legal principles: that the applicability of pastiche depends on a balancing exercise as regards the author's "legitimate interests" as technically required by the three-step test,[65] or—as in UK copyright law—on fairness, a tenet that, in turn, rather loosely refers to commercial expectations. Accordingly, the proportionality test must be conducted between the interest of users and the economic interests of right holders—authors and exploiters alike, rooted in the property clause under Article 17 EU-Charta.

There are objections against an approach focusing on allegedly detrimental economic or commercial effects only, both as regards the express legislative objective underpinning the German UrhDAG and the assertions by the Court of Justice that freedom of art, via the caricature, parody and pastiche exception, must be maintained in the context of platform liability and beyond[66], that is, as a generally broad exception through which expectations of user creativity, whether as a matter of platform uses or as a matter of an ordinary copyright dispute. Generally, one obvious consequence of any proportionality deliberation based on commercial fairness is that it leads to a prevalence of extensive property notions, much in the sense that any potential licensability of a transformative or recombinant use may be considered as infringing.[67] That insight also disqualifies a broad application of

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[64] See, for such approach, E Ortland, „Pastiche im europäischen Sprachgebrauch und im Urheberrecht" 14 (2022) 1 Zeitschrift für Geistiges Eigentum (ZGE) 3, 27 et seq.

[65] Article 5(5) EUCD.

[66] Republic of Poland v. European Parliament, Case C-401/19, Ilešič, Action for Annulment, [Ct. of Just.](May 24, 2019).

[67] See Manfred Rehbinder & Alexander Peukert, Urheberrecht, para. 525 (Munich 2018), (restricting the scope of the exception in case the use has serious effects on the marketability of the original); see also, on the problematic issue as to what may amount to such "commercial" effect Guido Westkamp, *Licensability as Property*, in Reforming Intellectual Property 266 (G Ghidini & V Falce, eds. 2022).

the "legitimate interest" tenet under the three-step test, which is generally perceived to apply predominantly vis-à-vis market-based intrusions.[68]

The same objection applies to the rather more appealing idea of applying a notion of confusion as a constraint to pastiche uses. Such re-exception applies in some member states as well as under the potentially applicable action for passing off in the UK.[69] However, confusion can effortlessly be prevented and avoided once an AI-generated artifact is labelled as such. In addition, and more substantively, the notion of confusion is an entirely opaque concept where it is applied to transformative or recombinant uses as a matter of copyright law. Confusion, as the case may be, may relate to the original work or to authorship (i.e., confusion as to artistic origin), but it may also relate to—again—constellations where the audience concludes that the use had been licensed, a supposition that in turn leads back to a predominance of property considerations.

The crucial objection is, however, that emphasising "property" (or relying on economic considerations derived from unfair competition law)[70] does not allow for properly distinguishing between authors' and exploiters' interests, and results in a false framing of the proportionality exercise by and large. Exploiters, as noted, may well wish to license any use for AI purposes (thus including both the use for training data, and any subsequent use such as for pastiche), preferably, of course, without any intercession from creators; an immovable and partial reliance

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[68] Ansgar Ohly, Urheberrecht im digitalen Binnenmarkt – Die Urheberrechtsnovelle 2021 im Überblick" (2021) Zeitschrift für Urheber- und Medienrecht (ZUM) 745, 748.

[69] The application of the action for passing off as a means to protect personality interests raises divergent issues so as to accommodate Article 8 ECHR under UK law; see *Fenty v Arcadia Group Brands Ltd.*, EWHC 2310 (U.K. 2013); Irvine v. Talksport [2002] 1 WLR 2355 (Ch), pp. 2361 – 2363, paras. 18 – 21; Guido Westkamp, "Sui Generis Rights, Unfair Competition and Extended Causes of Action", in *Intellectual Property, Unfair Competition and Publicity – Convergences and Development,* 61-96 (Nari Lee, Guido Westkamp, Annette Kur, Ansgar Ohly, eds. 2013): Hazel Carty, "The Common Law and the Quest for the IP Effect" 3 IPQ 237 (2007); CN Ng, "The Law of Passing Off – Goodwill beyond Goods", 47 IIC 814, 817–842, (2016).

[70] See also Stefan Scheurer, "Artificial Intelligence and Unfair Competition – Unveiling an Underestimated Building Block of the AI Regulation Landscape" GRUR Int. 834, 836 (2021); for related issues of market considerations under the US fair use clause Gary Rinkerman, "Artificial Intelligence and Evolving Issues under US Copyright and Patent Law" 6 (2) Interactive Entertainment Law Review 48. 56 (2023).

on commercial prerogatives thus neglects ideational interests. Finally, evidently defamatory, discriminatory[71] or pejorative[72] uses may be excluded from the application of the pastiche exception anyway as a matter of proportionality- but again, this is not the concern deliberated here.

To be sure, it is not the intention here to slate the decision by the OLG Hamburg in *Pelham*. Evidently, social expectations as regards platform uses require a broader recognition of freedom of art.[73] Certainly not all expressions by average users found on platforms or social media today align with a more orthodox and bourgeois perception of "art". Indeed, "pastiche" is a metaphor: not for a contemporary understanding of fundamental rights applicable in copyright, but for the need to reduce complexity as regards diverse interests in the context of platform regulation—noticeably with repercussions on how pastiche, or freedom of art, is understood in an "ordinary" copyright context where that freedom may easily tip the scale in favour of the defendant and thus outweigh the interests of authors.

That distinction—between scenarios where, on one hand, freedom of art is a matter of judicial decision making and, on the other, where it is a matter of an all-encompassing platform regulation– is of utmost importance in an AI context. Where users flag, the legal "meaning" of pastiche and freedom of art as an issue of construction becomes mostly immaterial; instead, the law reacts to specific interests through a dedicated technological solution without a need or even a possibility for any nuanced proportionality considerations. Any perception of a qualitative imbalance between original and dependent creation is effectively evened out in return for payment, and likewise any economic interests of commercial

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[71] Deckmyn v. Vandersteen, Case C-201/13, RDI 581-594, Reference for a preliminary ruling [Ct. of Just.] (Apr. 17, 2013).

[72] See Christophe Geiger, "Elaborating a Human Rights friendly Copyright Framework for Generative AI" 55 Int'l Rev. for Intell. Prop. and Competition L. 1129 (2024) SSRN https://ssrn.com/abstract=4634992. Similarly, and much more relevant to the AI debate, a number of decisions in various jurisdictions have addressed the Google auto-complete function where that technology automatically added a pejorative message violating dignitarian personality rights. See Bundesgerichtshof [BGH] [Federal Court of Justice] May 14, 2013, BHGZ 197, 213 (2013)(Ger.); see Anna Beckers & Gunther Teubner, Three Liability Regimes for Artificial Intelligence, 163 (Oxford and New York, 1st ed. 2021).

[73] See discussion infra, D. II., especially as to whether the "extension" of the pastiche exception as a matter of user freedom on platform can sustain the argument that AI creations on platforms should be treated in an identical manner.

copyright exploiters are taken out of the equation—again, to predominantly avoid complex convolutions in law making, and thereby as a corollary to novel perceptions of creativity. In contrast, in ordinary copyright disputes, "pastiche" remains a metaphor for measuring out spheres of artistic freedom compelling the customary degree of judicial meticulousness, as the various conceivable outcomes of the *Pelham* dispute amply attest.

Yet what appears a persuasive approach in the context of platform regulation—a supra-individual right to freedom of expression - is not necessarily a convincing solution with a view to intrusions by AI applications upon the artistic self-perception of artists. In short, distinctions must be made according to dissimilar functions of fundamental rights, both in their positive and, crucially, negative libertarian dimension. Thus, the following section briefly outlines what may be categorised as the missing link in the debate.

C. THE ARTIST'S PERSONALITY RIGHTS AS A NEGATIVE LIBERTY: MORAL AND PERSONALITY RIGHTS TO OPPOSE

It is undisputed in constitutional theory that positive libertarian rights inherently include a negative dimension:[74] the bearer of the right may object against certain impositions of freedom of art as exercised by a third party. In constitutional literature, the existence of a negative freedom of art is sometimes referred to[75], though never as a right to object to any established "free" use under copyright law. That omission is predictable given that copyright law—the interplay between economic and moral rights on the one hand and exceptions on the other—determines that relationship as a matter of ordinary law.

A number of discrete patterns of argument already point towards such a negative freedom of art concept, more accurately understood as a general artistic personality right that ultimately emanates from notions of artistic self-autonomy. The moral right to object to a derogatory treatment under copyright law comes close, in that it can conceptually be calibrated as a right to indirectly apply in cases where—even in the absence of any modification or treatment— the author or performer can successfully object to uses that convey an undesirable message that the owner of the right had

[74] Johannes Hellermann, Die sogenannte negative Seite der Freiheitsrecte, 92 (Dunckler & Humblot, 1993).
[75] For German constitutional law, see Johannes Hellermann, Die sogenannte negative Seite der Freiheitsrecte, 92 (Dunckler & Humblot, 1993).

consented to the use for political purposes. Likewise, freedom of art, where it conflicts with personality rights, can be severely limited: an intrusion into the defendants' intimate sphere limits the exercise of a novelist's liberty—even where the defendant, as a real person, is disguised as a fictional character, such as in a *roman à clef*.[76]

The recognition of an artist's personality right should, however, not be misunderstood as simply extending or modifying existing substantive copyright law towards a general and opaque personality right. The function of such a right lies predominantly in allowing a clearer perception of how personality interests in relation to human creativity can frame any future legislative regulation of the inherent collisions between machine and human creativity. The notion of a negative right to object based on artistic self-perception also has the advantage of permitting the inclusion precisely of aspects such as appropriations of style, or emulations of a performer's distinctive voice, or any other characteristic that pertains to an artist's individuality. It does not mean, likewise, that a right to object on such a basis must inadvertently result in limiting the freedom to engage with art by and large. As personality rights law amply demonstrates, it has the capacity to develop re-exceptions—for example, the general prohibition to use the image of a person for commercial gain by way of advertising is permitted provided that the message conveyed can be characterised as political comment.[77]

There is an obvious void from the claimants' perspective. Evidently, the litigation is not motivated by the prospect of acquiring licensing fees, but to prevent the use of their sounds not as an element of a sound recording but as a reflection of their artistic oeuvre. In other words, the true desire is to be given protection as a reflection of artistic self-perception, thus the very act of appropriation by certain representatives of a different genre (hip hop). Copyright law cannot (and indeed should not) accommodate such a claim that would encompass an entire artist's

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[76] Order of the First Senate [Federal Constitutional Court] June 13, 2007, BVerfGE 119, 1-59 (102)(Ger.).

[77] Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 10, 2006, BHGZ 169, 340 (2006)(Ger.). See further Franz Hofmann, The economic part of the right to personality as an intellectual property right? A comparison between English and German Law, 2 ZGE / IPJ , 1, 8 et seq. (2010) ; Guido Westkamp, "Personality Rights, Unfair Competition and Extended Causes of Action," in Intellectual Property, Unfair Competition and Publicity 61 (Nari Lee, Guido Westkamp, Annette Kur & Ansgar Ohly eds., 2014).

opus, and this is not what is suggested here. But if that personality-based assertion (which was not argued during the various stages of the dispute decided by the OLG Hamburg in *Pelham*) is taken seriously, a broader notion of legal protection for such claims to artistic self-autonomy and respect is obvious that brings such claims into the proximity of general personal rights—resulting in a need to formulate parameters and criteria for a hypothetically open-ended balancing of rights test conducted between two claims to divergent artistic spheres and liberties.

Necessarily, that position requires further differentiation as a matter of framing the balancing exercise and to avoid situations where the two claims to freedom of art cancel each other out. Criteria that may speak in favor of artistic self-autonomy—and that would go beyond uses that have a "detrimental" dimension[78]—may include the recognition of the artistic influence and power to innovate, the pioneering work in the establishment of electronic music as a new genre, and indeed *Kraftwerk's* general artistic self-perception that has transported the idea of machines into the realm of human creativity—thus, the very recreation and emulation of "robots" that transcends *Kraftwerk's* musical legacy (from machines into the human realm) is the opposite of what AI does.

In sum, integrating broader notions of personality rights would have forced the court to the rather different considerations whether—as a matter of constitutional law—the desire to object to an appropriation and potentially an unwanted association with the offending genre would have altered the outcome of the case, much in the sense of establishing a re-exception to the otherwise prevailing positive freedom of art as exercised by the defendant. The proximity to claims for the protection of how one's life is represented in art or media is obvious. Conceptually, such a right can operate as a basic principle that can encompass economic considerations. Indeed, the definition given to freedom of art under the German constitution highlights that the—as such, unrestricted—liberty encompasses both the creative process, i.e. the making of a work of art, ("*Werkbereich*") since the exploitation, marketing and any other relevant subsequent uses in the system of art ("*Wirkbereich*").[79]

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[78] In its "Esra" decision, the Constitutional Court asserted that personality rights can be exercised against the otherwise unrestricted right to freedom of art at least where the "intimate sphere" is affected, see Order of the First Senate [Federal Constitutional Court] June 13, 2007, BVerfGE 119, 1-59 (102)(Ger.).

[79] See generally S Whyatt, Free to Create: Artistic Freedom in Europe, Council of Europe report on the freedom of artistic expression, Strasbourg 2023; for

Necessarily, that suggestion requires further differentiation as a matter of framing the balancing exercise as regards a future regulation of generative AI - and so to avoid situations where the two claims to freedom of art cancel each other out. The *Pelham* facts, again, offer copious hypothetical arguments and permit the elaboration of criteria that would tip the scale back in in favour of artistic self-autonomy and self-determination—and that would therefore exceed requirements of a "detrimental" facet[80]—may effortlessly include the recognition of artistic influence and power to innovate, their pioneering work in the establishment of electronic music as a new genre, and indeed *Kraftwerk's* artistic self-perception: the recreation, mimicking and emulating of "robots" and the inversion of the machine into the human realm that transcends *Kraftwerk's* entire work is, precisely, the opposite of what AI does. Re-detecting such negative liberty more meticulously thus reintroduces a vital modification to the standard copyright assessment - consequently, any appropriation of feature, style, or characteristic properties by AI must be assessed in light of whether such dealing resembles, more metaphorically, the distinctive features of the oeuvre and is therefore likely to affect the claim to artistic self-perception and self-autonomy.

