

International human rights law in the era of digital disinformation and propaganda: case studies from Myanmar and Ukraine

Prawo międzynarodowe praw człowieka
w dobie cyfrowej dezinformacji i propagandy.
Analiza przypadków Mjanmy i Ukrainy

Международное право в области прав человека
в эпоху цифровой дезинформации и пропаганды.
Анализ примеров из опыта Мьянмы и Украины

Міжнародне право прав людини в епоху цифрової дезінформації
та пропаганди. Аналіз на прикладі М'янми та України

MICHAŁ BALCERZAK

Dr. habil., Prof. of University of Szczecin
e-mail: michal.balcerzak@usz.edu.pl, <https://orcid.org/0000-0002-6421-1742>

JULIA KAPELAŃSKA-PRĘGOWSKA

Dr., Nicolaus Copernicus University in Toruń
e-mail: jkpre@umk.pl, <https://orcid.org/0000-0002-7643-2681>

Summary: Today, more than ever, the Internet and social media have become our primary sources of information, offering us a window to the world. However, this freedom to access and disseminate information has negative consequences, as it allows for a rapid spread of disinformation, propaganda, and hate speech. From the perspective of international human rights law, questions arise regarding the obligations and responsibilities of states. In this discussion, the authors argue that one of the primary tasks of states is to take necessary and appropriate measures to simultaneously protect the freedom of expression and prevent the spread of propaganda and disinformation. Balancing these conflicting interests is a complex challenge. To better understand them, the authors analyse selected examples from international and domestic jurisprudence and practice, such as the Rohingya genocide in Myanmar and the war in Ukraine. These cases serve to illustrate how state-sponsored propaganda and disinformation can lead to violence and result in grave human rights violations.

Key words: freedom of expression, disinformation, propaganda, Myanmar, Ukraine, human rights

Streszczenie: Internet i media społecznościowe stały się naszymi głównymi źródłami informacji, otwierając nam okno na świat. Jednak wolność dostępu do informacji i łatwość jej rozpowszechniania niesie ze sobą negatywne konsekwencje w postaci szybkiego rozprzestrzeniania się dezinformacji, propagandy i mowy nienawiści. Z perspektywy prawa międzynarodowego praw człowieka pojawiają się pytania dotyczące obowiązków i odpowiedzialności państw. W niniejszym artykule autorzy argumentują, że zadaniem państw jest podjęcie niezbędnych i odpowiednich działań zarówno w celu ochrony wolności wypowiedzi, jak i zapobiegania rozprzestrzenianiu się propagandy i dezinformacji. Rozróżnienie wypowiedzi podlegających ochronie od tych przekraczających dopuszczalne granice wolności słowa niekoniecznie jest oczywiste i może stanowić

trudne wyzwanie. Aby lepiej zrozumieć te kwestie, autorzy koncentrują się na analizie dwóch przykładów, tj. ludobójstwa muzułmańskiej mniejszości Rohingya w Mjanmie oraz wojny w Ukrainie. Stanowią one ilustrację tego, jak państwowa propaganda i dezinformacja mogą prowadzić do przemocy i poważnych naruszeń praw człowieka.

Słowa kluczowe: wolność słowa, dezinformacja, propaganda, Mjanma, Ukraina, prawa człowieka

Резюме: Интернет и социальные сети стали для нас основными источниками информации, открыв нам окно в мир. Однако свобода доступа к информации и возможность ее распространения влекут за собой негативные последствия в виде быстрого распространения дезинформации, пропаганды и языка вражды. С точки зрения международного права в области прав человека возникают вопросы об обязанностях и ответственности государств. В данной статье авторы утверждают, что в обязанности государств входит принятие необходимых и надлежащих мер как для защиты свободы выражения мнений, так и для предотвращения распространения пропаганды и дезинформации. Разграничение между защищаемой речью и речью, выходящей за допустимые пределы свободы выражения мнений, не всегда очевидно и может представлять определенную сложность. Чтобы лучше понять эти вопросы, авторы сосредоточились на анализе двух примеров – геноцида мусульманского меньшинства рохинджа в Мьянме и войны в Украине. Они наглядно показывают, как государственная пропаганда и дезинформация могут приводить к насилию и серьезным нарушениям прав человека.

Ключевые слова: свобода слова, дезинформация, пропаганда, Мьянма, Украина, права человека

Резюме: Інтернет та соціальні мережі стали нашими основними джерелами інформації, відкриваючи вікно у світ. Однак свобода доступу до інформації та легкість її поширення призводить до негативних наслідків у вигляді швидкого поширення дезінформації, пропаганди та мови ворожнечі. З точки зору міжнародного права прав людини виникають питання щодо обов'язків та відповідальності держав. У цій статті автори стверджують, що саме на державах лежить відповідальність за вжиття необхідних і належних заходів як для захисту свободи вираження поглядів, так і для запобігання поширенню пропаганди та дезінформації. Різниця між захищеним мовленням і мовленням, яке перевищує допустимі межі свободи вираження поглядів, не завжди очевидна і може бути складною. Щоб краще зрозуміти ці питання, автори зосереджуються на аналізі двох прикладів, а саме геноциду мусульманської меншини Рохинджа в М'янмі та війни в Україні. Вони ілюструють, як державна пропаганда та дезінформація можуть призвести до насильства та серйозних порушень прав людини.

Ключові слова: свобода слова, дезінформація, пропаганда, М'янма, Україна, права людини

Introduction

Information warfare is not a new phenomenon. Throughout history, information and its presentation have consistently represented valuable assets and instruments of influence over individuals and societies.¹ This influence becomes particularly potent in times of war, conflict and crisis, and it should not be underestimated.² In recent decades, rapid technological development

¹ On the role played by the media, in particular the audiovisual media see, e.g.: Judgment of the ECtHR of 17 September 2009, *Manole and Others v. Moldova*, application no. 13936/02, § 97; Judgment of the ECtHR of 16 June 2015, *Delfi AS v. Estonia*, application no. 64569/09, § 134.

