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# Fake News and International Law

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## Abstract

*In light of current efforts at addressing the dangers of fake news, this article will revisit the international law relevant to the phenomenon – in particular, the prohibition of intervention, the 1936 International Convention on the Use of Broadcasting in the Cause of Peace and the 1953 Convention on the International Right of Correction. It will be argued that important lessons can be learned from the League of Nations' efforts in the interwar period and the United Nations' (UN) activities in the immediate post-World War II era, while taking into account the new challenges that arise from modern communication technology. Taking up the League of Nations' and UN's distinction between false and distorted news, the international legal framework will be tested, in particular, against the coverage of the 2016 'Lisa case' by Russian government-funded media. This coverage is widely considered to be fake news aimed at destabilizing Germany's society and institutions. The article argues that false news can be subject to repressive regulation in a sensible manner. Distorted news, however, will have to be tolerated legally since prohibitions in this regard would be too prone to abuse. A free and pluralist media, complemented by an appropriate governmental information policy, remains the best answer to fake news in all of its forms. Due diligence obligations of fact-checking, transparency and remedies that are effective despite difficulties in attribution, and despite a lack of universal acceptance, could likewise be conducive.*

## 1 Introduction

In 2013, the false report that the President had been injured in an attack on the White House sent the Dow Jones on a US\$136 billion dive.<sup>1</sup> The false allegation that Hillary Clinton was operating a child-trafficking ring from the basement of a Washington

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<sup>1</sup> M. Fisher, 'Syrian Hackers Claim AP Hack That Tipped Stock Market by \$136 Billion. Is It Terrorism?', *Washington Post* (23 April 2013), available at [www.washingtonpost.com/news/worldviews/wp/2013/04/23/syrian-hackers-claim-ap-hack-that-tipped-stock-market-by-136-billion-is-it-terrorism/?utm\\_term=.a9adecac21bc](http://www.washingtonpost.com/news/worldviews/wp/2013/04/23/syrian-hackers-claim-ap-hack-that-tipped-stock-market-by-136-billion-is-it-terrorism/?utm_term=.a9adecac21bc).

pizzeria prompted a man to investigate with an assault rifle,<sup>2</sup> and it may have influenced the 2016 US election.<sup>3</sup> Fake news is widely considered a substantial security threat, in particular, if it is state-sponsored.<sup>4</sup> Accordingly, various actors are now contemplating how to counter it.<sup>5</sup> This article will examine the concept (section 2) and legality (section 3) of fake news, and it will explore possible remedies (section 4), in particular, against the backdrop of fake news that is said to be employed by the Russian government. Finally, the lessons learned will be drawn (section 5).

## 2 The Concept of Fake News

According to a common definition, fake news items are lies – that is, deliberately false factual statements, distributed via news channels.<sup>6</sup> But current usage is not yet settled, and there are clearly different types of fake news that should not be confounded for legal purposes.<sup>7</sup> This article will use ‘fake news’ as an umbrella term and take up the differentiation between false and distorted (or tendentious) news used by the League of Nations as well as the United Nations (UN).<sup>8</sup>

### *A Fake News in a Strict and in a Wider Sense (False and Distorted News)*

News items that are intentionally fabricated, of course, are fake news in the strict sense (false news), regardless of their author’s ultimate intention. But the use of

<sup>2</sup> M. Fisher, J.W. Cox and P. Herman, ‘Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.’, *Washington Post* (6 December 2016), available at [www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c\\_story.html](http://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html).

<sup>3</sup> In a December 2016 poll, 14 per cent of Trump supporters believed Pizzagate to be true, 32 per cent were not sure. ‘Trump Remains Unpopular; Voters Prefer Obama on SCOTUS Pick’, *Public Policy Polling* (9 December 2016), available at [www.publicpolicypolling.com/main/2016/12/trump-remains-unpopular-voters-prefer-obama-on-scotus-pick.html](http://www.publicpolicypolling.com/main/2016/12/trump-remains-unpopular-voters-prefer-obama-on-scotus-pick.html). See also and generally K. Hall Jamieson, *Cyberwar: How Russian Hackers and Trolls Helped Elect a President. What We Don’t, Can’t, and Do Know* (2018), at 129.

<sup>4</sup> O’Malley and Levin, ‘How to Counter Fake News’, *Foreign Affairs* (5 January 2017), available at [www.foreignaffairs.com/articles/americas/2017-01-05/how-counter-fake-news](http://www.foreignaffairs.com/articles/americas/2017-01-05/how-counter-fake-news).

<sup>5</sup> See, e.g., European Commission, *A Multi-Dimensional Approach to Disinformation: Report of the Independent High Level Group on Fake News and Online Disinformation* (2018); United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe’s Representative on Freedom of the Media, Organization of American States’s Special Rapporteur on Freedom of Expression, and African Commission on Human and Peoples’ Rights’ Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda, Doc. FOM.GAL/3/17, 3 March 2017, para. 2c.

<sup>6</sup> For an overview, see M. Verstraete *et al.*, ‘Identifying and Countering Fake News’, *Arizona Legal Studies Discussion Paper no. 17-15* (2017), at 5–9.

<sup>7</sup> Cf. L. Graves, *Deciding What’s True: The Rise of Political Fact-Checking in American Journalism* (2016), at 145ff.