Once that claim is recognized, the analysis needs to turn to the probably most contested issue addressed herein—can AI be the bearer of fundamental rights? Can, or should, AI be ascribed personhood? And if so, should personhood be ascribed as a general principle, or should such an approach be tailored functionally to the specific legal and regulatory environment in question? Should the new understanding of freedom of art, and the arguments that support an extensive construction of pastiche, etc., on social media platforms equally apply where the artifact is made by a machine rather than a human?

V. AI PERSONHOOD: THE ROBOT AS BEARER OF FREEDOM OF ART?

Inescapably, the debate concerning AI and fundamental rights today is so multi-layered and nuanced that a first cursory

German constitutional law, see Ino Augsberg, "Ver-Gegenständlichung. Zum Kunstbegriff des Grundgesetzes", in *Literatur und Recht: Materialität* 211 (Berlin 2021).

[80] Order of the First Senate [Federal Constitutional Court] June 13, 2007, BVerfGE 119, 1-59 (102)(Ger.) – Esra.

outline should be given before considering the notion of freedom as exercisable by algorithms in more detail. In broad terms, two extreme positions can be distinguished. A first pattern of argument as regards liability of AI systems—understood generally as an algorithm-based decision maker - posits that the use of AI should be treated as illegal unless, on a case-by-case basis, the law would permit its application incrementally because only the legislator can make effective risk provisioning.[81] At the other end of the spectrum, and more relevant in the context of robotic creativity, are assertions according to which no distinction whatsoever should be made between machine and human creativity[82] because, ultimately, any type of creativity can enhance culture.

This latter observation—dissected in more detail below[83] - has further consequences. It evidently permits the assertion that when relying on the pastiche exception, either no human input whatsoever is required or that personhood should be ascribed to the autonomous system to eradicate any legitimate objection by the original author. Necessarily, this also paves the way towards recognising subjective rights for the AI system—this would enable either copyright protection or a new absolute right[84] which would protect the investment in AI creations—possibly with a view to replace human creativity over time for the benefit of the AI industry, a development that can find much support in the function ascribed to the pastiche etc. exceptions as applicable on social media.

Asserting a complete equilibrium between human and robotic creativity to fill perceived gaps in copyright law presupposes that creativity without constraints is a monolithic entity that the law must safeguard. In addition, there is an enormous risk in the copyright/AI debate because it obscures relevant non-commercial interests. It effectively categorizes uses by an AI system as either an original work or subsumes such use under a new property right, thus, to be allocated to the relevant industries via a notion of digital agency. Conveniently, no

[81] Herbert Zech, "Liability for Autonomous Systems: Tackling Specific Risks of Modern IT," in Liability for Robotics and the Internet of Things 192 (Reiner Schulze ed., 2020).; Susanne Beck, "The Problem of Ascribing Legal Responsibility in the Case of Robotics," 31 AI & Soc'y 473, 477 (2016).
[82] Madeline de Cock Buning, "Autonomous Intelligent Systems as Creative Agents under the EU Framework for Intellectual Property," Eur. J. of Risk Regul. 310, 313 (2016).
[83] See below, E. II.
[84] T Dornis, "Artificial Creativity: Emergent Works and the Void in Current Copyright Doctrine" 22 (2020) Yale J. L. & Tech. 1, 16- 17.

problems arise with regard to the permissibility of data mining because freedom of research would be geared towards a socially desirable aim, a tenet that points precisely—as will be seen later—to the central problem of uncertainty as it may soon become apparent that it is premature to conclude that such future is desirable at all.

A. The Function of AI Personhood and the Digital Eco-System

If the collision of interests is framed - in contrast to the copyright debate that, in a siloed fashion, orbits around a potential allocation of rights - as a matter of positive versus negative dimensions of freedom of art, it may soon become more obvious that the problem of AI creativity requires an analysis through the lens of the function of fundamental rights as well as a more precise and discerned categorisation of notions of AI agency. As regards freedom of art, an understanding of that fundamental right as a classical libertarian right[85] would immediately end the debate. Individuality, like the perception of copyright, can only be perceived as a property of humans. The question of whether an Artifact produced by generative AI can be characterised as creative would simply not arise. However, current debates on fundamental rights go beyond a strict individuality-based notion[86] and ask different and more nuanced questions.

Both strands of the debate—fundamental rights and liability—must ask for the specific functions that AI is said to accomplish therein. The most advanced approach considers that the function of AI and its regulation by law must depend on the socio-digital institution in which they operate.[87] For the purpose of allocating liability rules, a division has been proposed, which distinguishes between assisted AI uses, human-machine associations and interconnected AI systems.[88] The latter describes what is relevant here—that generative AI is a system making autonomous decisions, including risks to violate the legitimate

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[85] KN Peifer, „Roboter als Schöpfer – Wird das Urheberrecht im Zeitalter der künstlichen Intelligenz noch gebraucht?“, in: S von Lewisnki & H Wittmann, Urheberrecht! Festschrift für Michel M. Walter zum 80. Geburtstag (Vienna 2021), 222, 227; JE Schirmer, „Rechtsfähige Roboter?“ (2016) Juristenzeitung (JZ) 660, 662.

[86] A Beckers/G Teubner, Three Liability Regimes for Artificial Intelligence (Oxford, New York 2021), 12-15.

[87] Ibid., p. 13.

[88] Ibid., pp. 138 et seq.

interests of creators. Legal personhood is a flexible "bundle of rights and duties" that can be adapted to different constellations.[89]

However, as regards the function of personhood in the context of communicative freedoms—in contrast to the more refined approaches now taken vis-à-vis liability issues—rather extensive positions are taken that in general refer to alleged favourable effects of AI in the communicative sphere in general.[90] These broad concerns over freedom of communication precisely underpin the German UrhDAG and the prevalence of the pastiche exception. The statutory solutions under the UrhDAG mirror a direct legislative reflection of fundamental rights subtly informed by concepts of collective or supra-individual rights. That concept of collective rights denotes a shift in constitutional theory, away from a perception of subjective rights that can hardly be exercised individually in the digital ecosystem, towards ascribing personhood to the communicative system. Where AI produces Artifacts used on platforms, that line of constitutional thinking links directly back to the legislative objective and, in turn, conceptually permits the ascription of personhood to the machine since it permits the idea of personality to be ascribed to the "stream" of indistinguishable acts of communication—in short, any communication by AI would be treated in the same way as any human communication on, for example, social media platforms.

The effect—if these theoretical approaches were to be transferred to AI to allocate personhood—would be drastic vis-à-vis any exercise of claims to individual rights rooted in artistic self-autonomy—effectively, then, the positive and negative dimensions of freedom of art would cancel each other out. The predominance of communicative freedoms can then result in a seemingly persuasive and consistent pattern of argument in favour of the AI industry. AI may thus be ascribed personhood precisely because it may be posited that generative AI Artifacts would fulfill all the criteria discussed above as regards, for instance, the relevance of freedom of communication on social media in general: AI is as capable as humans to engage in transformative and recombinant uses of pre-existing art, which, of course, is the very purpose of generative AI applications. In that sense, AI contributes to the

[89] S Wojtczak, "Endowing Artificial Intelligence with Legal Subjectivity" [2021] AI & Society 1, 10.
[90] S Neuhöfer, Grundrechtsfähigkeit künstlicher Intelligenz (Berlin 2023), pp. 212, 232, 238 et seq.

communicative sphere and thus to a pluralist society.[91] From here, it is only a short step towards ascribing personhood, and the need for such ascription would effortlessly follow from another consideration—that, in the absence of personhood, the state could censor AI "opinions".[92]

Thus, if personhood was indifferently ascribed to robots interfering with an artists' opus and legacy, the legitimacy of these interests would be severely weakened. To counter that notion of personhood, the following will first provide a closer examination of the issue in the context of the German UrhDAG before considering the implications of a supra-individual right. The UrhDAG is particularly decisive in this context precisely because this legislation is a continuation of notions of collective rights that transposes wider theories into legal rules. The instantaneous line of reasoning is obvious. If any recombinant use is permitted to humans, then why should it not, as a matter of principle, be permitted to machines—and in turn, why should users not be able to upload content generated by AI?

B. AI Artifacts on Platforms in the Context of The German UrhDAG

The UrhDAG is best described as a piece of legislation that reduces complexity, and for that reason, the pastiche exception has a function that differs in statutory copyright law. As mentioned, the legislator was faced with an insurmountable and complex web of interests with regards to platform liability.[93] The prime legislative objective was, as mentioned, to avoid filtering and blocking altogether, which is an inescapable consequence of focusing upon the high relevance the law now ascribes to user creativity.

The pastiche exception, then, has necessarily eradicated property as a monolithic right to object. It is important to note that development is not a consequence of a sudden or rapid legislative turn. It is an outcome of an incremental process, a reaction to

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[91] C Lewke, „…aber das kann ich nicht tun!": Künstliche Intelligenz und ihre Beteiligung am öffentlichen Diskurs" (2017) Zeitschrift für Innovations- und Technikrecht (InTeR) 207, 209.

[92] S Neuhöfer, Grundrechtsfähigkeit künstlicher Intelligenz (Berlin 2023), p. 203; J Kersten, „KI-Kunst – ‚Künstliche Intelligenz und künstlerische Freiheit' ", in: R Ismer, E Reimer, A Rust & C Waldhoff, Territorialität und Personalität, Festschrift für Moris Lehner (Cologne 2019), p, 437.

[93] G Westkamp, "Two Constitutional Cultures, Technological Enforcement and User Creativity: The Impending Collapse of the EU Copyright Regime?" 53 (2022) 1 IIC 62, 85 et seq.

increasing social and collective expectations for access to culture and typical internet and social media uses. The technical solution adopted under the UrhDAG in particular—that users may flag content and that authors receive remuneration, as outlined previously—then necessarily has potentially significant and disruptive repercussions on how the traditional copyright system works and how nuanced the decision-making process becomes. The UrhDAG in particular recognizes, therefore, all applicable fundamental rights concurrently. What is new and inventive about that approach is simply that it translates something that has been observed before into dedicated normative principles: that the autonomy of the medium is linked to broader collective concerns of access to the medium and participation. Thus, rendering the medium liable for copyright infringement by its users cannot solely be considered as an inference on the economic fundamental right to conduct a business, and the potentially serious implications of extended liability on user freedoms cannot be dismissed as mere collateral damage. Indeed, the economic rights in the matrix of interests between authors, users, copyright exploiters and platform operators must be considered as rights that are subservient to the dominant objective to safeguard creativity[94]—an aspect that has already been addressed by the Court of Justice.[95] This—admittedly rather subtle - shift from a rigid towards an open and malleable system is a necessary step and responds to numerous criticisms that have been voiced in the past decades vis-à-vis the general "high level" approach, favouring the copyright industries, that had been taken when the EUCD was adopted some twenty-five years ago.[96]

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[94] The relevant interests safeguarded by the EU-Charter (and applicable, to one degree or other) to any issue pertaining to aspects of digital copyright include the right to intellectual property (Article 17 EU-Ch), freedom of expression (Art 11 EU-Ch.), freedom of art (Article 13 EU-Charta), freedom to conduct a business (Article 16 EU-Charta), and also protection of personal data (Article 7 EU-Ch.) and privacy (Article 8 EU-Ch). See further C Sganga, 'The fundamental rights saga in EU copyright law: time for the boundary-setting season?' (2019) Medien und Recht Int., 56; T Mylly, 'The constitutionalization of the European legal order: impact of human rights on intellectual property in the EU', in: C Geiger (ed.) Research handbook on human rights and intellectual property (Edward Elgar 2014) 103.

[95] Case C-70/10, Scarlet Extended NV v. Belgische Verenigung van Auteurs, Componisten en Uitgevers CVBA (SABAM), para. 43, 50-53, ECLI:EU:C:2011:771; Case C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH und Wega Filmproduktionsgesellschaft mbH, ECLI:EU:C:2014:192, para. 46.

[96] Ibid.

That development also marks a change, in a constitutional sense, away from property and towards freedom of art and communication as guiding principles altogether. The status of the pastiche exception in the context of platform liability is, as mentioned, functionally entirely different from that in ordinary copyright law because it represents a legislative reaction to specific social expectations. Consequently, however, it is impossible to distinguish as regards the statutory meaning of pastiche, i.e., between the two provisions now dealing with pastiche—one under the UrhDAG, the other in the Authors' Right Act, resulting in a broad and identical construction. Indeed, the foremost ramification of the pastiche clause upon ordinary copyright law is to remove any thinking in property categories. Predominantly, a closer attachment of copyright and freedom of art, disenfranchised from primarily economic considerations, allows for placing emphasis solely on user rights as regards transformative or recombinant uses. But just as well, appending copyright to freedom of art can similarly underline the negative dimension of that fundamental right as a creator's right to be left unaffected more clearly.[97] From that perspective, the economic rights of both the platform operator and the copyright exploiter become irrelevant—platform operators may rely on the autonomy of the medium through the right to conduct a business (Article 16 EU-Ch) and exploiters may still raise property rights under Article 17 EU-Ch., but the function of exercising such rights is constrained: the right to conduct a business is translated, then, in a right of the intermediary that is exercised for the benefit of supra-individual communicative freedom, and in that sense establishes an agency function (i.e. a subservient fundamental right) between user and platform. [98] The property right, as a right to exert control over the user and through the intermediary, is marginalised (though not, in an abstract sense, eliminated) in the case of pastiche because authors receive payment, which leaves authors a choice to either benefit from that payment or to pursue their rights in court. The dogmatic question

[97] F. Kahl, "Zum Spannungsverhältnis zwischen Kunstfreiheit und Urheberrecht" 196 et seq. (Berline, 2023).