² J. Fox, D. Welch, *Justifying War: Propaganda, Politics and the Modern Age*, in: *Justifying War*, eds. J. Fox, D. Welch, London 2012, pp. 1–20.

has enabled the rapid and widespread dissemination of information. During World War II, propaganda was disseminated through traditional media, such as newspapers, radio, posters, and leaflets. Today, however, the scale is different. Almost everyone owns a smartphone, tablet, or laptop, allowing them to capture, share and consume information. The World Wide Web has emerged as the predominant channel for communication and information, prompting states to apply measures to control and censor undesirable content.³ Techniques such as blocking webpages and suspending social media accounts have become standard procedures to fight “terrorist propaganda,” “external influence” or political critique.⁴

However, this paper does not aim to delve into these extensively well-researched phenomena infringing the freedom of expression. Instead, it will focus on another problem, i.e. on situations where the state or state-affiliated or inspired actors actively promote disinformation and propaganda, incite war and violence, or deliberately manipulate societies. In the domain of political – but also legal – discourse, disinformation is often labelled as propaganda. Political actors who produce disinformation masqueraded as news do so to influence public perception, whether it pertains to specific issues, individuals, or global views of the world.⁵ Identifying a message or news as propaganda inherently implies a negative and dishonest connotation. Synonyms for propaganda include terms such as falsehood, distortion, deceit, manipulation, mind control, psychological warfare, and brainwashing.⁶ A specific subset of this phenomenon is propaganda for war, which serves to incite or encourage aggression, hostility, and participation in armed conflicts.

The problem is significant, because disinformation, fake news, and propaganda are universally recognised as substantial security threats, particularly when they are state-sponsored.⁷ As observed by the human rights organisation Article 19, digital technologies have transformed the ways of state-led disinformation and

³ Internet disruptions, shutdowns and suspension of social media have been recorded in many countries around the globe. See: *Amnesty International Report 2021/22: The State of the World's Human Rights*, pp. 23, 36, 55, 111, 140–141, 191, 197, 216, 264, <https://www.amnesty.org/en/documents/pol10/4870/2022/en/> [access: 5.09.2023].

⁴ E. Bechtold, G. Phillipson, *Glorifying Censorship? Anti-Terror Law, Speech, and Online Regulation*, in: *The Oxford Handbook of Freedom of Speech*, eds. A. Stone, F. Schauer, Oxford 2021 [online edition: Oxford Academic, 10.02.2021], pp. 518–541.

⁵ B. Kalsnes, *Fake News*, in: *Oxford Research Encyclopedias: Communication*, ed. J. Nussbaum, <https://doi.org/10.1093/acrefore/9780190228613.013.809> [access: 10.09.2023].

⁶ G.S. Jowett, V.J. O'Donnell, *Propaganda and Persuasion*, 5th ed., London 2012, pp. 2–3.

⁷ B. Baade, *Fake News and International Law*, *European Journal of International Law* 2018, vol. 29, no. 4, pp. 1357–1376.

propaganda: not only expanding its scale and speed but also utilising state-sponsored troll farms, bots, deep fakes and impersonation of media outlets.⁸

The article is divided into three parts, followed by conclusions. The first section provides a normative overview of international law standards regarding freedom of expression, propaganda, and disinformation. The authors analyse the types of state conduct prohibited by international law and reflect on whether it violates the freedom of expression and information. The subsequent sections present two recent case studies of state-sponsored propaganda and disinformation: the situation of Rohingya in Myanmar and the Kremlin's propaganda related to the war in Ukraine.

The central issue we consider in this article is how international law currently addresses such state conduct. Is there a need for standardised definitions? How can we best prevent the misuse of the Internet and new digital technologies? What role do international organisations and the international community play in curbing state-sponsored propaganda and disinformation? Finally, do restrictions on state-inspired propaganda violate freedom of expression and information? We argue that the unprecedented rise of fake news and intentional disinformation calls for an interpretation of freedom of expression that encompasses the right to access reliable and unmanipulated information. The two case studies presented in the article effectively illustrate the power of propaganda. While we acknowledge that censorship and free speech restrictions should be approached cautiously, their appropriateness depends on the context. It is crucial to distinguish between situations in which a state limits its citizens' freedom of expression and situations in which it deliberately seeks to manipulate them. Without access to reliable information, democracies will struggle to function, and protecting human rights becomes challenging. The right of people to speak freely on matters of public concern is rightly viewed as essential to the formation of democratic public opinion through which the people control the government.⁹ However, ensuring this right may not suffice when governments actively employ propaganda.

⁸ *Article 19's Submission: Response to the Consultations of the UN Special Rapporteur on Freedom of Expression on Her Report on Disinformation*, <https://www.ohchr.org/sites/default/files/Documents/Issues/Expression/disinformation/2-Civil-society-organisations/ARTICLE19.pdf> [access: 12.09.2023].

⁹ A. Bhagwat, J. Weinstein, *Freedom of Expression and Democracy*, in: *The Oxford Handbook...*, pp. 82–105.