<sup>8</sup> S.P. López, Freedom of Information, UN ECOSOC OR, 16th Sess. Suppl. no. 12, UN Doc. E/2426, 6 May 1953, at 6, 53; UN (ed.), *Freedom of Information* (1950), vol. 1, at 204ff; GA Res. 534 (VII), 16 December 1952; League of Nations and Institut International de Coopération Intellectuelle (eds.), *La Radiodiffusion et la Paix* (1933), at 75–76, 140; League of Nations, Memorandum from the Polish Government Concerning the Attainment of Moral Disarmament, Doc. C.602.M.240.1931.IX, 23 September 1931, at 3; see also Correction Convention, *infra* note 98, preamble.

information to influence people's beliefs and behaviour can be much more subtle. Accurate information can be framed and presented in such a way as to make its recipients likely to draw certain (false) conclusions.<sup>9</sup> This is fake news in a wider sense (distorted news). Such reporting caters to the audience's preconceptions and reinforces them.<sup>10</sup> If firmly established, these preconceptions make it possible to predict the (false) conclusions an audience may draw from a certain presentation of true facts.<sup>11</sup> Consider, for example, a news outlet that reports exclusively on crimes committed by foreigners.

This concept of fake news will be tested, in particular, against the coverage of the 2016 'Lisa case' by the Russian government-funded news channel RT (formerly *Russia Today*) and the news agency *Sputnik*,<sup>12</sup> which have been continually accused of producing fake news to destabilize Western societies by sowing doubt about the integrity and functionality of Western institutions. The US intelligence services, the European Parliament and the French President share this assessment with various scholars.<sup>13</sup>

## B RT, Sputnik and the 2016 'Lisa case'

In January 2016, a 13-year-old Russo-German girl, known as Lisa, disappeared in Berlin for about 30 hours. The Russian public television Channel One (Первый канал, also *Pervij kanal*) was the first to report that, according to her aunt, Lisa had been abducted and raped by foreigners.<sup>14</sup> The same news was relayed by the German-language edition of *Sputnik*.<sup>15</sup> Both outlets reported that, according to Lisa's relatives,

<sup>9</sup> Rogers and Tyushka, "'Hacking into the West": Russia's "Anti-Hegemonic" Drive and the Strategic Narrative Offensive', 2 *Defence Strategic Communications* (2017) 35, at 45; cf. Timothy, 'Russia's Reflexive Control Theory and the Military', 17 *Journal of Slavic Military Studies* (2004) 237; Borchers, "'Do You Really Think Russia Should Pay Up for That?'"', 18(4) *Javnost – The Public* (2011) 89, at 98ff.

<sup>10</sup> Cf. Arendt, 'Truth and Politics', in H. Arendt (ed.), *Between Past and Future: Eight Exercises in Political Thought* (1961) 227, at 251–252.

<sup>11</sup> Cf. F.S. Hansen, *Russian Hybrid Warfare: A Study of Disinformation* (2017), at 28.

<sup>12</sup> J. Sarts, The Impact of Russian Interference on Germany's 2017 Elections, Testimony before the U.S. Senate Select Committee on Intelligence, 28 June 2017, at 2, available at [www.intelligence.senate.gov/sites/default/files/documents/sfr-jsarts-062817b.pdf](http://www.intelligence.senate.gov/sites/default/files/documents/sfr-jsarts-062817b.pdf); S. Spahn, *Das Ukraine-Bild in Deutschland: Die Rolle der russischen Medien* (2016), at 109.

<sup>13</sup> National Intelligence Council, *Assessing Russian Activities and Intentions in Recent US Elections*, Doc. ICA 2017-01D, 6 January 2017, at 3–4; European Parliament, Resolution on EU Strategic Communication to Counteract Propaganda against It by Third Parties, Doc. 2016/2030(INI), 23 November 2016, at 1, 7–8; M. de Boni, 'Devant Poutine, Macron dénonce la "propagande" de médias prorusses', *Le Figaro* (29 May 2017), available at [www.lefigaro.fr/politique/2017/05/29/01002-20170529ARTFIG00274-devant-poutine-macron-denonce-la-propagande-des-medias-pro-russes.php](http://www.lefigaro.fr/politique/2017/05/29/01002-20170529ARTFIG00274-devant-poutine-macron-denonce-la-propagande-des-medias-pro-russes.php); Spahn, *supra* note 12, at 17.

<sup>14</sup> Австрия временно приостанавливает действие Шенгенского соглашения из-за случаев насилия в Германии, Первый канал (16 January 2016), available at [www.1tv.ru/news/2016-01-16/3330-avstriya\\_vremenno\\_priostanavlivaet\\_deystvie\\_shengenskogo\\_soglasheniya\\_iz\\_za\\_sluchaeв\\_nasilija\\_v\\_germanii](http://www.1tv.ru/news/2016-01-16/3330-avstriya_vremenno_priostanavlivaet_deystvie_shengenskogo_soglasheniya_iz_za_sluchaeв_nasilija_v_germanii).

<sup>15</sup> 'Berlin Minderjährige vergewaltigt, Polizei tatenlos', *Sputnik* (17 January 2016), available at <https://de.sputniknews.com/gesellschaft/20160117307158514-berlin-minderjaehrige-vergewaltigt-polizei-tatenlos/>.