[98] The interdependency between the right to conduct a business, as claimed by platform operators, and any right to freedom of communication has not expressly been recognized by the Court of Justice, see critically H Gersdorf, "EU Charta", in: H Gersdorf/B Paal, Informations- und Medienrecht (2nd ed., Munich 2021), annotation 35, p. 10. See also G Westkamp, "Two Constitutional Cultures, Technological Enforcement and User Creativity: The Impending Collapse of the EU Copyright Regime?" 53 (2022) 1 IIC 62, 73.

as to what may constitute pastiche, in an ontological sense, is entirely irrelevant under such a scheme.

In essence, the perception underpinning the UrhDAG—to provide more freedom to users—cannot indecisively be applied to the constellation where artists oppose AI uses. As a matter of reducing complexity, the UrhDAG is irrelevant for the question of which function personhood should fulfil in that context. In the next step, therefore, the relevance of supra-individual rights will be assessed.

VI. FALSE RELIANCE: COLLECTIVE FREEDOM OF COMMUNICATION

References to supra-individual rights in general may still justify the allocation of personhood to AI. This view is indeed often taken and requires closer examination. The position taken here, however, is that this understanding, although it seems to rely on a rather consistent chain of arguments, contains various fallacies.

Indeed, this view concocts a range of issues. The first, and perhaps most fundamental error, concerns the confusion over personhood and a resulting communicative freedom. This is evidently based on the idea that any emulation of human behavior—here resulting in an Artifact that can, following an algorithmic process, easily qualify as "expression" under Article 11 EU-Charter, allows the conclusion that personhood should be established. This is not only partially circular but heavily relies on "reading" legal rules on the machine's behavior[99] and outputs rather than considering the function of any legal rule applicable to AI. Thus, would it be sensible to apply notions of personhood or to insinuate an ability to bear communicative fundamental rights in case the AI appears on a platform?

A. PERSONHOOD AND LEGAL FUNCTION FOR THE BENEFIT OF PLATFORM USERS

Ascribing personhood, first, presupposes a particular function;[100] such a function can only be found where there exists a

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[99] Beckers & Teubner, supra, at 16.

[100] There are many variations in the discussion on supra-individual communicative rights, see Claudio Fazius, Das Internet und die Grundrechte,71 Juristenzeitung 630, 635 (2016); Gunther Teubner, *Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law*, 33 Journal of Law and Society 497, 497 (2006); Andreas Fischer-Lescano, *Subjektlose Rechte,* ____(vol#)_____ Juristenzeitung 965, 970

general need to operationalise fundamental rights for the digital ecosystem in question, and such a function can only be derived from a notion of supra-individual or collective fundamental rights. This already shows a first problem: "communicative freedom" is a highly opaque expression that only accidentally also pertains to freedom of art, and thus immediately lacks differentiation. Further, much of the debate as regards the function of supra-individual fundamental rights rests upon various assumptions that, for this contribution, allow additional and more nuanced delineations.

The emergence of a protracted understanding of fundamental rights applicable to such media is, first and foremost, a result of a co-evolution of legal norms and user expectations[101] - a process felt particularly in copyright law. The function of fundamental rights in the context of communicative spheres such as the internet has the effect of incrementally establishing new (social) rules through a subtle process of recognizing needs for access and participation. User expectations thus incrementally and subtly enter the legal system and become recognized by courts. Such access rules were formulated most notably in constellations such as those in the Google image search case:[102] here, the otherwise inescapable finding of copyright infringement by the search engine (reproduction of protected artistic works by way of "thumb nail" images and absence of any written exception) was avoided by relying on contract law and the notion of an implied consent as ultimately an expression of the artists' autonomy.[103] That change in direction established a new "escape clause" responding predominantly to the rigidity of secondary copyright law in the EU.[104] The fact that the pastiche exception, as a matter of European secondary law (Article 17 (7) DSMD), in particular, has gained such strength and weight marks the final point in that

(2014); Albert Ingold, *Grundrechtsschutz sozialer Emergenz: Eine Neukonfiguration juristischer Personalität in Art. 19 Abs. 3 GG angesichts webbasierter Kollektivitätsformen*, 53 Der Staat 193, 206 (2014).

[101] Teubner, Supra, at 506 (discussing whether personhood can be ascribed to the "stream of communication" itself).

[102] BGH, 29.4.2010, I ZR 69/08 – Google Image Search I (Germany); see further Birgit Clarke, *BGH: Google's image search is no copyright infringement*, IPKat (2010), https://ipkitten.blogspot.com/2010/04/bgh-googles-image-search-is-no.html.

[103] See further Georgia Jenkins, *An Extended Doctrine of Implied Consent – A Digital Mediator*?, 52 IIC 706, 716 (2021).

[104] Guido Westkamp, *Emerging escape clauses? Online exhaustion, consent and European copyright law*, J Rosén, Intellectual Property at the Crossroads of Trade 38, 47 et seq. (2012).

development. It is enticing that "pastiche" thus symbolizes the conflation of two strands of the debate on more freedom on the internet[105], between extending copyright via exceptions on the one hand and notions of supra-individual rights and the collective exercise of such "subject-less" rights as propositioned in constitutional theories on the other.[106]

The solution under the German UrhDAG—which, again, factually removes the property rights as enjoyed by copyright exploiters[107]—then constitutes the final reorganisation of social expectations in "autonomous societal orders"[108]. Because such pastiche uses on platforms are, as mentioned, paid for on the basis of a technical, "code as code" process (flagging), the effect is to reduce complexity, rather than to establish a new substantive copyright exception. Hence, the UrhDAG itself is a consequence of a shrewd progress recognising such emergent social expectations that had been observed a long time ago. These collective expectations are now statutorily regulated and sanctioned by the Court of Justice after its decision following the *Poland* complaint. Instead, the expectations of traditional artists and those of "prosumers" are morphed into a homogenous meta-rule, establishing a single orientation point, manifested in the term "pastiche". Any constraint imposed upon the connotations of pastiche in the context of Article 17 (7) DSMD would ultimately

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[105] See only P. Bernt Hugenholtz & Ruth Okedidji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright, Study supported by the Open Society Institute (OSI), March 6, 2008*, SSRN Electronic Library Hugenholtz (2012), https://ssrn.com/abstract=2017629; Giancarlo Frosio, *Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity*, 51 IIC 709, 709 (2020).

[106] Erklärung der Bundesrepublik Deutschland zur Richtlinie über das Urheberrecht und verwandten Schutzrechte im Digitalen Binnenmarkt, insbesondere zu Artikel 17 der Richtlinie, https://www.bmjv.de/SharedDocs/Downloads/DE/News/PM/041519_Protokollerklaerung_Richtlinie_Urheberrecht.pdf?__blob=publicationFile&v=1 (declaring that the objective of implementing Artcile 17 DSMD ist to sustain user creativity and freedom in relevant practices on platforms and the internet and to therefore aim for a general licensing solution). The Court of Justice does not consider such protocol declaration as binding, see Case C-292/89, The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen (1991) ECR I-00745 (Germany).

[107] Guido Westkamp, *Digital Copyright Enforcement after Article 17 DSMD: Platform Liability between Privacy, Property and Subjective Access Rights*,14 Zeitschrift für Geistiges Eigentum/Intellectual Property Journal 400, 432 et seq. (2022).

[108] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* 17 et seq. (2012).

compromise the functioning of the communicative infrastructure. The alternative reaction—that which the copyright industry had long lobbied for—would be to remove virtually any content where there is the slightest possibility for infringement, and thus to accept the loss of communicative freedoms as collateral damage in the interest of resuscitating economic rights. Therefore, liability of platform operators for illegal content is limited, because overbroad claims to damages in particular, or impositions on constant monitoring,[109] would interfere with the openness of the infrastructure and would remove the incentive to innovate. This demonstrates that the function of supra-individual rights is to guarantee access and participation in an extremely broad sense. As regards freedom of art, there certainly exists a corollary.

B. Non-Transferability of Collective Freedoms to AI Personhood Concerns

However, as outlined above, such an extensive understanding of the positive dimension of the right to freedom of art requires closer inspection once the negative dimension of that right is put into the equation. In short, the rise of social expectations to access to copyright works, understood (again) as a supra-individual and collective right that informs an extensive pastiche clause, will effectively mutate into a quasi-property right for the AI industry. The underlying line of argument rests plainly on the need to maintain the infrastructure for the benefit of open communication, but it has no bearing upon the question whether the AI industry could be considered an intermediary to be able to rely on pastiche on behalf of users' collective rights—if it is accepted, as is suggested herein, that the AI Artifact is not covered by freedom of art, nothing remains to be mediated for the AI industry via the right to freedom of business, or indeed any claim to economic privileges. The discussion would return to the point of departure, because AI Artifacts are not the result of a creative process. If the opposite view were taken, the notion of pastiche would be transformed, indirectly, into an economic right.

Again, in the context of platform uses of copyright content, any material scope that could be ascribed to pastiche, whether

[109] Hence, "general monitoring" remains prohibited under Article 16 of the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')), OJ L 178, 17.7.2000, p. 1–16.

extensive or more limited, is largely irrelevant.[110] Of course, that does not mean that attempts to define pastiche (or any other notion of fair or free use) become futile. Rather, it signifies that disputes over whether a particular "flagged" use indeed constitutes a use falling under the exception should, as a matter of legislative objectives, not arise; and if so, disputes will be resolved within the system. Because of that, the legislator could unavoidably not differentiate between diverse aspects of communicative freedoms—such as between freedom of opinion and freedom of art - or indeed maintain the traditional normative hierarchy between work and alleged copy where some recombinant element is present; the notion of supra-individual fundamental rights as represented in the context of the German UrhDAG is an all-encompassing resolution responding to claims for greater communicative freedoms in a copyright context, and that broad function does not immediately permit the conclusion that the pastiche exception is a direct reflection of positive freedom of art that would principally and apathetically outweigh its negative dimension as a right to object. Indeed, it can well be argued that it is precisely an all-encompassing notion of a collective communicative right that, whilst imposing certain restrictions such as on social and economic interests, requires a re-formulation of individual rights in the classic sense as a right to oppose.[111]

C. HUMAN ART, AI AND THE INNER STRUGGLE

Thus, if broad communicative functions of fundamental rights cannot justify AI personhood, could the same not follow from considering AI at least as equal to human creativity, and thereby ascribing personhood for the sake of its "creative" features as a medium of art? The answer is no. Generative AI is, above all, a self-referential system. It depends on pre-existing creative output that is combined and re-combined in an infinite circle, always "looking backwards", and thus renders "authenticity, autonomy and reflection",[112] as pertinent idealistic perceptions of artistic production and as the subject driving creativity, obsolete.[113] This causes anxieties over maintaining the intrinsic motivation to create

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[110] Westkamp, supra, at 82.
[111] Ladeur, supra, at 526.
[112] Hanno Rauterberg, *Die Kunst der Zukunft: Über den Traum von der kreativen Maschine* 160 (2021).
[113] Id. at 161.

and the ensuing forfeiture of public appreciation in a future where AI Artifacts become dominant.

What is most crucial is that AI is not, and will never be, capable of revolutionising or bringing about new directions or genres. There may be, as it seems at present, perhaps a certain sense of momentary fascination when confronting users with AI-generated art, but any such reaction will predictably wane off the more social media is swamped with algorithmic creations. Once the next "next Rembrandt"[114] goes viral, predictably fatigue will set on - the constant emulation of styles, over and over again, can ultimately only refer back to some notion of origin but does not produce frictions for further meaningful public discourse. There will—and this marks a clear demarcation line to instances where AI may be said to express an opinion—be no relevant public discourse. AI Artifacts are perhaps best described as a "flash in the pan", maybe provoking some instantaneous wonderment that may prompt some terse reaction, or perhaps a transient sensation of surprise, but such a phenomenon will rapidly subside and evaporate once the viewer or listener knows that they are confronted with a banal machine creation. To be sure, that does not eradicate freedom of art where an artistic intention lies behind the operation of AI, but this is a matter of assessing the creativity and originality inherent in the *process* and not the resulting Artifact.

The circularity of AI production thus changes public perception and discourse, but—to use the perhaps most central definition of art under (German) constitutional law[115]– the Artifact is *not* open to interpretation, and precisely so for lack of any expression of the artists' feelings, views, and sentiments. AI does not interact with the world but with pre-existing information it has been fed. AI "art" therefore does not meet the standard of even the widest definition of art (as affirmed in German constitutional law) that art is a process that results in the expression of such emotion or judgement, and that the work is *therefore* open to interpretation as an object emanating from a human's free will, which ultimately is the basis and context for any meaningful impression and interpretation.

The AI Artifact, in mimicking the original authors' style or other individuality features, thus appropriates the authors' personality *per se*, which in turn causes the loss of freedom and the

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[114] On the – ubiquitous – "Next Rembrandt" project see https://www.nextrembrandt.com/.

[115] See generally Oliver Jouanjan, *Freedom of Expression in the Federal Republic of Germany*, 84 Indiana LJ 867 (2009).

capacity for self-development.[116] Generative AI thus produces "replications as travesty";[117] it is then precisely the collectivist notion and supra-individual function of libertarian rights that causes a loss of relevance in the public discourse on art. What is decisive, ultimately, is not the Artifact as output, and whether such object shares features with pre-existing human creations, but the fact that art is a result of intricate inner struggles. This is where the central fallacy in the current debates on both fundamental rights and copyright lies: personhood does not arise out of an emulation of human behavior. On the contrary, generative AI deeply affects artistic self-perception as reflected not only in the individual work created but in style and legacy and relevance; it produces feelings of control and surveillance. Therefore, there is no function for any concept of personhood to accomplish in the context of generative AI. AI can never defy its technical boundaries. Human art can and does.