1. Freedom of expression v. propaganda for war and disinformation (normative level)

Freedom of expression is universally recognised as one of the core civil and political freedoms guaranteed by fundamental global¹⁰ and regional¹¹ human rights instruments. Nonetheless, this freedom is not absolute and can be subject to limitations¹² or even a derogation in times of public emergency.¹³ In recent decades, freedom of expression has been an area of increased interest as reflected in the activities of various stakeholders, including the UN Special Rapporteur on freedom of opinion and expression,¹⁴ the Human Rights Committee,¹⁵ and, on the regional level, through the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR), which has been evolving since the late 1970s.¹⁶

While normative and jurisprudential standards pertaining to freedom of expression have been well-established, much less attention has been paid to phenomena that can be seen as the misuse or abuse of this freedom, such as the dissemination of propaganda for war and disinformation. Nevertheless, the international community's efforts to establish norms preventing states from inciting to war through radio transmissions date back to the 1930s. During this period, under the auspices of the League of Nations, nearly thirty states adopted the International Convention Concerning the Use of Broadcasting in the Cause of Peace.¹⁷

¹⁰ International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (hereinafter: ICCPR), Article 19 (2): "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950), Article 10; American Convention on Human Rights (adopted on 22 November 1969); OAS Treaty Series no. 36, Article 13; African Charter on Human and Peoples' Rights (adopted on 27 June 1981, entered into force 21 October 1986), (1982) 21 ILM 58, Article 9 (2).

¹² Cf. ICCPR, Article 19 (3); European Convention of Human Rights (hereinafter: ECHR), Article 10 (2).

¹³ The freedom of expression does not belong to the catalogue of non-derogable rights, see: ICCPR, Article 4; ECHR, Article 15 (2).

¹⁴ The mandate of the UN Special Rapporteur was established by the Human Rights Commission in 1993, UN Doc. E/CN.4/1993/L.48, currently operating under the Resolution of the Human Rights Council 52/9 of 2023.

¹⁵ UN Human Rights Committee, General Comment no. 34, UN Doc. CCPR/C/GC/34, 12.09.2011, Article 19: Freedoms of opinion and expression.

¹⁶ Cf. J.-F. Flauss, *The European Court of Human Rights and the Freedom of Expression*, Indiana Law Journal 2009, vol. 84, pp. 809–849; W.A. Schabas, *The European Convention on Human Rights. A Commentary*, Oxford 2015, pp. 444–481.

¹⁷ Adopted on 23 September 1936, League of Nations Treaty Series 1938, vol. 186, no. 4319.

Article 2 of this treaty obliged States Parties “to ensure that transmissions from stations within their respective territories shall not constitute an incitement either to war against another High Contracting Party or to acts likely to lead thereto.” The 1936 Convention entered into force in 1938, although its significance can only be described as mediocre. Nonetheless, it did reflect valid concerns about using the then-modern technology (radio broadcasting) to disseminate propaganda.

In the post-war evolution of international human rights law, one should remember the explicit reference to “propaganda for war” in Article 20 of the International Covenant on Civil and Political Rights (ICCPR). This provision prohibits “any propaganda for war” (§ 1) and obliges States Parties to establish statutory prohibitions of “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (§ 2). However, it is noteworthy that this standard has been barely explained in the practice of the Human Rights Committee and legal doctrine, at least until certain scholars took a closer look at the prohibition of war propaganda.¹⁸ General Comment no. 11, which provides guidance on Article 20 of the ICCPR, does not define or offer examples of the various forms of propaganda. Instead, it only clarifies the ultimate consequence of it, namely the threat of aggression or a resulting act of aggression or breach of the peace contrary to the Charter of the United Nations.¹⁹

The obligations arising from Article 20 of the ICCPR are considered largely ‘horizontal’ in nature and require state efforts to protect the essence of this right (i.e. not to be subjected to propaganda for war or incitement to discrimination, hostility, or violence) by private individuals.²⁰ General Comment no. 34 of the Human Rights Committee, which addresses freedom of expression, does not explore the essence of Article 20 in detail. However, it does highlight the compatibility of Article 20 with the broader guarantee enshrined in Article 19.²¹ Moreover, it points out that “what distinguishes the acts addressed in Article 20 from other acts that may be subject to restriction under Article 19 § 3, is that for the acts addressed in Article 20, the Covenant indicates the specific response required from the State: their prohibition by

¹⁸ M.G. Kearney, *The Prohibition of Propaganda for War in International Law*, Oxford 2007, passim.

¹⁹ CCPR, General Comment no. 11, 29.07.1983, Article 20: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred, § 2.

²⁰ M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., Kehl am Rhein 2005, XXI. See also: P.M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee’s Monitoring of ICCPR Rights*, Cambridge 2020, pp. 579–590.

²¹ *Supra* note 15, § 50.

law.”²² It is crucial to approach such often highly repressive legislation with caution due to its potential misuse. This legislation typically does not target the speech of state organs, but focuses on political opposition and activists.

Legally speaking, the prohibition of war propaganda has a well-defined status in international human rights law. It serves as a standard that prioritises the maintenance of peace and security over the misuse of freedom of expression, which runs counter to the most elementary principles of international order. Less clear, however, is how international law addresses the problem of disinformation. In her recent report, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression conducted an analysis of this phenomenon and offered numerous recommendations.²³ She emphasised that while there is no universally accepted definition of ‘disinformation,’ the term generally refers to “false information that is disseminated intentionally to cause serious social harm.”²⁴ The European Union (EU) employs a broader definition, understanding disinformation as “verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm.”²⁵ Notwithstanding these differences, there is a common understanding that disinformation can be extremely harmful to human rights, particularly in the context of modern digital technologies that enable a rapid and sophisticated spread of distorted information. Addressing this challenge – which has thus far received limited attention – must involve various stakeholders, including states and private companies.

In essence, international human rights law recognises the dangers of disseminating propaganda and disinformation. The existing legal framework, including Articles 19 and 20 of the ICCPR, attempts to strike a balance between the legitimate exercise of freedom of expression and the potential for its misuse. It is not coincidental that Article 19 (3) of the ICCPR recalls the “special duties and responsibilities” that come with the exercise of this freedom. However, as illustrated below, states and other actors engage in the active use of propaganda and disinformation, which ultimately leads to violence, war, and human suffering.