German police refused to investigate the matter.<sup>16</sup> Later, *Sputnik* accurately reported the official police statement declaring that there had been no abduction or rape.<sup>17</sup> It also reported on the prosecution's statement that it had begun an investigation into the sexual abuse of Lisa as a minor – that is, for voluntary, but, legally speaking, non-consensual sexual relations with an older man – which took place before the girl's disappearance.<sup>18</sup>

While reporting all of the facts, *Sputnik* framed the issue as showing that security problems had increased in German cities since the refugee crisis of 2015. During his annual press conference that coincided with the investigation, Russian Foreign Minister Sergey Lavrov made the same connection and mentioned:

[T]he situation when a Russian girl's disappearance in Germany was hushed up for a long time for some reason. Now, at least, we are communicating with her lawyer, who is working with her family and with the Russian Embassy. It is clear that Lisa did not exactly decide voluntarily to disappear for 30 hours. Truth and justice must prevail here.<sup>19</sup>

RT interviewed the family's lawyer who commented on the prosecutor's statement, confounding the (unfounded) allegation of a recent abduction and rape and the sexual abuse that the prosecutor believed to have taken place earlier.<sup>20</sup> In 2017, RT correctly reported that a man had been indicted for sexually abusing Lisa as a minor and called out 'mainstream media' for having accused Lisa of lying and for traumatizing her by using her case as a campaign against RT.<sup>21</sup>

In the wake of this coverage, over 700 people with Russian backgrounds had demonstrated in front of the Chancellery in Berlin, even more in other cities.<sup>22</sup> German Foreign Minister Frank-Walter Steinmeier rejected allegations of misconduct by the German authorities as 'political propaganda' at the time but stopped short of calling them an intervention in the internal affairs of Germany.<sup>23</sup> Initially, the police had not

<sup>16</sup> *Ibid.*

<sup>17</sup> 'Polizei dementiert: Keine Entführung von Mädchen durch Migranten in Berlin', *Sputnik* (18 January 2016), available at <https://de.sputniknews.com/panorama/20160118307180927-polize-dementiert-entfuhrung/>.

<sup>18</sup> 'Staatsanwalt: Zwei Verdächtige im "Fall Lisa" – Anwalt empört über Medien-Hetze', *Sputnik* (26 January 2016), available at <https://de.sputniknews.com/gesellschaft/20160126307389137-fall-lisa-medien-hetze/>.

<sup>19</sup> S. Lavrov, 'Remarks and Answers to Media Questions at a News Conference on Russia's Diplomacy Performance in 2015', *Ministry of Foreign Affairs of the Russian Federation* (26 January 2016), available at [www.mid.ru/press\\_service/minister\\_speeches/-/asset\\_publisher/7OvQR5KJWVmR/content/id/2032328](http://www.mid.ru/press_service/minister_speeches/-/asset_publisher/7OvQR5KJWVmR/content/id/2032328).

<sup>20</sup> 'Der Fall Lisa: Politisierung eines Sexualverbrechens', RT (28 January 2016), available at <https://deutsch.rt.com/inland/36526-fall-lisa-politisierung-sexualverbrechens/>.

<sup>21</sup> 'Fall Lisa: Staatsanwaltschaft erhebt Anklage wegen "schweren sexuellen Missbrauchs"', RT (28 February 2017), <https://deutsch.rt.com/inland/47059-fall-lisa-nun-ermittelt-staatsanwaltschaft/>.

<sup>22</sup> I. Nechepurenko and A. Smale, 'Russia Dismisses German Warnings about Exploiting Teen Rape Claim', *New York Times* (28 January 2016), available at [www.nytimes.com/2016/01/29/world/europe/russia-dismisses-german-claims-of-exploiting-teen-rape-case.html](http://www.nytimes.com/2016/01/29/world/europe/russia-dismisses-german-claims-of-exploiting-teen-rape-case.html).

<sup>23</sup> 'Steinmeier weist Lawrow in die Schranken', *Die Zeit* (27 January 2016), available at [www.zeit.de/politik/2016-01/berlin-angebliche-vergewaltigung-kritik-aussenminister-sergej-lawrow](http://www.zeit.de/politik/2016-01/berlin-angebliche-vergewaltigung-kritik-aussenminister-sergej-lawrow).

released any more details in order to respect the girl's and her family's privacy rights.<sup>24</sup> Only later were details announced concerning the GPS tracking of the girl's mobile phone that showed that she had spent the time in which she had disappeared at a friend's house.<sup>25</sup>

The incident's coverage by *RT* and *Sputnik* is not fake news in the strict sense since what was reported is, strictly speaking, true. But distorted news seems to be a fitting categorization, in view of the misleading quality of the information's presentation – in particular, its selectivity and framing. In the Lisa case, reporting relied heavily on the events of the preceding New Year's Eve in Cologne, when police and media had only belatedly reported the sexual assault of hundreds of women, mostly by persons with an apparent migrant background.<sup>26</sup> Some thought this to be because of a 'political correctness' that sought to deceive the population as to the extent of the problems caused by the refugee crisis. Such thinking made a similar reading of the Lisa case, which was supported by Lavrov's statement, seem plausible.