In sum, these sketchy considerations already should demonstrate that considering AI as a bearer of fundamental rights may only, if at all, rely on an opaque notion of communicative freedom. Whilst it is certainly true that the notion of collective fundamental rights has considerably advanced the theoretical understanding of emerging user expectations as regards claims to more freedom in the digital ecosystem. This applies not only to copyright law but to freedom of speech in general. However, the persuasiveness of that newly found standard of collective rights finds its limits when the effects on artistic self-autonomy are scrutinised more closely at the point where the positive and negative dimensions of freedom of art collide directly. There is a resounding delusion in the attempt to attribute a libertarian fundamental right to AI-created works if considering that condition. Consequently, supra-individual notions of fundamental rights have limits. Advocating a fundamental rights' status, instead, heavily relies on two misconceptions: first, that the legal rule (protection as "art") can be deduced from the properties of the machine to behave in a manner that (only) emulates human expression, and second, that it is solely the object, or the

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[116] See on this aspect P Drahos, A Philosophy of Intellectual Property (Aldershot etc. 1996), p. 79, (referring to GWF Hegel, Philosophy of Right, (Reprint, Oxford 1967), p. 57.

[117] Thus, singer and songwriter Nick Cave. See "This song sucks': Nick Cave responds to ChatGPT song written in style of Nick Cave:, The Guardian, 17.1.2023, https://www.theguardian.com/music/2023/jan/17/this-song-sucks-nick-cave-responds-to-chatgpt-song-written-in-style-of-nick-cave.

ontological features of the Artifact, that permits the conclusion that free choices have been made—albeit only through a process parroting human behavior. A further argument that may be advanced in favour of AI personhood in the context of artistic freedom must consequently be refuted. Freedom of art not only serves as a subjective right but also stabilizes the system of art as an institution by and large.[118] Yet it is precisely debatable whether such a system—based on the foregoing observations—is ultimately desirable.

VII. Summation And Conclusion

First, the current debate lacks much differentiation, and is, concurrently and paradoxically, not expansive enough. The dangers associated with AI are not limited to copyright but endanger the future of all art. At the same time, isolated debates orbiting around transparency obligations, data mining, ownership of computer-generated works, and new neighbouring rights are too isolated, ignore the dimensions of conflicting rights, and are overall guided by an unwarranted and obscure objective to protect and promote AI products by and large.

Second, the discussion here has shown that—as a result of a highly complex exegesis—generative AI is not a candidate for personhood. The negative dimension of the fundamental right to freedom of art is therefore not attributable to AI, and broader concepts of collective fundamental rights cannot outweigh the individual rights of artists. Essentially, this means that autonomous machines cannot, in theory, invoke the pastiche exception. The function of pastiche for platforms ought not to be confused with its function in other settings, including AI. To fully understand that exception, a distinction has been made here. The broad scope attributed to the pastiche exception has not developed out of copyright thinking but out of an incremental recognition of access rights and collective expectations. It is, in short, a metaphor that generates a twofold consequence—one for platforms and one for ordinary copyright disputes. In the latter case, courts can easily fine-tune the assessment by way of establishing exceptions to the pastiche rule and, as the case may be, re-exceptions once it is

[118]KH Ladeur, Die Beobachtung der kollektiven Dimension der Grundrechte durch eine liberale Grundrechtstheorie 50 (2011) 4 Der Staat 493, 525 et seq; see also V Karavas, The Force of Code: Law's Transformation under Information-Technological Conditions 19 (2009) German LJ 463: G Teubner & A Fischer-Lescano, Regime Collisions (Oxford 2006), p. 7 et seq.

accepted that the term indeed is to be understood as metaphorical and that it may have different functions, as corroborated by the complex web of interests in the *Pelham* scenario outlined above. However, neither the function of pastiche in a traditional copyright context nor that attributed to the role and function of pastiches on platforms (as a metaphor for collective user rights) can be transferred indiscriminately to AI Artifacts since they do not express anything but the fact that such the resulting object was made by an algorithmic process, and because of that the AI object does not attach itself to any need to foster plurality of opinion.

Generative AI cannot be considered as a bearer of the right to freedom of art vis-à-vis artists' personality rights, and it follows that reliance on pastiche is excluded because there is no legitimate function of such right. Specifically, notions of personhood cannot be deduced from broader concepts of communicative freedoms. Claims of social media users to employ AI are therefore irrelevant when asserted as legitimate counter-rights to an artistic personality right. There are also much more serious concerns above and beyond individual claims by creators, such as the dystopian outlook produced by an incremental devaluation of creativity and its consequence of replacing (mostly because it is cheaper) human expression, the overall drastic effects that a work of AI generated art will have on the intrinsic motivation to create, and, necessarily, any control over dissemination and commercial exploitation in the interest of *authors*.[119] In fact, the danger—and unintended consequence—is that the pastiche exception, rather than mediating freedom of expression, is misinterpreted as an economic right in favour of the AI industry.

On balance, the interests of artists prevail over the economic interests of the AI industry and may equally be understood as having a collective dimension that can re-stabilise the system of art and prevent, at least to some degree, a complete substitution of human creativity with Artifacts produced by machines. The recognition of the negative dimension to freedom of art serves to provide a fundamental principle that can inform the current debate both in terms of law and policy, and it is necessary to understand such right as usually prevailing in the sense of providing a balancing factor that outstretches conventional copyright subject matter and integrates ideational interests in

[119] P Zurth, Artificial Creativity? A Case Against Copyright Protection for AI-Generated Works 25 (2021) UCLA J. L. & Tech. 1, 15 et seq., https://uclajolt.com/wp-content/uploads/2021/12/Zurth_Artificial-Creativity.pdf.;

maintaining control overt features such as controlling the oeuvre, including its distinctive properties such as styles. There exist, certainly, approximations to such "basic norm", including the indirect application of moral rights under copyright law and indeed considerations based on false association, endorsement, or confusion as they exist in the law of unfair competition or under personality rights laws such as the US-American publicity rights. Yet in the face of a potentially "high risk," artists face such piecemeal approaches are insufficient to capture the entire picture.

The point, then, is *not* to afford protection for a style as such or to establish an opaque principle of artistic personality rights that must necessarily collide with copyright and other legal causes of action, but to refocus the AI debate by complementing the system of law with a personality rights dimension that is largely based on a right to oppose AI uses as a right to be let alone[120], much in the same sense that the claimants in *Pelham* might have a personality right (albeit unenforceable there) to not be associated with a particular genre they quite obviously loathe. That certainly requires further differentiations but—as copyright law shows—such delineations are part and parcel of an ever-changing copyright doctrine where questions concerning the necessary distance between "original" and "copy" are at stake—the profound complexities and inherent balancing issues that arise in any application of general principles, such as the distinction between idea and expression, the notion of substantiality, or the scope attributed to the former German free use concept, are testament to that. The introduction of pastiche predominantly as a metaphor for user freedoms has shifted that matrix in decision making as a much-needed response to communicative expectations, but evidently must shift back to some degree in case artistic expectations are pitted against AI uses.[121] In short, the decisive issue is that the construction of copyright exceptions is contingent upon the environment in which they operate.

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[120] Thus, a right that is ultimately rooted in the principle that exposure to AI appropriations has similarly detrimental effects on the human motivation to create as constant surveillance has on the general right to self-determination in general, as was asserted by the BVerfG in its seminal "census" decision: BVerfG 1 BvR 209/83, BVerfGE 65, 1, 43; see G Hornung/S Schnabel, "Data Protection in Germany I: The Population Census Decision and the Right to Informational Self-Determination" (2009) Computer Law and Security Review (CLRS) 84.

[121] For copyright see P Samuelson, "Generative AI meets copyright". Ongoing lawsuits could affect everyone who uses generative AI" 381 (2023) Science No. 6654, https://doi.org/10.1126/science.adi0656.

A first consequence to be drawn is that the law must develop relevant collision clauses between the need to establish collective communicative freedoms for human interactions on the one hand, and artists' personality interests as guiding principles in AI regulation on the other. The proper place where to put such collision clauses appears to be a future revision of the AI Act—to be regulated in the context of high-risk AI systems and clarifying the close connection between artists' interests and fundamental rights.

As with all technological progress, it will be impossible to practically prevent the use of AI for transformative purposes on platforms, and here the regulatory model under the German UrhDAG and its payment option can be followed. Such "medium of money"[122] solution should significantly alleviate the need for a more drastic solution, which would require platforms to distinguish between AI Artifacts and human content with a duty to technically remove the former. The conclusion to be drawn is to give artists a choice, and consequently to establish both a general right to prohibit the use for data mining purposes as a fundamental principle, but to complement such right with a statutory license that would encompass the entire chain of exploitation and that would therefore cover both uses of creative output for training purposes and subsequent uses on platforms.

Thus, neither the underlying rationale in the German UrhDAG nor notions of supra-individual rights can eradicate such negative liberty only because the individual right is considered to be usurped by collective expectations. The residual issue then concerns liability. Cases concerning alleged personality rights' violations, for instance by Google's auto-complete function,[123] show that liability can be attributed to the machine.[124]

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[122] See N Luhmann, Zur Funktion der subjektiven Rechte, in: Luhmann, Ausdifferenzierung des Rechts – Beiträge zur Rechtssoziologie und Rechtstheorie (2nd ed., Frankfurt am Main 2015; originally published 1970), 360.

[123] BGH (2013) Neue Juristische Wochenschrift 2348, paras. 24 et seq. – Google Auto-Complete. See further KN Peifer, „Google's autocomplete function – is Google a publisher or mere technical distributor? German Federal Supreme Court, Judgment of May 14, 2012 – Case No. VI ZR 269/12 – Google Autocomplete" 3 (2013) 4 Queen Mary Journal of Intellectual Property (QMJIP) 318; D Wielsch, „Haftung des Mediums", in: B Lomfeld, Die Fälle der Gesellschaft (Tübingen 2017) 125, 138-141.

[124] See also J Soh, "Legal Dispositionism and Artificially-Intelligent Attributions" 43 (2023) 4 Legal Studies 583, 593, discussing violations of personality rights by search engines and referring to the decisions in

Already at this stage, it becomes obvious that the exercise of *individual* fundamental personality rights (personality rights) remains relevant, and that the ability to rely on rights to object as a matter of self-autonomy is not eliminated. As a future legislative task, the central implication of a right to object will require a bespoke solution to fully regulate the entire chain of use.

Metropolitan International Schools Ltd v Designtechnica Corp & Others [2011] WLR 1743; Trkulja v Google LLC (No 5) [2015] VSC 635; Trkulja v Google LLC [2018] 263 CLR 149 (affirmed).

MEDIA IN UNRECOGNIZED COUNTRIES: CHALLENGES AND LESSONS FROM ARTSAKH (NAGORNO-KARABAKH) IN THE FACE OF ISOLATION AND MISINFORMATION

Arman Asryan *

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I. INTRODUCTION

Media, as a means of communication, plays a crucial role in our society and is more prevalent than ever before. From social media, television, magazines, radio, music, and books, the media is an extremely powerful tool. It can be useful and constructive by providing easy access to information, increasing public awareness, helping us with constant self-education, promoting transparency and plurality, and acting as a watchdog for democracy.

Nonetheless, the media can sometimes be manipulated with devastating consequences. It may be abused by dictatorships for propaganda purposes, to disseminate racist ideas, incite ethnic hatred, and even provoke acts of genocide. For example, during the Rwandan genocide, radio—used by the Hutu majority—served as a primary instigator, spreading anti-Tutsi conspiracy theories, dehumanizing the Tutsi population, circulating calls to action, and coordinating killings.[1] More recently, social media have played a central role in spreading and promoting ethnic violence before and during the Rohingya genocide.

This paper asserts that people in non-recognized countries face significant barriers to using media as an effective tool for internal development, while simultaneously being more susceptible to external media manipulation and misuse. Domestically, their exclusion from international structures denies them access to critical resources such as guidance, strategies, and financial support, all of which are vital for promoting democratic reforms, including efforts to bolster media independence and uphold professional standards. On the global stage, the lack of participation in international platforms and cross-border partnerships is further exacerbated by the dominance of narratives shaped by recognized states, often involved in conflicts or disputes with these unrecognized regions. These narratives frequently marginalize the voices of unrecognized states, allowing perpetrator states to advance criminal agendas and whitewash their atrocities.

One such country was the Republic of Artsakh (also known as the Nagorno-Karabakh Republic, or simply Artsakh or Nagorno-Karabakh), which declared its independence in 1991 and operated as a sovereign but unrecognized state for 32 years. Throughout its

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* Human Rights Ombudsman's Office of the Artsakh Republic (formerly).

[1] HUMAN RIGHTS WATCH, *The Rwandan Genocide: How It Was Prepared* (2006), https://www.hrw.org/legacy/backgrounder/africa/rwanda0406/rwanda0406.pdf.

existence, Artsakh unilaterally ratified major international human rights instruments and steadfastly pursued a democratic path, despite receiving no support from the international community. Tragically, in 2023, Artsakh was subjected to ethnic cleansing of its indigenous Armenian population following an unprovoked and illegal attack by Azerbaijan. In the meantime, the international community stood by as a silent witness, failing to intervene or hold Azerbaijan accountable for its blatant violations of international law and human rights, culminating in the fall of the Republic.

This paper argues that even while enduring three decades of armed conflict and facing significant economic and diplomatic isolation, including exclusion from international legal structures, the Republic of Artsakh managed to maintain media regulations that adhered to minimum international standards within a democratic framework. However, certain aspects of Artsakh's media regulations remained outdated or underdeveloped, limiting their ability to foster greater freedom of expression and media independence. Alongside an analysis of Artsakh's legislation, this paper also examines the media regulations of other unrecognized countries to allow readers to draw comparisons more effectively. Finally, it addresses how Azerbaijani false narratives frequently overshadowed and marginalized the voice of Artsakh's people and enabled Azerbaijan to advance its criminal agendas and whitewash its atrocities. With limited media resources, Artsakh was unable to effectively counter these narratives, contributing to its vulnerability.

II. ETHNIC ARMENIAN ASPIRATIONS IN ARTSAKH: THE EMERGENCE OF AN AUTONOMOUS STATE—AND MEDIA FREE OF STATE CONTROL

The Artsakh conflict spans over a century. After the Russian Empire collapsed in 1917, Armenia, Georgia, and Azerbaijan declared independence. Azerbaijan, supported by Turkey, claimed Artsakh, a historically Armenian region. Despite violence and massacres, Azerbaijan failed to subdue the Armenians of the region. In 1920, the Russian Red Army regained control and recognized Artsakh as disputed. In 1921, the Soviet government arbitrarily included the region, with a 94% Armenian population, in the Azerbaijani SSR, establishing the Nagorno-Karabakh Autonomous Oblast.