²² *Ibidem*, § 51.

²³ Disinformation and freedom of opinion and expression – Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, A/HRC/47/25, 13.04.2021.

²⁴ *Ibidem*, §§ 11–15.

²⁵ Communication on tackling online disinformation, COM (2018) 236, Brussels, 26.04.2018.

2. Case study: anti-Rohingya propaganda in Myanmar

The Rohingya are a Muslim ethnic minority group, although they are not officially recognised as such in Myanmar and face statelessness. They have lived in the predominantly Buddhist Myanmar for centuries. The Rohingya have endured discrimination and persecution for many decades,²⁶ but the most significant exodus occurred in August 2017 following armed attacks, widespread killings, and violence that began in October 2016.²⁷ As observed by the UN High Commissioner for Human Rights, the primary catalyst behind this escalation can be traced to “the dramatic expansion of public access to social media [that] has enabled extremist and ultra-nationalist movements to propagate messages inciting hatred and violence, fuelling communal tensions.”²⁸ The case of anti-Rohingya propaganda serves as a compelling illustration of how powerful the Internet has become and underscores that states cannot afford to remain passive. Instead, states need to take all measures necessary, while fully respecting human rights and fundamental freedoms, to counter any incitement to hatred or violence by publicly condemning such acts and holding those who commit them accountable under criminal law. These obligations are, however, not new and have been previously voiced by various human rights bodies in the context of addressing hate speech.²⁹ In essence, states are expected to act as reasonable regulators, setting standards for social media platforms and website administrators while implementing preventive measures and effectively combating hate speech.

The case of Myanmar is far from straightforward due to the direct and active involvement of public officials in propaganda activities. According to statements from former military officials, researchers, and civilian officials, members of the Myanmar military played a central role in the systematic anti-Rohingya campaign

²⁶ Situation of human rights of Rohingya Muslims minority and other minorities in Myanmar – Report of the United Nations High Commissioner for Human Rights, A/HRC/43/18, 27.01.2020. The report addresses the root causes of the violations and abuses suffered by ethnic and religious minorities in Myanmar, including the Rohingya.

²⁷ Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, 18.09.2018, §§ 1069–1095. It is estimated that between 2016 and 2018 there could have been as many as 25,000 casualties.

²⁸ Statement by Michelle Bachelet, United Nations High Commissioner for Human Rights at the Human Rights Council 43rd Session, 27.02.2020, <https://www.ohchr.org/en/statements/2020/02/high-commissioner-report-rohingya-and-other-minorities-myanmar> [access: 15.09.2023].

²⁹ Cf. Decision of ECtHR of 27 June 2017, *Belkacem v. Belgium*, application no. 34367/14; Decision of ECtHR of 20 April 2010, *Le Pen v. France*, application no. 18788/09; Decision of ECtHR of 8 February 2018, *Abedin Smajić v. Bosnia and Herzegovina*, application no. 48657/16; ECRI General Policy Recommendation no. 15 on Combating Hate Speech, CRI(2016)15, 8.12.2015, Strasbourg.

on Facebook that spanned half a decade. Facebook itself admitted that there were clear and deliberate efforts to covertly disseminate propaganda directly linked to the Myanmar military.³⁰ The United Nations Mission also reported the involvement of several key actors, including nationalist political parties and politicians, prominent monks, academics, influential individuals, and members of the government, who ‘weaponised’ Facebook and other media for “a carefully crafted hate campaign [to] develop a negative perception of Muslims among the broad population in Myanmar.”³¹

Myanmar’s case demonstrated a need to ensure that social media platforms, including Facebook and X (formerly Twitter), uphold human rights and adhere to due diligence standards, as envisaged in the United Nations Guiding Principles on Business and Human Rights (UNGPs).³² It also underscored how states may manipulate Internet in violation of their human rights obligations. In November 2019, Gambia instituted proceedings against Myanmar at the International Court of Justice (ICJ) for breaching its obligations under the Genocide Convention.³³ It seeks to hold Myanmar accountable for the crime of genocide against the Rohingya, and part of the application addresses the issue of hate propaganda against the Rohingya group.³⁴ Under Article III of the Genocide Convention, the commission of the acts listed therein, other than genocide itself, is also prohibited by the Convention. This includes a direct and public incitement to commit genocide. On 23 January 2020, the ICJ indicated provisional measures,³⁵ obliging Myanmar to ensure that its military, as well as any irregular armed units it may direct or support and any organisations and persons that may be subject to its control, direction or influence, do not commit acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to

³⁰ P. Mozur, *A Genocide Incited on Facebook, With Posts From Myanmar’s Military*, The New York Times, 15.10.2018, <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> [access: 24.09.2023].

³¹ Report of the Detailed Findings..., § 696.

³² Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/40/68, 2.05.2019, p. 19. See also: M. Gajos, *Facebook in Myanmar: The Challenges and Promises of Applying the United Nations Guiding Principles on Business and Human Rights to a Social Media Company*, Review of International, European and Comparative Law 2020, vol. 18, pp. 121–148.

³³ The Gambia v. Myanmar (Application instituting proceedings and request for provisional measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, filed on 11 November 2019), <https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf> [access: 26.09.2023].

³⁴ Ibidem, §§ 37–46.

³⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3.

commit genocide, or of complicity in genocide.³⁶ As of December 2023, the case is pending before the ICJ. On 22 July 2022, the Court delivered its Judgment on the preliminary objections raised by Myanmar, finding that it had jurisdiction and that the application was admissible.³⁷

Alongside the proceedings before the ICJ, Gambia initiated a civil action against Facebook at the US District Court for the District of Columbia. Pursuant to Title 28 of the United States Code § 1782, Gambia sought access to the content removed by Facebook for use as evidence in its litigation against Myanmar at the ICJ. Gambia intended to use these records to prove the genocidal intent necessary to establish responsibility for the genocide of the Rohingya. Gambia's request for de-platformed content and related internal investigation documents was granted by the Court's order of 22 September 2021. The US court emphasised that "Facebook can act now. It took the first step by deleting the content that fuelled a genocide [...]. Locking away the requested content would be throwing away the opportunity to understand how disinformation begat genocide of the Rohingya and would foreclose a reckoning at the ICJ."³⁸

While much of the academic and public discourse regarding the Rohingya focused on Myanmar's accountability for the genocide, including state responsibility and individual criminal responsibility,³⁹ other vital aspects received relatively less attention. It seems no less essential to encourage a discussion on possible pathways for prevention and the role of the international community, as well as UN special procedures and other bodies. UN reports have highlighted the root causes and long-standing systemic discrimination against the Rohingya,⁴⁰ which has been overlooked not only by Myanmar but also by the international community as a whole.⁴¹

³⁶ Ibidem, § 80.

³⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022, p. 447.

³⁸ US District Court for the District of Columbia, The Republic of Gambia v. Facebook, Inc., Order of 22 September 2021, <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2021/10/In-re-Gambia-v-Facebook.pdf> [access: 12.09.2023].

³⁹ Cf. M. Ramsden, *Accountability for Crimes against the Rohingya: Strategic Litigation in the International Court of Justice*, Harvard Negotiation Law Review 2021, vol. 26, pp. 153–191; K. Rapp, *Social Media and Genocide: The Case for Home State Responsibility*, Journal of Human Rights 2021, vol. 20, no. 4, pp. 486–502. See also: ICC Pre-Trial Chamber III, 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, ICC-01/19-27, 14.11.2019.

⁴⁰ *Supra* note 31, § 458.

⁴¹ Ibidem, § 747: The UN Mission concluded that already in 2012 and 2013 violence in Rakhine State was pre-planned and instigated and that the Myanmar security forces were actively involved and

Given the fine line between systemic discrimination and hate speech that can ultimately lead to violence or even genocide, it is imperative that such ‘campaigns’ ring an early warning bell.⁴² Facebook has faced criticism for being too slow to act, but at the same time, it has been accused of restricting freedom of speech on many different occasions. This raises the critical question of who should be entrusted with the authority to make such decisions. The question of *who* is crucial because the question of *how* is well-grounded in human rights standards. As reflected in a well-established case law of the ECtHR: “any measure taken by State authorities or private-sector actors to block, filter or remove internet content [...] must in particular be prescribed by a law which is accessible, clear, unambiguous and sufficiently precise to enable individuals to regulate their conduct. They must at the same time be necessary in a democratic society and proportionate to the legitimate aim pursued.”⁴³ In other words, it is crucial *who* will assess the intention (*mens rea* criteria), context, causal link, and potential harm requirements and take responsible and adequate decisions.

3. Case study: Russia’s war propaganda

Russia’s information war against Ukraine had started well before 24 February 2022, when the former launched full-scale military aggression.⁴⁴ While engaging in disinformation in international relations is, in and of itself, neither new nor illegal, Russia took it to the next level by orchestrating a propaganda campaign in support of the war of aggression. This campaign was strictly interlinked with the use of force in blatant violation of the United Nations Charter.⁴⁵ Even though official and media statements have avoided using the term ‘war’ and instead employed the phrase

complicit.

⁴² The Report of the Special Rapporteur on the situation of human rights in Myanmar (A/71/361, 29.08.2016, § 67) mentions systemic discrimination and deprivation of basic human rights of Muslim minority, as well as incidents of hate speech, incitement to hatred and violence and religious intolerance.

⁴³ See: Council of Europe, *Thematic Factsheet on Freedom of Expression, the Internet and New Technologies*, June 2018, <https://rm.coe.int/freedom-of-expression-internet-and-new-technologies-14june2018-docx/16808b3530> [access: 8.08.2023].

⁴⁴ A. Aliaksandrau, *Brave New War: The Information War between Russia and Ukraine*, Index on Censorship 2014, vol. 43, no. 4, pp. 54–60. See also: OHCHR Report on the human rights situation in Ukraine, 15.04.2014, §§ 72–76, <https://www.ohchr.org/en/press-releases/2014/04/ukraine-misinformation-propaganda-and-incitement-hatred-need-be-urgently> [access: 27.09.2023].

⁴⁵ B. Asrat, *Prohibition of Force Under the UN Charter: A Study of Art. 2 (4)*, Uppsala 1991, p. 139.

‘special military operation’, it is indisputable that Russia’s actions constituted a crime of aggression. Russia’s allegations of genocide have been used as a pretext for invading Ukraine, and this case awaits judicial assessment through Ukraine’s application to the International Court of Justice.⁴⁶ The justifications for Russia’s aggression, presented at domestic and international fora, exemplify the instrumentalisation of international law.