### C Attributing Fake News

Legally attributing fake news to a state will often be difficult. First, it is possible to plant and distribute information on the Internet without leaving significant traces as to its origin.<sup>27</sup> Second, today's news is mostly distributed by separate legal entities that are government funded. *Sputnik* is operated by the government-founded federal state unitary enterprise *Rossiya Segodnya*.<sup>28</sup> Although its editor-in-chief is simultaneously the head of *Rossiya Segodnya*,<sup>29</sup> *RT* is another separate entity.<sup>30</sup> Both *RT* and *Sputnik* are heavily funded by the Russian government.<sup>31</sup>

The conduct of news corporations can be attributed to a state under the customary rule reflected in Article 8 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),<sup>32</sup> if it can be shown that the state directed or controlled the company's actions<sup>33</sup> or that it instructed

<sup>24</sup> Berlin Police, 'Verschwundenes Mädchen wurde nicht entführt', *Polizeimitteilung*, Doc. 0167/2016, 18 January 2016, available at [www.berlin.de/polizei/polizeimeldungen/pressemitteilung.434674.php](http://www.berlin.de/polizei/polizeimeldungen/pressemitteilung.434674.php).

<sup>25</sup> 'Staatsanwalt: Angeblich vergewaltigtes Mädchen verbrachte Nacht bei Freund', *Süddeutsche Zeitung* (29 January 2017), available at [www.sueddeutsche.de/politik/berlin-marzahn-staatsanwalt-angeblich-vergewaltigtes-maedchen-verbrachte-nacht-bei-freund-1.2840429](http://www.sueddeutsche.de/politik/berlin-marzahn-staatsanwalt-angeblich-vergewaltigtes-maedchen-verbrachte-nacht-bei-freund-1.2840429).

<sup>26</sup> M. Eddy, 'Reports of Attacks on Women in Germany Heighten Tension over Migrants', *New York Times* (5 January 2016), available at [www.nytimes.com/2016/01/06/world/europe/coordinated-attacks-on-women-in-cologne-were-unprecedented-germany-says.html](http://www.nytimes.com/2016/01/06/world/europe/coordinated-attacks-on-women-in-cologne-were-unprecedented-germany-says.html).

<sup>27</sup> See, e.g., Pihelgas, 'Back-Tracing and Anonymity in Cyberspace', in K. Ziolkowski (ed.), *Peacetime Regime for State Activities in Cyberspace* (2013) 31, at 57–58.

<sup>28</sup> Executive Order on Measures to Make State Media More Effective (9 December 2013), available at <http://en.kremlin.ru/events/president/news/19805>.

<sup>29</sup> 'RT Editor Simonyan to Head Kremlin-backed News Agency', *British Broadcasting Corporation* (31 December 2013), [www.bbc.com/news/world-europe-25560434](http://www.bbc.com/news/world-europe-25560434).

<sup>30</sup> Borchers, *supra* note 9, at 92.

<sup>31</sup> Spahn, *supra* note 12, at 13–14.

<sup>32</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc A/56/83, 3 August 2001.

<sup>33</sup> *Ibid.*, at 48; J. Crawford, *State Responsibility: The General Part* (2013), at 161–165.

it to take a certain action.<sup>34</sup> As first held by the International Court of Justice (ICJ) in the *Nicaragua* case, and still generally accepted as stating the law, effective control of an entity's actions is required, for which even heavy funding is in itself insufficient.<sup>35</sup> Naturally, news agencies will reject allegations of being government controlled.

Exceptionally, under Article 11 of ARSIWA, one might consider attribution of conduct acknowledged and accepted by a state subsequently as its own. RT's editor-in-chief was one of 300 journalists to be awarded a medal of the Order for Service to the Fatherland by President Vladimir Putin for the coverage of the Crimean conflict.<sup>36</sup> This certainly amounts to approval and endorsement, but mere congratulations are insufficient; perpetuation of the same conduct would be needed.<sup>37</sup> Awarding the medal, on its own, cannot in good faith be understood as the Russian government adopting international responsibility for that news coverage. Fake news spread by such companies will thus in most cases not be attributable to a state. Rumours of direct government influence on the editorial process persist – for example, concerning Channel One – but they would not, on themselves, hold up in a court of law.<sup>38</sup>

### 3 The Legality of Fake News

#### A *Fake News as Intervention*

Under customary international law, intervention by one state in the internal or external affairs of another is prohibited. As held in the *Nicaragua* case by the ICJ, the principle of non-intervention protects the area in which sovereignty allows states to decide freely, but it does so only with respect to interventions that are 'coercive'.<sup>39</sup> The range of actions between military intervention, which is clearly coercive, and offering one's good offices, which clearly is not, is a large grey area.<sup>40</sup> However, from the UN General Assembly's Friendly Relations Declaration, which is generally accepted as

<sup>34</sup> M.N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017), at 95–96.

<sup>35</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, at 62, 64–65, paras 109, 115.