Over the decades, Armenians faced systemic discrimination and violence. By the 1970s, the Armenian

population had dwindled to 76% due to forced expulsions. In 1988, Armenians protested for unification with Armenia, leading to pogroms in Azerbaijani cities. Azerbaijan launched an offensive but met resistance from Armenian forces.

On September 2, 1991, Artsakh declared independence, leading to a ceasefire in 1994 after military hostilities, with Artsakh controlling the former NKAO and seven surrounding regions. However, on September 27, 2020, Azerbaijan, backed by Turkey, launched a new assault, regaining parts of the region after 44 days, with a ceasefire brokered by Russia.

On December 12, 2022, Azerbaijan blocked the Lachin Corridor, the only land route connecting Artsakh to Armenia and the outside world, trapping Artsakh's population without essential supplies. After a months-long blockade, on September 19, 2023, Azerbaijan launched another military attack to take control of the region, forcing the entire indigenous population to flee and completing its ethnic cleansing campaign.

III. THE MEDIA-RELATED LEGAL FRAMEWORK OF THE ARTSAKH REPUBLIC COMPLIED WITH MINIMUM INTERNATIONAL STANDARDS; HOWEVER, SOME MEDIA REGULATIONS REMAINED OUTDATED OR UNDERDEVELOPED.

Given the role of media in a democratic society, several international organizations and non-governmental networks annually publish reports on the state of media and the safety of journalists and issue alerts on violations of media freedom in countries worldwide. For example, The Platform for the Protection of Journalism and Safety of Journalists functions as a mechanism with the aim of "electronically collecting, analyzing and exchanging information on violations of journalistic and media freedom."[2] Reporters Without Borders (RWB) informs about censorship and abuses against journalists daily and issues the annual World Press Freedom Index that rates the state of press freedom in 180 countries.[3] However, only a few of the above-mentioned organizations extend their activities to unrecognized states.

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[2] *Who We Are*, Safety of Journalists Platform, https://fom.coe.int/en/apropos (last visited Jul. 30, 2023).

[3] *Who Are We?*, Reporters Without Borders, https://rsf.org/en/who-are-we (last visited Jul. 30, 2023).

Another benefit for a country to be recognized and allowed to participate in international structures is that other countries and international organizations provide guidance and strategies, and financially support democratic reforms, including reforms in the media. For example, various UN agencies, the Council of Europe, the European Union, and the Organization for Security and Co-operation in Europe list the promotion and support of democracy and good governance all over the world as a key priority of their mandate and, to this aim, take political and diplomatic actions to cooperate with and assist various countries. Unfortunately, that is also not the case for unrecognized countries.

In this chapter, the legal framework of the Republic of Artsakh concerning the media is examined, highlighting its alignment with international standards and addressing certain gaps in its normative development. The chapter explores the country's endeavors to adhere to global norms regarding media freedom and regulation, while also identifying areas where outdated or underdeveloped regulations persisted. Through this analysis, the chapter assesses both the progress made and the challenges encountered by the Republic of Artsakh in establishing a reliable media landscape.

A. FREEDOM OF EXPRESSION AND MEDIA

As Justice Holmes stated in one of his dissenting opinions, "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [our] wishes safely can be carried out."[4] The Universal Declaration of Human Rights (hereafter UDHR), the International Covenant on Civil and Political Rights (hereafter ICCPR), the European Convention of Human Rights (hereafter ECHR), and several other documents acknowledge the freedom of opinion and expression as a fundamental human right. Everyone's right to freedom of opinion and expression is enshrined in Article 19 of the UDHR[5]. The right includes "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article

[4] *Abram v. United States*, 250 U.S. 616, 630 (1919).
[5] G.A. Res. 217 (III) art. 19, Universal Declaration of Human Rights (Dec. 10, 1948).

10 (1) of the ECHR[6] and Article 19 of the ICCPR[7] have similar articulations. Resolution 1535 of the Parliamentary Assembly of the Council of Europe provides that "freedom of expression and information in the media includes the right to express political opinions and criticize the authorities and society, expose governmental mistakes, corruption and organized crime, and question religious dogmas and practices."[8]

The European Court of Human Rights (hereafter ECtHR), in the landmark case *Handyside v. the United Kingdom,* concluded that freedom of expression is also applicable to information or ideas that "[o]ffend, shock, or disturb. . . such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'"[9] The ECtHR has also emphasized that freedom of expression extends not only to the content of information but also to the means of transmission or reception of that information, as any limitation placed on the means inevitably interferes with the right to receive and impart information.[10]

On the other hand, Article 10(2) of the ECHR allows specific limitations on the right to freedom of expression "as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The ECtHR stated that in case of interference with Article 10 of the Convention, the following three criteria must be taken into account: (1) whether the impugned measures are "prescribed by law," meaning that the legal rules in question must have a certain quality, be accessible, and foreseeable; (2) whether the interferences pursue a legitimate aim, such as those aims listed in

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[6] *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 233 U.N.T.S. 213 [hereinafter ECHR]

[7] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter Int'l Cov.]

[8] Parliamentary Assembly of the Council of Eur., Res. 1535, *Threats to the Lives and Freedom of Expression of Journalists* (Jan. 25, 2007), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17510&lang=en.

[9] Handyside v. United Kingdom, App. No. 5493/72, ¶ 49, Eur. Ct. H.R. (Dec. 7, 1976), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57499%22]}.

[10] Autronic AG v. Switzerland, App. No. 12726/87, ¶¶ 47-48, Eur. Ct. H.R. (May 22, 1990), https://hudoc.echr.coe.int/?i=001-57630.

Article 10 of the Convention; and (3) whether they are "necessary in a democratic society," which means that a proportionate balance must be between the "measures chosen to satisfy a legitimate aim" and "the degree of injury inflicted on expression rights."[11]

To have a better understanding of how Article 10 is applied by the Court, it is worth scrutinizing *Handyside* in a more detailed way. Richard Handyside, a British proprietor, purchased and distributed a book called "The Little Red Schoolbook," which was aimed at pupils and teenagers and contained a 26-page section concerning sex, contraception, abortion, etc. Following multiple complaints, the Metropolitan Police conducted an investigation. A successful request was made for a warrant, resulting in the provisional seizure of 1,069 copies of the book, along with leaflets, posters, showcards, and correspondence pertaining to its publication and sale. Later, Handyside was found guilty of possessing obscene publications. In 1972, an application was lodged before the ECtHR by Handyside claiming to be the victim of a violation of Article 10 of the ECHR. The Court held that to understand whether the interferences by public authority entail a "violation" of Article 10, the following questions should be answered: 1) whether the "restrictions" and "penalties" complained of by Mr. Handyside have been prescribed by law, 2) whether the interferences have had a legitimate aim under Article 10 (2), in this particular case, the aim in question has been the protection of morals in a democratic society, 3) whether the protection of morals in a democratic society necessitated the various measures taken against Mr. Handyside. As of the first question, the Court found that the measures taken have been based on the 1959/1964 Acts of the UK legal system. As of the second and third questions, the Court found that there is no uniform European conception of morals and that "State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements." In other words, the Court recognized the margin of appreciation of the contracting parties to the ECHR, at the same time providing that the domestic margin of appreciation is not unlimited, and it goes hand in hand with European supervision. Exercising its supervisory jurisdiction and based on the different data and evidence available, the Court held that no breach of Article 10 has been established in *Handyside.*

[11] Council of Eur., *Guide on Article 10 of the European Convention on Human Rights* (Mar. 31, 2020), https://rm.coe.int/guide-art-10-eng/16809ff23f.

B. GUARANTEES FOR THE FREEDOM OF EXPRESSION AND MEDIA PROVIDED BY THE CONSTITUTION OF ARTSAKH AND OTHER LEGAL DOCUMENTS.

On September 2, 1991, the Nagorno Karabakh Republic declared independence in full respect of "the principles of the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, the Concluding Document of the Vienna Meeting of the Conference on Security and Cooperation in Europe and other universally recognized norms of international law."[12] To this end, being in isolation and deprived of any international support and guidance, the Republic of Artsakh enhanced its ties with the Republic of Armenia in various spheres, including economic, cultural, social, etc.[13] Alongside these, the legislation of Artsakh, and media regulations in particular, were significantly affected and influenced by Armenia's legislation.[14]

Artsakh adhered to major international instruments and recognized the supremacy of international law over its national legislation.[15]

Article 42 of the Constitution of Artsakh ensures everyone's right "to freely express his/her opinion," including the right "to hold own opinion, as well as to seek, receive and disseminate information and ideas through any media, without the interference of state or local self-government bodies and regardless of state frontiers."[16] The Article further guarantees the freedom of the press, radio, television, and other means of information and imposes the obligation on the State to guarantee the activities of independent public television and radio offering a diversity of informational, educational, cultural, and entertainment programs.[17] The last provision of the Article provides the possibility of restricting freedom "for the purpose of state security, protecting

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[12] HṚCH'AKAGIR LEṚNAYIN GHARABAGHI HANRAPETUTYAN PETAKAN ANKAKHUTYAN MASIN [STATE INDEPENDENCE DECLARATION OF THE NAGORNO KARABAGH REPUBLIC], SEP. 2, 1991 (Artsakh)

[13] Ararat Institute for Near Eastern Studies, *Legal Aspects of Relations Between Republics of Armenia and Artsakh: Past, Present and Future* (Jan. 9, 2021), https://araratinstitute.org/2021/01/09/legal-aspects-of-relations-between-republics-of-armenia-and-artsakh-past-present-and-future/

[14] AGBU, Nagorno Karabakh – The Artsakh-Armenia-Diaspora triad, AGBU Magazine (Dec. 2012) https://agbu.org/building-republic/nagorno-karabakh

[15] SAHMANADRUTYUN, [CONSTITUTION] (Artsakh) art. 5.

[16] *Id*. art. 42

[17] *Id.*

public order, health and morals or the honor and good reputation of others and other basic rights and freedoms thereof."[18]

Article 4 of the Law on Mass Media of Artsakh, as a guarantee to freedom of speech in the media sphere, prohibits censorship, coercion to disseminate information or refrain from its dissemination, obstruction of legitimate professional activities of a journalist, discrimination in the civil circulation of equipment and materials necessary for the media activities, and restrictions on media usage, including those produced and distributed in other countries.[19] The same Article provides that media activities are not subject to prior or ongoing state registration, licensing, accreditation, or notification to the state or any other body.[20]

Even though the European standards provide that the requirement of media technical registration does not, per se, violate freedom of expression when it meets certain conditions, nevertheless, it also finds that the registration requirement is unnecessary and opens a window for abuses. In this context, the above-mentioned regulations of Artsakh completely conform to the democratic concept of freedom of the media.

The only exception to the general licensing rule in Artsakh was the licensing of Radio and TV broadcasting, which was regulated by the "Law on television and radio broadcasting."[21] However, this exception is also in line with international standards. The reason is the following:

It is well-recognized that different media require different regulatory approaches. Article 10 of the ECHR provides that freedom of expression "shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[22] As can be seen, States have a wider margin of discretion when it comes to broadcast media.

However, the case law of the ECtHR shows that some licensing criteria must be followed. The body with the licensing authority must be independent of the government. Arbitrariness must be excluded from the licensing process, and the licensing authority's decision denying a broadcasting license must be

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[18] *Id*.
[19] ZANGVATSAYIN LRATVUTYAN MASIN ORENK' [LAW ON MASS MEDIA] (Artsakh)
[20] *Id.*
[21] HEṚUSTATESUTYAN EV Ṛ ADIOYI MASIN ORENK' [LAW ON TELEVISION AND RADIO BROADCASTING] (Artsakh)
[22] ECHR, *supra* note 6, art. 10.

properly reasoned.[23] Domestic law regulating broadcasting must be sufficiently accessible, precise, and foreseeable for a person to be able to adapt his/her behavior to it.[24]

"The Law on television and radio broadcasting" of the Republic of Artsakh provides that the licensing and control of television and radio broadcasters are carried out by the National Commission, an independent institution separately funded by the state budget. The National Commission issues licenses and provides frequencies through competition. The exhaustive grounds for refusing and revoking licenses are expressly prescribed, and the decision to refuse and revoke the license may be appealed in court.

C. RESTRICTIONS ON FREEDOM OF EXPRESSION ENVISAGED BY THE LAW ON MASS MEDIA AND THE CRIMINAL CODE OF ARTSAKH

Article 7 of the Law on Mass Media of Artsakh states the following restrictions on the freedom of expression in the sphere of the media:

It is prohibited to disseminate 1) secret information as stipulated by law, 2) information advocating criminally punishable acts, 3) information violating the right to privacy of one's personal or family life, as well as 4) information obtained by video and audio recording conducted without notifying the person of the fact or recording, when the person expected to be out of sight or earshot of the implementer of video and audio recording and has taken sufficient measures to ensure it, except for situations when such measures were obviously not sufficient. The same Article states that the third and the fourth restrictions can be legitimately bypassed when it is necessary for the protection of public interest.[25]

According to Article 19 of the ICCPR, freedom of expression may be subject to restrictions that are provided by law and are necessary: (a) For respect of the rights or reputations of others; and (b) For the protection of national security or of public order (order public), or of public health or morals.[26] As can be seen

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[23] *See* COUNCIL OF EUR., PLATFORM TO PROMOTE THE PROTECTION OF JOURNALISM AND SAFETY OF JOURNALISTS, FREEDOM OF EXPRESSION AND THE BROADCASTING MEDIA (Apr. 2016) https://rm.coe.int/1680631e3c

[24] *See* Groppera Radio AG & Others v. Switzerland, App. No. 10890/84, ¶ 65-68 (Mar. 28, 1990), https://hudoc.echr.coe.int/eng?i=001-57623

[25] ZANGVATSAYIN LRATVUTYAN MASIN ORENK, art. 7.