It is disappointing, although not entirely surprising, that Russian propaganda has not been strongly condemned by the UN General Assembly (UNGA) and the UN Security Council. Opposition to such propaganda has been voiced by the Human Rights Council (HRC) and various expert bodies, which have called on the Russian Federation to immediately cease its unlawful practices of propaganda for war and promotion of national hatred.⁴⁷ In a resolution addressing the war in Ukraine, the HRC emphasised that “disinformation spread by States and state-sponsored actors can accompany serious violations of international law and can have a far-reaching negative impact on the enjoyment of human rights, in particular in times of emergency, crisis and armed conflict.” In the resolution, the HRC also demanded an immediate cessation of disinformation, propaganda for war, and national hatred related to the aggression against Ukraine.⁴⁸

Before adopting the aforementioned HRC resolution, the Council of the European Union took a significant step on 1 March 2022 by suspending the distribution of state-owned disinformation outlets Russia Today and Sputnik across the EU.⁴⁹ Even before this decision, several regulators in EU Member States had taken action against these outlets, including Estonia, Latvia, Lithuania, and Poland. Germany also prohibited broadcasting the German edition of Russia Today due to a lack of a licence.⁵⁰ EU sanctions were comprehensive, covering all means of transmission and distribution, including cable, satellite, IPTV, platforms,

⁴⁶ Ukraine v. Russian Federation, Application instituting proceedings filed on 26 February 2022, <https://www.icj-cj.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf> [access: 2.08.2023].

⁴⁷ Ukraine: Joint statement on Russia’s invasion and importance of freedom of expression and information, 4.05.2022, <https://www.ohchr.org/en/statements-and-speeches/2022/05/ukraine-joint-statement-russias-invasion-and-importance-freedom> [access: 4.08.2023].

⁴⁸ Human Right Council Resolution S-34/1 on the deteriorating human rights situation in Ukraine stemming from the Russian aggression, 12.05.2022.

⁴⁹ Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine, OJ L 65, 2.03.2022, pp. 1–4 and Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine, OJ L 65, 2.03.2022, pp. 5–7.

⁵⁰ *Ukraine: Sanctions on Kremlin-backed outlets Russia Today and Sputnik*, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1490 [access: 12.08.2023].

websites, and apps. All licences, authorisations, and distribution arrangements were suspended.

While these sanctions can be seen as legal countermeasures to address the Russian Federation's illegal conduct, they raised some concerns about their necessity and proportionality.⁵¹ Russia challenged these measures before the General Court.⁵² Some commentators argued that the EU's decisions violated the right to access information because they were overly broad and covered all content broadcasted by these outlets rather than targeting only propaganda information.⁵³ Admittedly, some justifications for the sanctions may be viewed as too general and do not specifically refer to the war in Ukraine. Instead, they focus on a systematic, international campaign of media manipulation and distortion of facts to reinforce Russia's strategy of destabilising its neighbouring countries as well as the EU and its Member States.⁵⁴ Another argument against the proportionality of EU's sanctions was that misleading and manipulative information is not equivalent to propaganda and that only false information qualifies as such.⁵⁵ However, such an interpretation is legally unfounded. In our opinion, future distinctions should be based on the intent/aim of a particular information and the source and author of the information. Secondary dissemination and use of false information by private individuals,⁵⁶ as well as expressing opinions that may "shock, offend or disturb" on issues that fall within the realm of political discourse and are of public

⁵¹ Ukraine: Joint statement on Russia's invasion...

⁵² Action brought on 8 March 2022, *RT France v. Council*, T-125/22, OJ C 148/64, 4.04.2022.

⁵³ I. Popović, *The EU Ban of RT and Sputnik: Concerns Regarding Freedom of Expression*, EJIL: Talk!, 30.03.2022, <https://www.ejiltalk.org/the-eu-ban-of-rt-and-sputnik-concerns-regarding-freedom-of-expression/> [access: 13.08.2023].

⁵⁴ Recital (6) of Council Regulation continues that "In particular, the propaganda has repeatedly and consistently targeted European political parties, especially during election periods, as well as targeting civil society, asylum seekers, Russian ethnic minorities, gender minorities, and the functioning of democratic institutions in the Union and its Member States", see *supra* note 49.

⁵⁵ *Supra* note 53.

⁵⁶ As observed by the ECtHR: "Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention," see: Judgment of 6 September 2005, *Salov v. Ukraine*, application no. 65518/01, § 113. In the said case, the applicant was apprehended for having disseminated false information about the alleged death of a presidential candidate, the incumbent President Mr Leonid D. Kuchma. This statement of fact was not made or published by the applicant himself and was referred to by him in conversations with others as a personal assessment of factual information, the veracity of which he doubted.

interest,⁵⁷ is different from producing or inspiring false or manipulated content by public authorities.

The CJEU has assessed the latter situation in the *Kiselev* case. The Court observed that “large-scale media support for the actions and policies of the Russian Government destabilising Ukraine, provided, in particular during very popular television programmes, by a person appointed by a decree of President Putin as Head of RS, a news agency that the applicant himself describes as a ‘unitary enterprise’ of the Russian State could be covered by the criterion based on the concept of ‘active support,’ provided that the resulting limitations on the freedom of expression comply with the other conditions that must be satisfied in order for that freedom to be legitimately restricted.”⁵⁸

It can be further argued that even if specific information does not meet the definition of propaganda for war, it may still be subject to legitimate censorship or banning, provided that these measures have a legal basis, pursue a legitimate aim, and are deemed necessary and proportional. Although it should be noted that the ECtHR has asserted that the wholesale blocking of access to an entire website is an “extreme measure” akin to banning a newspaper or television station, this statement cannot be used as an argument against sanctioning Russian media outlets. The context it referred to was entirely different.⁵⁹ In the case of Russia’s aggression, information is deliberately intended to mislead both the domestic population and the international community; to provide false justifications for invasion (such as claims of genocidal denazification); to incite violence, discrimination, or hostility against Ukrainians; and to furnish ‘arguments’ for further attacks (e.g. claims of the presence of biological weapons in Ukraine).⁶⁰ Therefore, the adoption of restrictive measures against media outlets or individuals actively supporting the Russian Government’s actions and policies destabilising Ukraine served the general objective referred to in Article 21 (2) (c) of the Treaty on European Union, which is to preserve peace, prevent conflicts, and strengthen international security in accordance with the purposes and principles of the United Nations Charter.