<sup>36</sup> A. Luhn, 'Pro-Kremlin Journalists Win Medals for "Objective" Coverage of Crimea', *The Guardian* (5 May 2014), available at [www.theguardian.com/world/2014/may/05/vladimir-putin-pro-kremlin-journalists-medals-objective-crimea](http://www.theguardian.com/world/2014/may/05/vladimir-putin-pro-kremlin-journalists-medals-objective-crimea).

<sup>37</sup> ARSIWA, *supra* note 32, at 53; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980, ICJ Reports (1980) 3, at 29–30, 35; see also Crawford, *supra* note 33, at 181–188.

<sup>38</sup> EU East Stratcom Task Force, 'Corruption and Disinformation: Backstage at Russian Television', *EU v. Disinfo* (25 September 2017), available at <https://euvsdisinfo.eu/corruption-and-disinformation-backstage-at-russian-television/>; Ioffe, 'What Is Russia Today? The Kremlin's Propaganda Outlet Has an Identity Crisis', *Columbia Journalism Review* (2010), available at [http://archives.cjr.org/feature/what\\_is\\_russia\\_today.php](http://archives.cjr.org/feature/what_is_russia_today.php); Borchers, *supra* note 9, at 93.

<sup>39</sup> *Nicaragua*, *supra* note 35, para. 205.

<sup>40</sup> Kunig, 'Intervention, Prohibition of', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), vol. 6, 289, at 289–291.

reflecting custom,<sup>41</sup> it is clear that coerciveness is not restricted to the use of physical force.<sup>42</sup> The recent *Tallinn Manual 2.0* defines coercion as ‘an affirmative act designed to deprive another State of its freedom of choice, that is, to force that State to act in an involuntary manner or involuntarily refrain from acting in a particular way’.<sup>43</sup> In regard to broadcasts, Maziar Jamnejad and Michael Wood summarized the law of non-intervention as follows:

Whether a broadcast contravenes the non-intervention principle depends on all the circumstances. If it is deliberately false and intended to produce dissent or encourage insurgents, the non-intervention principle is likely to be breached. If factual and neutral, it is doubtful that the broadcast will constitute intervention, regardless of the effect it may in fact have.<sup>44</sup>

The main problem in specifying the threshold of coerciveness seems to be that various forms of pressure – for example, of an economic kind – are regarded as a legitimate and lawful part of international relations.<sup>45</sup> Others, such as incitement to revolutionary change,<sup>46</sup> pass the threshold.

Fake news in the strict sense (false news) may be coercive in the required sense. So far, there seems to be no state practice confirming this interpretation, but there are sufficient reasons that a state experiencing intervention by false news might advance to justify such a claim. First, economic pressure was rejected as a possible means of intervention because, in effect, this would have deprived states of changing their trading and development aid policies, which are generally a sovereign part of states’ external affairs. Recognizing false news as a possible means of intervention would not have any other direct legal repercussions. Second, while false news does not constitute a ‘threat’ against decision-makers,<sup>47</sup> it is coercive in the sense that it manipulates their capacity to reason. Much clearer than leaking true information at a strategically chosen time,<sup>48</sup> it utilizes the ‘forceless coercion of the better argument’ in a manipulative way.<sup>49</sup>

<sup>41</sup> *Ibid.*, para. 264.

<sup>42</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970; Damrosch, ‘Politics across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs’, 83 *American Journal of International Law (AJIL)* (1989) 1, at 5–6.

<sup>43</sup> Schmitt, *supra* note 34, at 317.

<sup>44</sup> Jamnejad and Wood, ‘The Principle of Non-Intervention’, 22 *Leiden Journal of International Law* (2009) 345, at 374.

<sup>45</sup> *Nicaragua*, *supra* note 35, para. 245; see also Damrosch, *supra* note 42, at 34, 42, 47.

<sup>46</sup> De Brabandere, ‘Propaganda’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), vol. 8, 507, at 509, para. 11; see also M.J. Kearney, *The Prohibition of Propaganda for War in International Law* (2007), at 12; Preuss, ‘International Responsibility for Hostile Propaganda against Foreign States’, 28 *AJIL* (1934) 649, at 652, 654, 668.

<sup>47</sup> Ohlin, ‘Did Russian Cyber-Interference in the 2016 Election Violate International Law?’, 95 *Texas Law Review* (2017) 1579, at 1591–1592.

<sup>48</sup> Cf. Goodman, ‘International Law and the US Response to Russian Election Interference’, *Just Security Blog* (5 January 2017), available at [www.justsecurity.org/35999/international-law-response-russian-election-interference/](http://www.justsecurity.org/35999/international-law-response-russian-election-interference/).

<sup>49</sup> J. Habermas, *Theorie des Kommunikativen Handelns* (1981), vol. 1, at 47, 52–53: ‘zwangloser Zwang’ (translation by the author).

Any rational decision is made based on facts.<sup>50</sup> People argue and disagree about which facts exist and what their significance for a decision is. But no rational person claims to make decisions unconnected to reality. Influencing a decision by introducing false facts into the decision-making process is coercive,<sup>51</sup> since the projection of a different set of facts constrains one's freedom to act by making certain options and conclusions no longer seem viable or making others seem mandatory.<sup>52</sup> This was also the conclusion arrived at in the first *Tallinn Manual*.<sup>53</sup> 'Truth carries within itself an element of coercion', as Hannah Arendt put it.<sup>54</sup> For example, when contemplating whether to vote for a candidate, the (false) information that he or she committed a grave crime might have a decisive impact on one's decision-making.