[26] Int'l Cov., *supra* note 7, art. 19.

from the wording, the list is exhaustive and restrictions on grounds not specified in Article 19 are not acceptable.

Analyzing Article 7 of the Law in light of Article 19 of the ICCPR, it should be noted that although Article 7 mostly meets the requirements of Article 19, some terms, such as "information advocating criminally punishable acts" lack legal clarity and might be misused. Further, under Article 19, restrictions are allowed only if they are necessary in a democratic society, while there is no similar articulation in Article 7.

To compare, the Law on Mass Media of Transnistria prohibits the use of mass media for purposes of 1) committing criminally indictable deeds, 2) divulging information making up a state secret or any other law-protective secret, 3) the performance of extremist activities, and also 4) for the spreading of broadcasts propagandizing pornography or the cult of violence and cruelty. It is also prohibited to "use… information texts belonging to special mass information media concealed in-sets influencing the subconscious of human beings and/or affecting their health."[27] Further, it is prohibited to "disseminate information on the means, methods of development, production and use, places of trade of narcotics, psychotropic substances and their precursors, propagating of any advantages of use of separate narcotics, psychotropic substances, their analogues and precursors … as well as any other information, dissemination of which is prohibited by federal laws."[28]

Restrictions on freedom of expression are also provided by the Criminal Code of Artsakh. According to Article 226 "Incitement of national, racial, or religious hostility- actions targeted at the incitement of national, racial, or religious hostility, at racial superiority or humiliation of national dignity" is a punishable crime. When any of these acts have been committed: (1) publicly or *by use of mass media*, (2) by use of violence or threat thereof, (3) by use of official position, or (4) by an organized group, then more serious punishment is envisaged by law.[29]

Another restriction is provided by Article 424 of the code which states that, "Denial, extenuation, upholding or justification of genocide and other crimes against peace and safety of humanity provided for in other articles of this Chapter, by disseminating materials to the public by a computer system or otherwise making

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[27] Zakon o Sredstvakh Massovoĭ Informatsii [Law on Mass Media], art. 4 (Transnistria) https://mincifra.gospmr.org/?page_id=2356

[28] *Id*.

[29] K'reakan Orensgirk' [K'r. Or.] [Criminal Code] (Artsakh), art. 226.

those materials available, where those have been committed based on racial background, color, national or ethnic origin or religious background, for the purpose of provoking hatred, discrimination or violence against a person or a group of persons," is a punishable crime.[30]

It is internationally well-recognized, that "freedom of speech" protects not every kind of speech. Hate speech, incitement to violence, racism and denial of genocide fall outside the protection provided by international instruments.

Council of Europe in Recommendation No. R (97) 20 defines hate speech as covering "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."[31] It further stresses public authority's and official's special responsibility in refraining from statements, in particular to the media, which may reasonably be understood as hate speech, as well as the necessity for the member states "to establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech."[32]

Article 20 of the ICCPR states that "any propaganda for war" and "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" shall be prohibited by law.[33]

International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter CERD) in Article 4 also obliges states to "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form," and to "undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination."[34]

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[30] *Id.* at art. 226(2).
[31] Council of Eur., Recommendation. No. R (97) 20 of the Comm. of Ministers to Member States on "Hate Speech" (Oct. 30, 1997), https://rm.coe.int/1680505d5b.
[32] *Id.*
[33] Int'l Cov., *supra* note 7, art. 20.
[34] *Int*'l *Convention on the Elimination of All Forms of Racial Discrimination*, U.N. GAOR Res. 2106, Art. 4 (Jan. 4, 1969),

Caselaw of the ECtHR provides that incitement to violence must be prohibited when there is "an intentional and direct use of wording to incite violence" and "a real possibility that the violence occurs."[35]

For example, the European Commission of Human Rights in *Honsik v. Austria* found that the applicant's denial of the existence of gas chambers and the mass extermination of the victims of the Holocaust is not protected speech, because what the applicant was seeking to use the freedom of expression as a basis for activities are "contrary to the text and spirit of the Convention" and "if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention."[36]

In *Özgür Gündem v. Turkey* the ECtHR found that measures imposed on the newspaper by State authorities through numerous prosecutions and convictions were disproportionate and unjustified in the pursuit of any legitimate aim.[37] The circumstances of the case were the following: The individuals associated with Özgür Gündem, an Istanbul-based newspaper, lodged an application, complaining, among other things, that the prosecutions brought against the newspaper in respect of the contents of articles and news reports were actually aimed at hindering and preventing the production and distribution of Özgür Gündem, and that the articles in question did not contain incitement to violence. After examining the content of the impugned articles the Court, including a cartoon depicting the Turkish Republic as a figure labelled "kahpe," held that "the authorities of a democratic State must tolerate criticism, even if it may be regarded as provocative or insulting."[38] As of an article describing alleged attacks by security forces on villages in the south-east and attacks made by terrorists, including the killing of an imam, the Court held that no relevant and sufficient reasons for interference were

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https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial.

[35]Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression Under the Eur. Convention on Human Rights*, Council of Eur. 23 (July 2017), https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814.

[36] Honsik v. Austria, App. No. 25062/94, (Oct. 18, 1995), https://hudoc.echr.coe.int/eng#{%22dmdocnumber%22:[%22666524%22],%22itemid%22:[%22001-2362%22]}.

[37] Özgür Gündem v. Turkey, App. No. 23144/93, ¶71(Mar. 16, 2000), https://hudoc.echr.coe.int/?i=001-58508.

[38] *Id.*

found.[39] As of 8 articles reporting the statements of the PKK, the Court held that "the fact that interviews or statements were given by a member of a proscribed organization cannot in itself justify an interference with the newspaper's freedom of expression," and that what matters is "the words used and the context in which they were published, with a view to determining whether the texts taken as a whole can be considered as inciting to violence."[40] The Court found that only 3 of 8 articles could be regarded as encouraging the use of violence, because they contain passages which "advocated intensifying the armed struggle, glorified war and espoused the intention to fight to the last drop of blood."[41]

Examining Articles 226 and 424 of the Criminal code of the Republic of Artsakh in light of the relevant rules of international law, it should be noted that not only do these articles conform to international standards, but also the lack of these articles would have indicated the failure of the Republic of Artsakh to comply with the internationally imposed obligations.

D. FREEDOM OF INFORMATION

Freedom of expression and media is correlated with freedom of information. This correlation is why most of the above-mentioned major international instruments have articulated the right to seek and receive information in the same article with the right to freedom of expression.

Among other international instruments, Article 10 of the ECHR should be interpreted so as to allow a broader understanding of the "freedom to receive information," which includes the recognition of a right of person to access information held by public authorities.[42]

For example, the ECtHR in *Jankovskis v. Lithuania* held that there was a violation of Article 10 of the ECHR, since the applicant had been refused access to a website of the Ministry of Education and Science of Lithuania (hereafter the Ministry).[43] The facts of the case are the following. In 2006, the applicant, who was serving a sentence in the Pravieniškės Correctional Home, requested information from the Ministry about the possibility of

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Jankovskis v. Lithuania, App. No. 21575/08, (Jan. 17, 2017), https://hudoc.echr.coe.int/?i=001-170354.
[43] *Id.* ¶ *60*

taking a second university degree via distance learning.[44] The Ministry replied that the requested information could be found on the website of the Ministry.[45] Based on the reply, the applicant asked the correctional home authorities to be granted Internet access to the website. However the request was denied "because at that time none of the legislation allowed the prisoners to use the Internet or to have a mailbox."[46] The applicant then took several other steps, including an initiation of court proceedings, to no effect.[47] The ECtHR found that the state authorities interference with the applicant's right to receive information contravened Article 10 of the ECHR.[48] In particular, the Court held that even though the interference was prescribed by law and pursued a legitimate aim, it was not necessary in a democratic society, as the state authorities could have considered the possibility of granting the applicant limited or controlled Internet access to the website of the Ministry.[49]

The Recommendation of the CoE Committee of Ministers to member states on Access to Official Documents REC (2002) recognizes the role of freedom of information in endeavoring democratic society, fostering the efficiency and effectiveness of public administration, promoting transparency, avoiding the risk of corruption, strengthening the public's confidence in public authorities, etc.[50] To this end, the document sets out minimum standards of freedom of information for the member states to be guided in their law and practice[51].

Similarly, non-governmental organization "Article 19" establishes general principles of the public's right to know.[52] Analyses of some of these principles and the Law on Mass Media of Artsakh are introduced below.

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[44] *Id.* ¶ *6*
[45] *Id.* ¶ *7*
[46] *Id.* ¶ *8*
[47] *Id.* ¶ *9*
[48] *Id.* ¶ *63*
[49] *Id.* ¶¶ *65–69*
[50] Council of Eur., Recommendation Rec. (2002)2 of the Comm'n of Ministers to Member States on Access to Office. Documents (Feb. 21, 2002), https://rm.coe.int/16804c6fcc#:~:text6=Member%20states%20should%20guarantee%20the,including%20that%20of%20national%20origin.
[51] *Id.*
[52] Article 19, *The Public's Right to Know: Principles on Right to Information Legislation*, 4 (2016), https://www.article19.org/data/files/RTI_Principles_Updated_EN.pdf

1. PRINCIPLE OF MAXIMUM DISCLOSURE AND OBLIGATION TO PUBLISH INFORMATION

Maximum disclosure assumes the Constitution should clearly enshrine access to official information as a basic right. There is a presumption that all information is subject to disclosure, and "where a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings."[53] In addition, definitions of the terms "information" and "public bodies" should be given broadly.[54] The term "public bodies" should encompass all branches and levels of government, including local authorities, nationalized industries, public corporations, non-departmental bodies, and judicial institutions, as well as private entities performing public functions or administering public funds. No body, including those in defense or security, should be exempt; private bodies should also be included where disclosure serves significant public interests or protects fundamental rights.[55] Freedom of information also assumes public bodies' obligation to publish and disseminate key information of public interest (for example functions, objectives, organizational structures, standards, achievements, manuals, policies, procedures, rules, and key personnel of public bodies), even if there is no special request made.

The Constitution and Law of the Republic of Artsakh reflect a firm commitment to the principle of maximum disclosure and obligation to publish information, affirming that access to official information is a fundamental right.

Article 51 of the Constitution of the Republic of Artsakh enshrines that "everyone shall have the right to receive information and get familiar with documents relating to the activities of state and local self-government bodies and officials. The right to receive information may be restricted only by law, for the purpose of protecting public interests or the basic rights and freedoms of others. The procedure for receiving information, as well as the grounds for liability of officials for concealing information or for unjustified refusal of providing information thereby, shall be prescribed by law."[56]

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[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] SAHMANADRUTYUN, *supra* note 21, art. 51.

In turn, Article 6 of the "Law on Freedom of Information" of the Republic of Artsakh provides that "each person has the right to address an inquiry to information holder to get acquainted with and/or get the information sought by him as defined by the law. Foreign citizens can enjoy the rights and freedoms foreseen by the following law as defined by the Republic of Artsakh Law and/or in cases defined by international treaties."[57]

According to Article 3 of the "Law on Freedom of Information," "information holder" relates to "state bodies, local self-government bodies, state offices, state budget sponsored organizations as well as organizations of public importance and their officials."[58] "Information" is defined as "records/data of facts, people, subjects, events, phenomena, processes that are received and formed as defined by legislation, despite of the way those are possessed or their material carrier (electronic or hard copy documents, records, videos, films, photos, drawings, schemes, notes, maps, etc.)"[59]

Article 7 of the "Law on Freedom of Information" provides that "if it is not otherwise foreseen by the Constitution and/or the Law, information holder at least once a year publicize the following information related to his activity and or changes to it: a) activities and services provided (to be provided) to the public; b) budget; c) forms for written inquiries and the instructions for filling those in; d) lists of personnel... f) influence on the environment; g) public events program, etc."[60]

An analysis of the constitutional and statutory framework of the Republic of Artsakh, in light of the principles set out by Article 19, shows that the law implements the main aspects of the principle of maximum disclosure. These include the assumption that information is publicly accessible, the responsibility of authorities to explain any refusal to disclose, and the broad definitions of "information" and "public bodies." In line with this, authorities are required publish regular updates on key aspects of their work. International standards support this approach, emphasizing that all information held by public authorities should generally be available, with exceptions allowed only in limited circumstances. Thus, the requirement of a broad definition is met.

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[57] TEGHEKATVUTYAN AZATUTYAN MASIN ORENK' [LAW ON FREEDOM OF INFORMATION OF THE REPUBLIC OF ARTSAKH] art. 6.
[58] *Id*. at art. 3.
[59] *Id*.
[60] *Id*. at art. 7.

2. THE LIMITED SCOPE OF EXCEPTIONS

A refusal to disclose information is justified only if it meets the following three-part test: 1) the information must relate to a legitimate aim as provided for in international law; 2) disclosure must threaten to cause substantial harm to that aim; 3) the harm to the aim must be greater than the public interest in having the information.

Article 8 of the Law meets the first prong of the test, as it provides a complete list of narrowly tailored exceptions directed to the protection of the following legitimate interests: a) state, official, bank, or trade secret; b) privacy of a person and his family, including the privacy of correspondence, telephone conversations, post, telegraph, and other transmissions; c) pre-investigation data not subject to publicity; d) data requiring accessibility limitation, conditioned by professional activity (medical, notary, attorney secrets); and e) copyright and associated rights.