⁵⁷ See: Judgment of ECtHR of 8 July 1999, *Ümit Erdoğan v. Turkey and Selami Ince v. Turkey*, applications no. 25067/94 and 25068/94, § 47.

⁵⁸ Judgment of the Court of 15 June 2017, *Dmitrii Konstantinovich Kiselev v. Council of the European Union*, T-262/15, ECLI:EU:T:2017:392, § 76.

⁵⁹ A Russian executive agency has been given so broad a discretion to censor and block websites that it carried a risk of content being blocked arbitrarily and excessively, see: Judgment of ECtHR of 23 June 2020, *Vladimir Kharitonov v. Russia*, application no. 10795/14.

⁶⁰ Meetings coverage, Security Council, *United Nations Not Aware of Any Biological Weapons Programmes, Disarmament Chief Affirms as Security Council Meets to Address Related Concerns in Ukraine*, 11.03.2022, <https://press.un.org/en/2022/sc14827.doc.htm> [access: 20.08.2023].

The Russian ‘special operation’ propaganda falls within the scope of Article 20 (1) of the ICCPR, which “extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations.”⁶¹ The exception to the prohibition, which covers advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations, is obviously not applicable to the case study under review.⁶² Moreover, state-sponsored advocacy of hatred that calls for the ‘denazification of Ukraine’ and questions the existence of the Ukrainian nation violates Article 20 (2) ICCPR.⁶³

Russian propaganda also contravenes the provisions of the International Convention Concerning the Use of Broadcasting in the Cause of Peace of 1936.⁶⁴ Although this treaty cannot be used as a legal avenue before the ICJ,⁶⁵ the principles and goals it was designed to pursue are worth remembering.

Conclusions

It is undisputed that international law provides for the prohibition of propaganda for war as well as incitement to discrimination and violence, even though this prohibition seems to be mostly disregarded by some significant global actors. Nevertheless, this prohibition remains a firmly established norm of general international law, and the international community should constantly insist on recalling the illegality of spreading war propaganda and hate speech.

The right to receive credible and unmanipulated information is integral to freedom of expression. The importance of “providing and promoting access to independent, factual and evidence-based information to counter disinformation” has

⁶¹ *Supra* note 19, § 2.

⁶² *Ibidem*.

⁶³ *Ibidem*: “paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned.”

⁶⁴ League of Nations Treaty Series 1938, vol. 186, no. 4319, p. 302, <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20186/v186.pdf> [access: 28.09.2023].

⁶⁵ T. de Souza Dias, *Russia’s “Genocide Disinformation” and War Propaganda Are Breaches of the International Convention Concerning the Use of Broadcasting in the Cause of Peace and Fall within the ICJ’s Jurisdiction*, EJIL: Talk! 4.03.2022, <https://www.ejiltalk.org/russias-genocide-disinformation-and-war-propaganda-are-breaches-of-the-international-convention-concerning-the-use-of-broadcasting-in-the-cause-of-peace-and-fall-within-the/> [access: 10.08.2023].

surged due to the proliferation of digital technologies. UNGA resolutions have acknowledged this fact.⁶⁶ It should be emphasised that disinformation can not only adversely affect the right to seek, receive, and impart information but also violate other human rights and fundamental freedoms. This includes, for instance, the right to free elections or even the right to life.⁶⁷ The obligation to combat propaganda should not be confined solely to the knowing and reckless dissemination of false statements by public officials and other state-related actors. It should also cover manipulated and misleading information, depending on the aim it seeks to achieve, its impact, and its scale.

The international community should avail of all existing measures and, if necessary, establish new ones to counter disinformation and state-sponsored propaganda. When a state entity, an official, or an authority – including public broadcasters or private entities whose conduct can be attributed to the State – violates its international legal obligations regarding propaganda, this violation engages the international responsibility of the State for an internationally wrongful act (Article 4 ARSIWA).⁶⁸ Well-known past cases adjudicated by the International Military Tribunal at Nuremberg or the International Criminal Tribunal for Rwanda prove that there are pathways for bringing individuals responsible for disseminating hate speech and propaganda to international justice.⁶⁹

Regrettably, initiating an inter-state complaint mechanism before the Human Rights Committee is not feasible in either of the cases analysed.⁷⁰ There are, how-

⁶⁶ UNGA Resolution 76/227 on the countering disinformation for the promotion and protection of human rights and fundamental freedoms, 24.12.2021.

⁶⁷ CCPR General Comment no. 36, UN Doc. CCPR/C/GC/36, 30.10.2018, Article 6: The Right to Life, § 59: “A particular connection exists between article 6 and article 20, which prohibits any propaganda for war and certain forms of advocacy constituting incitement to discrimination, hostility or violence. Failure to comply with these obligations under article 20 may also constitute a failure to take the necessary measures to protect the right to life under article 6.”

⁶⁸ ILC, Responsibility of States for Internationally Wrongful Acts, 2001, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf [access: 27.09.2023].

⁶⁹ G.S. Gordon, *The Propaganda Prosecutions at Nuremberg: The Origin of Atrocity Speech Law and the Touchstone for Normative Evolution*, Loyola of Los Angeles International and Comparative Law Review 2017, vol. 39, no. 1, pp. 209–245. With regard to the ICTR, the seminal Media Case is particularly noteworthy, see: Judgment Appeals Chamber of International Criminal Tribunal for Rwanda of 28 November 2007, Nahimana et al. v. The Prosecutor, case no. ICTR-99-52-A. See also a critical discussion concerning problems with proving instigation: R.A. Wilson, *Propaganda on Trial: Structural Fragility and the Epistemology of International Legal Institutions*, in: *Palaces of Hope: The Anthropology of Global Organizations*, eds. R. Niezen, M. Sapijnoli, Cambridge 2017, pp. 266–293.