False news, such as Pizzagate, may thus violate the principle of non-intervention if its placement or dissemination were attributable to a state. Should such false news be planted covertly by a state – that is, without revealing that its source is a state – this would be another factor indicating a violation of the principle because it deprives the addressees of critical information to assess the information's trustworthiness.<sup>55</sup> It cannot be necessary for a state to know that it is being compelled to act in a certain manner.<sup>56</sup> Such a view would exclude the most effective means of intervention from the scope of the prohibition. Moreover, the possibility of discovering the truth despite false news, or of not being moved by false news, is not relevant, since an intervention's illegality is not predicated on it being successful.<sup>57</sup>

In elections, the state decision-making body whose decision is sought to be influenced in that manner is made up of the citizens voting as the people.<sup>58</sup> Consequently, there is also a direct link between the influence exerted and the state's decision-making process. False news crashing the stock market, on the other hand, does not have such a direct effect on any decision by a state organ and would not constitute intervention, at least in itself. A threat of placing such false news if certain conditions are not complied with, however, may establish such a link and constitute intervention.

Fake news in a wider sense (distorted news), however, will not violate the principle of non-intervention.<sup>59</sup> Mere framing and presentation of true facts cannot be held to

<sup>50</sup> Cf. Helbig *et al.*, 'Will Democracy Survive Big Data and Artificial Intelligence?', *Scientific American* (25February2017), available at [www.scientificamerican.com/article/will-democracy-survive-big-data-and-artificial-intelligence/](http://www.scientificamerican.com/article/will-democracy-survive-big-data-and-artificial-intelligence/).

<sup>51</sup> Cf. Watts, 'Low-Intensity Cyber Operations and the Principle of Non-Intervention', in J.D. Ohlin *et al.* (eds), *Cyberwar* (2015) 249, at 261.

<sup>52</sup> Brennan, 'Making Sense of Lies, Deceptive Propaganda, and Fake News', 32(3) *Journal of Media Ethics* (2017) 179, at 180; cf. N. Luhmann, *Die Realität der Massenmedien* (2nd edn, 1996), at 156.

<sup>53</sup> M.N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (2013), at 45. The *Tallinn Manual 2.0* seems to have dropped the example, but see Schmitt, *supra* note 34, at 124.

<sup>54</sup> Arendt, *supra* note 10, at 239–241.

<sup>55</sup> See section 5.A below; cf. Damrosch, *supra* note 42, at 49.

<sup>56</sup> Which was the minority view in the *Tallinn Manual 2.0*: Schmitt, *supra* note 34, at 320–321.

<sup>57</sup> Schmitt, *supra* note 45, at 322.

<sup>58</sup> Cf. Damrosch, *supra* note 42, at 49.

<sup>59</sup> Cf., also concerning false information, M.N. Schmitt, "'Virtual' Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law', Exeter Centre for International Law Working Paper Series 2018/3 (2018), at 15–17.

be coercive in the sense required. In essence, framing and selection constitute a normative argument that considers the selected information and framing to be appropriate. Such arguments are generally, and rightly so, considered a legitimate and lawful part of international discourse. Mere criticism of the internal politics of another state, and be it biased, is not prohibited intervention.<sup>60</sup> Consequently, and irrespective of attribution, RT's and Sputnik's factually correct coverage of the Lisa case could not have violated the principle of non-intervention. Neither did Lavrov's remarks.

## **B 1936 International Convention on the Use of Broadcasting in the Cause of Peace**

Some of the difficulties encountered when applying the law of non-intervention to fake news are addressed by the League of Nations' 1936 Broadcasting Convention.<sup>61</sup> The treaty, *inter alia* and without using that term, covers false news as defined above. It is still in force, as confirmed by the UN General Assembly post-World War II.<sup>62</sup>

### *1 Its Content and History*

The Broadcasting Convention's purpose, as expressed in its preamble and operating provisions, is the safeguarding of 'good international understanding'. This common interest is protected from certain broadcasts. For the purposes of this article, the central provision is Article 3(1), which, according to its *travaux préparatoires*,<sup>63</sup> was explicitly meant to cover news:

The High Contracting Parties mutually undertake to prohibit and, if occasion arises, to stop without delay within their respective territories any transmission likely to harm good international understanding by statements the incorrectness of which is or ought to be known to the persons responsible for the broadcast.

The convention addresses two issues that may prevent the application of the non-intervention principle to fake news: attribution of private actors' conduct as well as the threshold of coerciveness. First, according to Article 6, states parties need to ensure the principle's application against public as well as private broadcasters.<sup>64</sup> Second, broadcasts need not pass a threshold of coerciveness to violate the convention. Article 4 of the Broadcasting Convention even establishes a due diligence obligation to ensure that stations broadcast information concerning international relations, especially in

<sup>60</sup> Kunig, *supra* note 40, at 293; De Brabandere, *supra* note 46, at 510, para. 14; Schmitt, *supra* note 34, at 318–319.

<sup>61</sup> International Convention on the Use of Broadcasting in the Cause of Peace 1936, 186 LNTS 301 (Broadcasting Convention).