Nevertheless, Article 8 doesn't require the likely harm to legitimate aim to be substantial and greater than the public interest in having the information and thus falls short of the second and third prongs of the test. This weakness of the Article is partly compensated by the 3rd part of it, which provides that information requests on urgent cases threatening public security and health, as well as natural disasters and their aftermaths, the real situation in the spheres of nature and environment protection, health, education, agriculture, trade and culture and overall economic situation of the Republic of Armenia cannot be denied. The same is also the case "if the decline of the information request will have a negative influence on the implementation of state programs of the Republic of Artsakh directed to socio-economic, scientific, spiritual and cultural development."[61]

3. PROCESSES TO FACILITATE THE ACCESS

According to this principle, open and accessible internal systems should be established by public bodies to guarantee the public's right to request and receive information. Time limits for the processing of requests should not exceed one month. In addition, the legislation should provide for the right of appeal at

[61] *Id*.

three levels: 1) within the public body 2) to an independent administrative body and 3) to the courts.[62]

Article 9 of the Law provides that in case of oral inquiry, the answer is given immediately or within the shortest possible time.[63] In the case of written inquiries, the time is 5 days.[64] However, when additional work is needed for providing the requested information, then the public body has 30 days for the answer but must notice about it within 5 days after the application has been filed.[65]

Here, the requirement to provide the right of appeal at three levels is also met. According to Article 11 of the Law, "the decision not to provide information can be appealed either in the state government body defined by Legislation or in the court." The Ombudsman's office stands as an independent administrative body. Article 16 of the "Law on Human Rights Ombudsman" of the Republic of Artsakh states that in the case one's rights and freedoms are violated by state or local self-government bodies, everyone has the right to apply to the Ombudsman.[66]

4. FREE OF CHARGE NATURE OF PUBLIC INFORMATION

The information must be provided at no cost or be limited to the actual cost of reproduction and delivery. The purpose is to not allow deterrence from obtaining public information by costs.

Article 10 of the Law enshrines that the information shall be provided free of charge in the following cases: responses to oral inquiries, for up to 10 pages of printed or copied information, or information via e-mail (internet), declining the information request, etc.[67] In other cases, the cost to be paid for information cannot exceed the costs of providing that information.

In sum, internationally recognized principles on freedom of information are mostly reflected in the legislation of Artsakh.

E. DEFAMATION AND "INSULT" LAWS

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[62] ARTICLE 19, *supra* note 36.
[63] *Id*.
[64] *Id*.
[65] TEGH. AZAT, *supra* note 38.
[66] MARDU IRAVUNK'NERI PASHTPANI MASIN ORENK' [LAW ON HUMAN RIGHTS OMBUDSMAN] (Artsakh)
[67] TEGH. AZAT, *supra* note 38.

Defamation and insult are not considered a crime, and no criminal punishment is provided by the Criminal Code of Artsakh.[68] Instead, laws against defamation and insult are embodied in the Civil Code.[69] This means that both public officials and private persons seeking redress should apply to civil court as a plaintiff. These regulations conform to internationally recognized standards, according to which Civil defamation and "insult" laws achieve the legitimate goal of providing victims with redress. Accordingly, criminal regulations for redress purposes are unnecessary. Moreover, laws criminalizing defamation risk being misused to force people into self-censorship.[70]

However, Article 355 of the Criminal Code provides that "threatening or insulting or showing undisguised disrespect to the Human Rights Defender with regard to the exercise of powers thereof" is punishable by a fine or by detention.[71]

Distinguishing insults directed at a public official, such as the Human Rights Defender, from those directed at a private person is incompatible with the concept of freedom of speech established by main international instruments. The ECtHR in *Lingens v. Austria* held that limits of tolerable criticism for public officials are wider than for private persons, as "the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance."[72] In addition, the term "insult" itself is subjective and imprecise, and it may be misused, for example, as a tool against political opponents.

Article 368 of the Criminal Code of Artsakh provides that contempt of court expressed by insulting the participants of a trial, as well as the judge in relation to exercising official powers, shall be punished by fine or by detention.[73] In contrast to other public officials, limits of tolerance for judges are narrow, and thus, this Article is in line with international standards. The doctrine of contempt of court is widely recognized worldwide and is aimed at the protection of the administration of justice. As described by

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[68] K'r. Or., *supra* note 25.
[69] K'aghak'ats'iakan Orensgirk' [K'agh. Or.] [Civil Code] art. 1093 (Artsakh).
[70] COUNCIL OF EUR., *Guide on Article 10 of the European Convention on Human Rights - Freedom of Expression*, (2020) https://rm.coe.int/guide-art-10-eng/16809ff23f.
[71] K'r. Or., *supra* note 25, art. 355.
[72] *Lingens v. Austria,* 9815/82, 8 EHRR 407 (Eur. Ct. H.R. July 8, 1986), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57523%22]}.
[73] K'r. Or., *supra* note 25, art. 368.

Lord Diplock, "It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it."[74] The ECtHR, in *Prager and Oberschlick v. Austria*, stated that to carry out its duty of guaranteeing justice, the judiciary must enjoy public confidence, and therefore, it is necessary "to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticized are subject to a duty of discretion that precludes them from replying."[75]

To compare, the Criminal Code of Transnistria envisages criminal punishment for "public insult of a representative of the authority," for "public insult of the President" during the discharge by him of his official duties, or in connection with their discharge, as well as for insult to the memory of Great Patriotic War- "Public actions or statements expressing obvious disrespect for society and aimed at distorting reliably proven information about the Great Patriotic War, or belittling the merits of participants in the Great Patriotic War, as well as persons who died in the fight against fascism."[76]

The Criminal Code of Abkhazia envisages criminal punishment for "insult (the denigration of the honor and dignity of another person, expressed in indecent form) ... slander (the spreading of deliberately falsified information that denigrates the honor and dignity of another person or undermines his reputation), and public insult of an authority representative of the authority."[77]

F. ACCREDITATION OF FOREIGN JOURNALISTS

International standards provide that accreditation is necessary [to access restricted areas, including places with limited

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[74] ART. 19, BACKGROUND PAPER ON FREEDOM OF EXPRESSION AND CONTEMPT OF CT., INT'L SEMINAR ON PROMOTING FREEDOM OF EXPRESSION WITH THE THREE SPECIALISED INT'L MANDATES (Nov. 29-30, 2000) https://www.article19.org/data/files/pdfs/publications/foe-and-contempt-of-court.pdf.

[75] *Prager & Oberschlick v. Austria*, App. No. 15974/90, ¶ 34, 21 Eur. H.R Rep. 1 (1995), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-57926&filename=CASE%20OF%20PRAGER%20AND%20OBERSCHLICK%20v.%20AUSTRIA.doc.

[76] Ugolovnyĭ kodeks Приднестровской Молдавской Республики [Criminal Code of the Pridnestrovian Moldavian Republic] arts. 242-1, 316, 316-1, (UK PMR) (Trans.)..

[77] Уголовный кодекс Республики Абхазия [Criminal Code of the Republic of Abkhazia] arts. 124, 125, 321, (Abkh.).

capacity, closed-off spaces, or dangerous zones] for access to places with limited capacity or closed places, including dangerous areas.[78]

Over the last three decades, border skirmishes and serious escalations were taking place in the region constantly. In this context, the accreditation of foreign journalists for their protection and assistance was justifiable. In addition, the only way into Artsakh was from Armenia. The Azerbaijani authoritarian regime, headed by Ilham Aliyev, prohibited the access of foreign journalists to Artsakh from Azerbaijan, and those visiting from Armenia soon found their names on Azerbaijan's blacklist. For example, a group of Russian journalists, namely Alexander Shmelev, Dmitry Bavyrin, Marina Skorikova, and Svetlana Shmeleva, were included in that list immediately after visiting Artsakh in 2014. Journalist and editor-in-chief of the Swiss monthly magazine Schweizer Monat, Ronnie Grob, was also blacklisted for his visit to Artsakh in 2019.

To obtain accreditation, foreign journalists had to apply to the Ministry of Foreign Affairs of the Republic of Artsakh according to clearly defined procedures available on the Ministry's website. The procedure was mostly in line with the recommendations on the accreditation of foreign journalists in the OSCE region provided by the OSCE (Organization for Security and Co-operation in Europe). Freelancers also had the right to be accredited.

The list of grounds for accreditation refusal was legitimate and exhaustive. Nevertheless, one of them, articulated as "dissemination of biased information about Artsakh," appeared problematic. By OSCE standards, accreditation should not have been used as a means to control the content of critical reporting and should have been aimed solely at facilitating the work of journalists. In this context, the refusal of accreditation for "biased information" falls short of international standards. Moreover, the term "biased information" is a subjective notion and lacks certainty. Nevertheless, journalists had the right to appeal such refusals in court.

To compare, in Transnistria foreign journalists must receive accreditation in the State Media Service. For short-term accreditation, editors, journalists, and independent freelancers

[78] ELENA SHERSTOBOEVA & VALENTINA PAVLENKO, ACCREDITATION OF FOREIGN JOURNALISTS IN THE OSCE REGION (ORG. FOR SEC. & COOP. IN EUR., 2016),https://www.osce.org/files/f/documents/2/8/245146.pdf.

must submit a statement to the civil service. The grounds for the denial of accreditation listed in law are the following: 1) the application contains incorrect data, 2) a foreign state media or a journalist disseminated information that does not correspond to reality, degrades the honor and dignity of citizens, damages the business reputation of Pridnestrovian organizations, the interests of Pridnestrovie, as well as false or distorted information, that can harm friendly relations between states; 3) the journalist carried out activities in the PMR without having received accreditation earlier; 4) the journalist was previously deprived of accreditation on the territory of PMR.[79]

Media representatives of foreign countries working in the territory of South Ossetia should apply to the State Information and Press Committee of the Republic of South Ossetia..[80] The application must be accompanied by "a copy of the accreditation of the Ministry of Foreign Affairs of the Russian Federation."[81] Official confirmation for accreditation is sent to the media "based on the results of consideration."[82] The State Information and Press Committee of the Republic of South Ossetia does not provide grounds for the denial of accreditation.

Returning to the regulations of Artsakh, it is worth noting that over 800 foreign journalists from 290 media outlets were accredited by the Government of Artsakh to cover the 44-day war in 2020. Canadian journalist, analyst, and freelancer for The Guardian and CNN, Neil Hauer, who covered the war live from the frontlines in Artsakh, testified, "Broadly speaking, there weren't any restrictions that were beyond the pale."[83] However, some

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[79] Polozhenie o Poriadke Akkreditatsii v Pridnestrovskoĭ Moldavskoĭ Respublike Zhurnalistov Redaktsiĭ Sredstv Massovoĭ Informatsii Inostrannykh Gosudarstv i Nezavisimykh Zhurnalistov Inostrannykh Gosudarstv (Frilanserov)
[Regulation on the Accreditation Procedure in the Pridnestrovian Moldovian Republic for Journalists of the Foreign Mass Media and Foreign Independent Journalists (Freelancers)], approved by the State Service for the Ministry of Digit. Dev., Comm'n and Mass Media of the Pridnestrovian Moldavian Republic, Jun. 21, 2016, No. 37(Trans.).

[80] *Accreditation Scheme of Working in the Territory of South Ossetia for Media Representatives of Russia and Other Countries*, State InformationNews Agency "ResES," https://cominf.org/en/accreditation (last visited Jul. 30, 2023).

[81] *Id.*

[82] Id.

[83] Neil Hauer, *Covering the Nagorno-Karabakh Conflict and War as a Foreign Journalist*, Regional Post (June 9, 2021),

journalists working on the ground were deliberately targeted by Azerbaijani armed forces. As a result, a local fixer was killed, and seven journalists were heavily injured. An ad hoc report by the Artsakh Ombudsman titled *on the Azerbaijani Attacks on Journalists Covering Hostilities in Artsakh* stated that Azerbaijan's deliberate attacks on journalists were carried out with drones and aimed at keeping foreign media out of Artsakh.[84]

After the 44-day war, foreign journalists often found their access to Artsakh denied. This change was primarily due to the Russian peacekeeping mission deployed there, which monitored traffic into and out of Artsakh. For example, Neil Hauer and British journalist Mark Stratton reported being denied permission to visit Artsakh.[85]

Moreover, since December 2022 to the last days of its existence, Artsakh had been completely blockaded by Azerbaijan, causing a major humanitarian crisis. With the only road linking Artsakh to the outside world blocked, in the words of Reporters Without Borders, "Nagorno-Karabakh [was] turning into a news and information black hole."[86]

IV. AZERBAIJANI FALSE NARRATIVES OVERSHADOWED AND MARGINALIZED ARTSAKH'S VOICE, ENABLING CRIMINAL AGENDAS AND WHITEWASHING ATROCITIES

Azerbaijan is an authoritarian state. Since 1993, the presidency has been controlled by the Aliyev family. Current president Ilham Aliyev assumed the presidency over the country from his father in 2003. Since there are no term limits, he has been "elected" for 5 consecutive terms. During that time, Azerbaijan has never had free or fair elections and international observers have documented systemic media repression, a biased electoral framework, harassment, and intimidation by authorities, resulting

https://regionalpost.org/en/articles/covering-the-nagorno-karabakh-conflict-and-war-as-a-foreign-journalist.html

[84] Human Rights Ombudsman of the Republic of Artsakh, *Ad Hoc Public Report on the Azerbaijani Attacks on Journalists Covering Hostilities in Artsakh (Nagorno-Karabakh)*, 18 Dec. 2020, https://artsakhombuds.am/en/document/783

[85] Reporters Without Borders, *Russian Peacekeepers Deny Foreign Reporters Access to Nagorno-Karabakh*, Apr. 9, 2021, https://rsf.org/en/russian-peacekeepers-deny-foreign-reporters-access-nagorno-karabakh

[86] *Id.*

in opposition parties having no chance to gain power through elections.[87]

To have a general understanding of the status of freedom of expression and freedom of media in Azerbaijan, it is enough to mention that Freedom House, in its *Freedom in the World* annual reports, has rated Azerbaijan "not free" for several years in a row.[88]

Azerbaijan is a country where defamation is a criminal offense. Many provisions are not in line with European standards on freedom of expression and media freedom, and do not allow the media to effectively exercise its role as a "public watchdog."[89]

For years, journalists and human rights activists in Azerbaijan have been subjected to murder, death threats, kidnapping, bogus criminal charges, detentions, tortures, and thorough surveillance. Victims of these horrific actions are those raising awareness about different issues. "Justice for Journalists" reports that only 215 incidents of attacks and threats against journalists were recorded in 2021.[90] For 2020 the number was 194[91]. In most cases, attacks are committed by government officials, and no adequate investigation is carried out. Moreover, laws criminalizing defamation continue to be used to force journalists into self-censorship. As a result of brutal persecution, many human rights activists and journalists have had to leave the country. However, even living abroad for dissent is not safe. For example, the body of a political refugee Vugar Rza was found in a river in Belgium, opposition activist Bayram Mammadov, was found dead in Istanbul, Journalist Huseyn Bakixanov "fell" from a roof of a hotel in Tbilisi.[92]

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[87] FREEDOM HOUSE, *Country Report: Azerbaijan,* 2025, https://freedomhouse.org/country/azerbaijan.