⁷⁰ Myanmar is not a Party to the ICCPR and Russian Federation has not made a declaration recognising the competence of the Committee in this regard.

ever, other possibilities for action that may be discussed. For instance, establishing a new early warning oversight mechanism could be a valuable solution. The Special Rapporteur on freedom of opinion and expression plays a crucial role in this regard. Drawing from historical lessons, it is imperative to ensure that incitement to violence and hostility, akin to situations witnessed in Rwanda or Myanmar, are met with zero tolerance, thus setting a universal standard. Achieving this necessitates meaningful cooperation between international mechanisms and the private sector, encompassing both 'old' and 'new' media. Relying solely on business self-regulation and voluntary commitments may prove insufficient.⁷¹ In this context, the significance of Article 19 (3) of the ICCPR, which stipulates the "special duties and responsibilities" of those whose right to freedom of expression must be safeguarded, has transcended rhetorical use. Following the development of the UN Guiding Principles on Business and Human Rights in 2011,⁷² there is a growing recognition that corporations should act with due diligence to identify, prevent, and mitigate "human rights risks."⁷³

There is a need for more meaningful support of civil society initiatives aimed at suppressing disinformation and propaganda. By way of example, open-source intelligence (OSINT) represents a laborious process of verifying videos and photographs using open sources and social media for investigative purposes.⁷⁴ There are already many examples of successful exposure of disinformation spread by Russia in the context of the war in Ukraine,⁷⁵ as well as related to other conflicts.⁷⁶ Furthermore, Russia's disinformation campaigns have been routinely monitored and

⁷¹ Such as the World Economic Forum Global AI Action Alliance (GAIA), <https://www.weforum.org/impact/a-new-alliance-is-ensuring-responsible-global-ai/> [access: 3.10.2023].

⁷² UNHCR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, New York–Geneva 2011.

⁷³ A. Callamard, *The Human Rights Obligations of Non-State Actors*, in: *Human Rights in the Age of Platforms*, ed. R.F. Jørgensen, Cambridge 2019, p. 202.

⁷⁴ K. Vick, *Bellingcat's Eliot Higgins Explains Why Ukraine Is Winning the Information War*, Time, 9.03.2022, <https://time.com/6155869/bellingcat-eliot-higgins-ukraine-open-source-intelligence/> [access: 7.10.2023].

⁷⁵ N. Waters, *'Exploiting Cadavers' and 'Faked IEDs': Experts Debunk Staged Pre-War 'Provocation' in the Donbas*, Bellingcat, 28.02.2022, <https://www.bellingcat.com/news/2022/02/28/exploiting-cadavers-and-faked-ieds-experts-debunk-staged-pre-war-provocation-in-the-donbas/> [access: 3.10.2023].

⁷⁶ N. Mustafayev, *Azerbaijan v. Armenia before the European Court of Human Rights: Revisiting the Effective Control Test after the "44-Day War"*, *Opinio Juris*, 8.04.2022, <http://opiniojuris.org/2022/04/08/azerbaijan-v-armenia-before-the-european-court-of-human-rights-revisiting-the-effective-control-test-after-the-44-day-war/> [access: 10.10.2023].

exposed by the East Stratcom Task Force set up as a part of the Strategic Communications and Information Analysis Division of the European External Action Service.⁷⁷

While it is both legitimate and desired to ensure the prevention and discouragement of disinformation and propaganda, it is crucial to acknowledge the potential slippery slope that such measures may entail. In other words, the suppression of certain forms of (mis)information and expression, if not carefully managed, may result in the limitation of the freedom of expression itself. The two case studies presented here are very illustrative in this regard. The process often starts with the suppression of free media and critical thinking under the guise of, i.a. national security and public safety. The second step involves state-sponsored propaganda and indoctrination. The third – and final – can be described as ‘digital dictatorship’.⁷⁸

Interestingly, this threat, albeit not inherently ‘digital’, has been reflected in one of the early UNGA resolutions, i.e. Resolution 381 of 17 November 1950 “Condemnation of propaganda against peace.” This document defines propaganda as including not only incitement to conflicts or acts of aggression but also “measures tending to isolate the peoples from any contact with the outside world, by preventing the press, radio and other media of communication from reporting international events, and thus hindering mutual comprehension and understanding between peoples.”⁷⁹ This kind of isolation has been experienced by several countries behind the ‘Iron Curtain’ and some are still experiencing it today.

Ultimately, what matters is that state-sponsored abusive speech, disinformation, and propaganda are not tolerated and do not enjoy any protection under international law. On the contrary, international law should be expected to be considered

⁷⁷ https://www.eeas.europa.eu/eeas/questions-and-answers-about-east-stratcom-task-force_en#11232 [access: 21.09.2023].

⁷⁸ Russia is censoring Internet content, blocking ‘external’ social media, such as Facebook, and suppressing independent media, see: A. Nußberger, *Report on Russia’s Legal and Administrative Practice in Light of Its OSCE Human Dimension Commitments*, 22.09.2022, <https://www.osce.org/files/f/documents/7/5/526720.pdf> [access: 2.10.2023]. In Myanmar, following the February 2021 coup, the junta blocked access to social media and messaging platforms and imposed rolling nationwide internet shutdowns. A draft Cyber Security Law would ban the use of VPNs, with users facing up to three years’ imprisonment, and empower authorities to block online content or restrict internet access without judicial oversight, see: Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews, A/HRC/49/76, 16.03.2022, p. 16, §§ 78–79.

⁷⁹ <https://digitallibrary.un.org/record/209541> [access: 24.09.2023].

a shield against these forms of abusive speech. And it is a legitimate expectation that the international community should have the right to name and shame disinformation and propaganda when it sees it.

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