<sup>62</sup> GA Res. 841(IX), 17 December 1954; but cf. Office of the Representative on Freedom of the Media, *Propaganda and Freedom of the Media* (2015), at 12, considering the treaty to be obsolete without giving reasons.

<sup>63</sup> Preliminary Draft International Agreement for the Use of Broadcasting in the Cause of Peace, Doc. C.12.1934.XII, 4 January 1934, Annex 1, at 4. Cf. J.B. Whitton and A. Larson, *Propaganda* (1964), at 255, holding Art. 3 to address 'false news'.

<sup>64</sup> Cf. de Brabandere, *supra* note 46, at 509–510, para. 12.

times of crisis, ‘the accuracy of which shall have been verified – and that by all means within their power – by the persons responsible for broadcasting the information’ or, in more modern parlance, to ‘fact-check’ before broadcasting. Neglecting to fact-check clearly cannot in itself be considered coercive conduct. The treaty can therefore be understood as an attempt to fill a gap left by the principle of non-intervention.

The Broadcasting Convention was part of the ‘moral disarmament’ efforts after World War I<sup>65</sup> and a reaction to the pervasive use of broadcasting for aggressive political propaganda, in particular, by Germany and the Soviet Union.<sup>66</sup> Contemporaneous critique argued that the states likely to ratify the convention would not have resorted to such broadcasting anyway.<sup>67</sup> Before and during World War II, the convention did not play any significant role. Twenty-two states joined the convention, among them the United Kingdom (UK), India, France, Australia and Chile. But Germany, Japan and Italy never signed it, and the Soviet Union signed, but did not ratify, the convention before the war.<sup>68</sup> The USA showed a cooperative attitude but declined to join because of the high value that its Constitution accords to free speech.<sup>69</sup>

After the war, the UN for a time tried to revitalize the convention,<sup>70</sup> and, in 1982, the Soviet Union ratified it, almost 50 years after signing. At the time, the Soviet Union was accusing Western states of subversive propaganda,<sup>71</sup> often jamming Western radio signals.<sup>72</sup> Western radio stations broadcasting in Russian, such as Radio Free Europe, were accused of interfering in the internal affairs of socialist states.<sup>73</sup> Having been the first state to professionally use the radio for international propaganda, broadcasting in numerous languages,<sup>74</sup> the Soviet Union was now seeking to ward off outside interference, sometimes interpreting the prohibition of intervention so broadly as to cover any news coverage of events concerning socialist states.<sup>75</sup> This, however, was not a generally accepted interpretation. Considering that the Western stations’ stated

<sup>65</sup> Preliminary Draft International Agreement, *supra* note 64, at 1. For the adoption process, see L.J. Martin, *International Propaganda* (1958), at 66–81.

<sup>66</sup> See Saar Basin, Secretary-General of the League of Nations, speech delivered by Dr. Goebbels at Zweibrücken, 6 May 1934, Doc. C.201.1934.VII, 16 May 1934, at 6; Whitton, ‘War by Radio’, *Foreign Affairs* (April 1941), available at [www.foreignaffairs.com/articles/1941-04-01/war-radio](http://www.foreignaffairs.com/articles/1941-04-01/war-radio); Joeden, ‘Die Funksendefreiheit der Staaten’, *4 Jahrbuch für Internationales Recht* (1952–1953) 71, at 82–83.

<sup>67</sup> Whitton and Larson, *supra* note 63, at 126–127.

<sup>68</sup> ‘Reich and Japan Shun Radio Treaty; They Are Only Great Powers Remaining Silent on the Proposed League Pact. Its Aim Is to Aid Peace; United States Says It Cannot Join Convention but Will Seek to Carry Out Principles’, *New York Times* (27 March 1936), at 17; see also Kearney, *supra* note 46, at 30–31.

<sup>69</sup> See the Draft International Convention for the Use of Broadcasting in the Cause of Peace (Draft Broadcasting Convention), Doc. C.L.44.1936.XII, 16 March 1936, at 22.

<sup>70</sup> GA Res. 2021 (XX), 5 November 1965; GA Res. 841 (IX), 17 December 1954.

<sup>71</sup> Simma, ‘Grenzüberschreitender Informationsfluß und domaine réservée der Staaten’, *19 Berichte der Deutschen Gesellschaft für Völkerrecht* (1979) 39, at 59–63.

<sup>72</sup> Martin, *supra* note 65, at 85–87.

<sup>73</sup> Roth, ‘Cuius regio – eius informatio: Die Ratifizierung des Rundfunkfriedenspaktes durch die Sowjetunion und die “Neue Weltinformationsordnung”’, *34 Osteuropa* (1984) 559, at 561.

<sup>74</sup> Mikkonen, ‘To Control the World’s Information Flows: Soviet Cold War Broadcasting’, in A. Badenoch *et al.* (eds), *Airy Curtains in the European Ether: Broadcasting and the Cold War* (2013) 241, at 242–243.