[88] *Id.*

[89] European Commission for Democracy through Law (Venice Comm'n), *Azerbaijan - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Law on Media*, 131st Plenary Sess., DOC. NO. CDL-AD(2022)09 (June 17-18, 2022), https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)009-e.

[90] Khaled Aghaly, *Attacks on Media Workers in 2021: Azerbaijan and Central Asia,* JUSTICE FOR JOURNALISTS(2021), https://jfj.fund/report_2021_2/#:~:text=In%20Azerbaijan%2C%20215%20incidents%20of,of%20the%20research%20for%202021.

[91] Justice for Journalists Found., *Annual Report 2021: Attacks on Media Workers in Azerbaijan* (2021), https://jfj.fund/annual-report-2021

[92] Reporters Without Borders, *Azerbaijani Journalists Face Threats Abroad* (2022), https://rsf.org/en/news/azerbaijani-journalists-face-threats-abroad

However, among dissenters, activists who promote the peace agenda with Armenians face the cruelest treatment. One Azerbaijani correspondent who was working with a Turkish-Armenian newspaper became the victim of a hate campaign, received threats, and was called "Armenian bastard" and "traitor."[93] According to her "My treason is obviously to seek peace."[94] In addition, social media users and anti-war activists who called for a peaceful resolution to the 2020 44-day war have become a target of online harassment and threats.[95] Following the 2022 September escalation, journalists and political activists who spoke out against the war became the target of a public campaign that spread their photos stamped with the hashtag #xainitaniyaq (recognize the traitor).[96] For example, Ahmad Mammadli, the chair of Democracy 18 Movement was sentenced to 30 days in prison for stating that "Aliyev Ilham will definitely answer before the international courts… for the crimes he committed not only against the Azerbaijani people but also against the Armenian people."[97] . Such examples are widespread.

For decades Azerbaijan has consistently employed misinformation to overshadow and marginalize Artsakh's voice while advancing its aggressive policies and excusing repeated human rights abuses. By combining state-controlled propaganda, diplomatic leverage, and the strategic exploitation of international dynamics, Azerbaijan has not only obscured its role as an aggressor but also manipulated global perceptions of Artsakh's Armenian population.

Azerbaijan weaponized disinformation to delegitimize Artsakh's struggle for self-determination, portraying the region's Armenian population as occupiers of Azerbaijani land. This narrative dismisses centuries of Armenian heritage in the region and disregards the legitimate aspirations of its people. By promoting this distorted perspective, Azerbaijan has largely

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[93] Committee to Protect Journalists, *Harassed and Jailed: Attacks on the Press in Azerbaijan* (Apr. 6, 2016), https://cpj.org/2016/04/attacks-on-the-press-harassed-and-jailed

[94] *It Seems to Be Treason to Seek for Peace; Azerbaijani Journalist Reacts to Threats,* EPRESS.AM (Oct. 17, 2014, 6:19 PM), https://epress.am/en/2014/10/17/it-seems-to-be-treason-to-seek-for-peace-azerbaijani-journalist-reacts-to-threats.html.

[95] Ismi Aghayev, *Voices of Dissent: Azerbaijan Reacts to War*, OC MEDIA (Sep. 22, 2022), https://oc-media.org/features/voices-of-dissent-azerbaijan-reacts-to-war/

[96] *Id.*

[97] *Id.*

succeeded in silencing Artsakh on global platforms, often denying it the opportunity to defend its rights and present its case to the international community.

Azerbaijan's influence over international organizations has been pivotal in justifying its actions. That influence allowed Azerbaijan to deflect scrutiny from well-documented war crimes, such as targeting civilians, deploying banned weapons, and destroying cultural heritage during and after conflicts.

Despite independent observers and human rights organizations thoroughly documenting these atrocities, Azerbaijan has evaded accountability. Instead, it continues to exploit its geopolitical relevance to shield itself from consequences, leveraging diplomatic and economic partnerships.

Before engaging in any of its criminal activities, Azerbaijan systematically fabricates a false narrative through various international platforms and cross-border partnerships, sometimes even bribing state officials and media outlets.

For example, on December 12, 2022, in an effort to block the Lachin Corridor—the sole lifeline connecting 120,000 residents of Nagorno-Karabakh to the outside world—a group of Azerbaijanis, disguised as environmental activists, staged a demonstration on the highway.[98] This orchestrated protest was part of a broader effort to blockade the corridor. The demonstrators, predominantly members of Azerbaijani NGOs—many of which are state-sponsored—were joined by journalists, amplifying their message.[99]

The so-called "environmentalists" claimed that the Artsakh government was illegally operating and mismanaging mining sites in the region.[100] In reality, this claim was largely seen as a pretext for the blockade[101] The irony of their protest lies in Azerbaijan's own economy, which is heavily reliant on oil and natural gas, industries often criticized for their environmental impact.[102] In

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[98] Lusine Musayelian,*Who Are The Azerbaijani Eco-Activists?,* AZTUTYUN RADIOKAYAN, *(*Dec. 14, 2022), https://www.azatutyun.am/a/32176325.html

[99] *Id.*

[100] Lynn Zovighian et al., *From Blockade to War: The Ethnic Cleansing of the Armenians of Nagorno-Karabakh*, News.am (Feb. 15, 2023), https://news.am/eng/news/797696.html

[101] Alex Avaneszadeh, *What Does Azerbaijan's Blockade of Nagorno-Karabakh Mean?*, Fletcher Forum of World Affairs (Feb. 14, 2023), https://www.fletcherforum.org/the-rostrum/2023/2/14/what-does-azerbaijans-blockade-of-nagorno-karabakh-mean

[102] OCCRP, *Azerbaijan's COP29 Organizers Criticized For Oil Ties, Other Potential Conflicts of Interest*, Organized Crime and Corruption Reporting

reality, the demonstration served as a strategic maneuver to exert pressure on Artsakh by severing its vital connection to the outside world.[103]

Another example is that prior to its pre-planned and unprovoked attack on Artsakh on September 19, 2023, Azerbaijan's Ministry of Foreign Affairs issued a press release stating:

"On September 19, 2023, a vehicle exploded on an anti-tank landmine planted in the Khojavand region by a sabotage group of the Armenian armed forces located in the territories of temporary deployment of the Russian peacekeeping contingent in Azerbaijan. As a result of this provocation, 2 civilians were killed. On the same day, 4 personnel of the Ministry of Internal Affairs dispatched to the area of the aforementioned terror act were killed in a landmine explosion on a new road tunnel in Taghaverd village of Khojavend region."[104] However, the attack, clearly coordinated and reported along the entire line of contact, occurred just hours after the press release and followed weeks of observed Azerbaijani military build-up and aggressive rhetoric.[105]

It is also worth mentioning that Azerbaijan's practice of "caviar diplomacy" has become a central strategy in its efforts to marginalize the voice of Artsakh and manipulate global perceptions of its actions.[106] Through the systematic bribing of foreign officials, Azerbaijan has gained influence in key international organizations, notably the Parliamentary Assembly of

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Project (Nov. 8, 2024), https://www.occrp.org/en/project/know-your-host/azerbaijans-cop29-organizers-criticized-for-oil-ties-other-potential-conflicts-of-interest

[103] Human Rights Defender of the Republic of Artsakh & Tatoyan Foundation, *The Azerbaijani Government's "Eco-Activist" Agents Who Blockaded the Only Road of Life Connecting Artsakh to Armenia and the Outside World* (Feb. 22, 2023), https://tatoyanfoundation.org/wp-content/uploads/2023/02/ECO_ACTIVISTS_22.02.2023V2.pdf

[104] Republic of Azerbaijan Ministry of Foreign Affairs, *No:504/23, Press Release on the Death of Civilians and the Personnel of the Ministry of Internal Affairs as a Result of Landmine Terror in Khojavend*, https://mfa.gov.az/en/news/no50423 (last visited Dec. 8, 2024).

[105] Hodge, Nathan & Matthias Williams, *Azerbaijan Launches Massive Offensive in Nagorno-Karabakh*, EurAsiaNet (Sept. 19, 2023), https://eurasianet.org/azerbaijan-launches-massive-offensive-in-nagorno-karabakh

[106] Kristof Bender, *Caviar Diplomacy: How Azerbaijan Silenced the Council of Europe*, European Stability Initiative (May 24, 2012), https://esiweb.org/publications/caviar-diplomacy-how-azerbaijan-silenced-council-europe

the Council of Europe (PACE).[107] This corrupt network has allowed Azerbaijan to suppress critical reports and evade accountability for human rights violations and its aggressive policies, particularly towards Artsakh.[108]

One of the most striking examples of this strategy was revealed in a 2021 ruling by the Milan Court of General Jurisdiction, which directly linked the Azerbaijani regime to a €500,000 bribe paid to Luca Volontè, the former leader of the European People's Party-Christian Democrats in PACE.[109] This bribe was specifically intended to derail a 2013 report on political prisoners in Azerbaijan, which highlighted the country's systemic repression, including the imprisonment of political dissidents and critics.[110] The Milan investigation uncovered a wider bribery network within PACE, where Volontè, along with other members such as Elkhan Suleymanov and Muslum Mammadov, was implicated in securing Azerbaijan's interests through illicit financial means.[111] From December 2012 to December 2014, Volontè received a total of €2.39 million funneled through offshore companies and banks in Estonia and Latvia.[112] The court focused on the €500,000 bribe as the clearest evidence of Volontè's efforts to conceal critical reports and promote Azerbaijan's agenda at the expense of human rights and justice.[113]

As demonstrated by the Milan court ruling, "caviar diplomacy" shows how Azerbaijan used financial influence to control international discourse. By silencing critical voices and promoting a distorted version of events, Azerbaijan succeeded in marginalizing the struggle of Artsakh for self-determination. This allowed Azerbaijan to present itself as a victim of aggression, diverting attention from its own violations and manipulations. The corrupt network, facilitated by Azerbaijan's strategic use of bribery and disinformation, further distorts global perceptions, making it more difficult for international bodies to hold the country accountable.[114]

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[107] *Id.*
[108] European Stability Initiative, *Caviar Diplomacy: Why Every European Should Care*, https://www.esiweb.org/proposals/caviar-diplomacy.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*

While there is limited direct evidence linking these operations specifically to the marginalization of Artsakh's struggle for self- determination, it is plausible that such influence was employed to distort the narrative about the Armenian population of Artsakh and silence criticism of its actions, including the blockade of the Lachin corridor and its attack on Artsakh in September 2023. This likely contributed to a more favorable presentation of Azerbaijan's position and limited the visibility of Artsakh's claim for justice and self-determination.

For the sake of comprehensiveness, it is worth noting that despite employing the aforementioned illegal tactics, Azerbaijan's efforts to advance its false narratives and whitewash its atrocities do not always succeed. For example, the International Court of Justice (ICJ) ruled on November 17, 2023, that, while awaiting a final verdict, Azerbaijan must "(i) ensure that persons who have left Nagorno-Karabakh after 19 September 2023 and who wish to return to Nagorno-Karabakh are able to do so in a safe, unimpeded and expeditious manner; (ii) ensure that persons who remained in Nagorno-Karabakh after 19 September 2023 and who wish to depart are able to do so in a safe, unimpeded and expeditious manner; and (iii) ensure that persons who remained in Nagorno-Karabakh after 19 September 2023 or returned to Nagorno-Karabakh and who wish to stay are free from the use of force or intimidation that may cause them to flee that individuals who left Nagorno-Karabakh after September 19 and wish to return can do so safely, without obstruction, and promptly."[115]

However, despite substantial evidence[116][117] indicating Azerbaijan's involvement in systemic corruption, human rights violations, and disinformation efforts, the international community has yet to implement significant sanctions or accountability measures. This absence of a decisive response not only allows Azerbaijan to continue such practices with relative impunity but also undermines confidence in global institutions responsible for upholding justice and human rights.

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[115] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, 2023 I.C.J. 619 (Nov. 17, 2023), https://www.icj-cij.org/node/203314.

[116] Freedom House, *Freedom in the World 2024: Azerbaijan* (2024), https://freedomhouse.org/country/azerbaijan/freedom-world/2024

[117] Amnesty Int'l, *Azerbaijan 2024: Human Rights Situation in Azerbaijan* (2024), https://www.amnesty.org/en/location/europe-and-central-asia/azerbaijan/report-azerbaijan/

V. CONCLUSION

Freedom of expression and media is an indicator and a core element of a democratic society. Restriction of the person's right to report on any matter of public concern deprives the public of an essential check on the powers of government. In contrast, the protection of that right leads to a sustainable and strong democracy. To achieve the latter goal, states and various universal and regional organizations cooperate, provide mutual assistance, organize seminars, etc. By the deprivation of such opportunities, unrecognized countries face serious challenges.

Based on the conducted research and analyses, this paper concludes that one of the unrecognized countries, the Republic of Artsakh, was able to overcome the challenges of diplomatic and economic isolation and had media regulations that comply with the minimum standards recognized in international law. However, some norms of the legislation were to be amended, as they had a "chilling effect" on freedom of expression and freedom of information.

This paper also concludes that the marginalization of unrecognized states like Artsakh highlights a significant flaw in the international system, where dominant state narratives often overshadow the voices of vulnerable populations. Azerbaijan's ability to spread misinformation about Artsakh while silencing its people illustrates the risks posed by unchecked informational dominance in global conflicts. Artsakh's limited access to media and international platforms further deepened its isolation, leaving it vulnerable to Azerbaijan's efforts to distort facts, pursue unlawful agendas, and conceal its crimes. This imbalance not only undermines justice and accountability but also perpetuates cycles of aggression and oppression, underscoring the urgent need for more inclusive and equitable representation in global discourse.