<sup>75</sup> Simma, *supra* note 71, at 63; Roth, *supra* note 73, at 566–567.

purpose was to impart correct information without inciting revolt,<sup>76</sup> these broadcasts were not considered by Western scholars to constitute prohibited intervention.<sup>77</sup>

Ratifying the Broadcasting Convention, and calling on all other states to ratify it as well,<sup>78</sup> was intended as a step towards improving the Soviet Union's legal position against Western broadcasts.<sup>79</sup> This interpretation was corroborated by the Western states' reaction to this accession; Australia, France and the UK denounced it,<sup>80</sup> and the USA welcomed that step to further the free flow of information.<sup>81</sup> The internal justification of the German Democratic Republic (GDR) for acceding to the convention in 1984, which was by now publicly available, further clarifies the socialist states' motivation:

In order to deal with the intensified confrontation politics by the most aggressive parts of Imperialism – especially in the UN and the UNESCO – the Convention is of particular importance today. At the same time, it can serve as an important instrument in the struggle of all progressive, democratic forces for a new international information order. For these reasons, the USSR ... called [on other states] to strengthen the Convention with as many accessions as possible and to do everything to stand up against the abuse of modern mass media for intervention in the internal affairs of States, for subversive propaganda and for fomenting hostility between peoples. The USSR has also asked the GDR to consider acceding to the Convention.<sup>82</sup>

The background to the rather unexpected resurgence of interest in the convention is therefore evident.<sup>83</sup> The Soviet Union's own propaganda activities make the decision seem possibly counterproductive. But the GDR at least perceived no risks in this regard, considering itself to be in full compliance with the convention's provisions: 'From the GDR's accession, no substantive effects will result as regards the implementation of the Convention's obligations. There is no need to change existing legal provisions or pass new ones.'<sup>84</sup> Just to be on the safe side, however, no socialist state failed to enter a reservation that excluded the jurisdiction of the ICJ, as the Permanent Court of International Justice's successor,<sup>85</sup> in Article 7 of the Broadcasting Convention.

<sup>76</sup> See 'Excerpts from the US Information Agency Basic Guidance Paper of 1957', reprinted in Whitton and Larson, *supra* note 63, at 268–273.

<sup>77</sup> Simma, *supra* note 71, at 68; cf. Whitton and Larson, *supra* note 63, at 52.

<sup>78</sup> Roth, *supra* note 73, at 559.

<sup>79</sup> B. Lange, *Medienpolitik des Völkerbundes* (1991), at 114–115; cf. C. Breunig, *Kommunikationspolitik der UNESCO* (1987), at 88; Schönbeck, 'Die Resolution der Vereinten Nationen vom 10. Dezember 1982 über Prinzipien für das Direkte Satellitenfernsehen', 32 *Zeitschrift für Luft- und Weltraumrecht* (1983) 16, at 16, 20.

<sup>80</sup> For details, see *United Nations Treaty Collection*, available at [https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=514&chapter=30&clang=\\_en](https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=514&chapter=30&clang=_en).

<sup>81</sup> Goldberg, 'Transnational Communication and Defamatory Speech: A Case for Establishing Norms for the Twenty-First Century', 50 *New York Law School Law Review* (2005) 145, at 153–154.

<sup>82</sup> Vorlage für den Ministerrat der DDR vom 28.5.1984 zum Beschluss über den Beitritt der DDR zur Internationalen Konvention über den Gebrauch des Rundfunks im Interesse des Friedens vom 23. September 1936 (Draft for the Council of Ministers of the GDR on the Accession to the Broadcasting Convention), file DC 20 I/4 / 85382, at 128, Federal Archive of Germany (translation by the author).

<sup>83</sup> See also G.-H. Gornig, *Äußerungsfreiheit und Informationsfreiheit als Menschenrechte* (1988), at 439–440.

<sup>84</sup> Draft for the Council of Ministers, *supra* note 82.

<sup>85</sup> Statute of the International Court of Justice 1945, 59 Stat. 1031, Art. 37.

## 2 Applicability to New Communication Technology

The English wording of the Broadcasting Convention ('broadcasting') seems more open to modern mass media than the equally authentic French wording ('*radiodiffusion*'). However, '*radiodiffusion*' was meant to denote the means by which information is transferred, not the content; Hertzian waves in contrast to cables ('*câblodiffusion*').<sup>86</sup> In any case, the customary rule reflected in Article 33 of the Vienna Convention on the Law of Treaties calls for the resolution of conflicting language versions according to the treaty's object and purpose.<sup>87</sup> As evidenced by the preamble and clearly stated in the *travaux préparatoires*, the purpose of the Broadcasting Convention was to combat the dangers for international peace and security emanating from a certain use of modern information technology that, for the first time, allowed information to directly reach many persons in other countries, while the territorial state was unable to effectively counter it.<sup>88</sup> New mass media like television<sup>89</sup> and the Internet<sup>90</sup> obviously have the same properties. The convention's effectiveness as a law-making treaty justifies this dynamic interpretation.<sup>91</sup>

## 3 Applicability to Modern Fake News

While Article 3 of the Broadcasting Convention certainly applies to false news, it is questionable if it is violated by merely distorted news.<sup>92</sup> This would not only be inconsistent with the ordinary meaning of 'incorrectness' since, despite post-modern doubts in the scientific community,<sup>93</sup> whether a statement is 'correct' or 'incorrect' is determined, in ordinary language, by a simple correspondence theory of truth – that is, the accordance of the statement with reality. This was also the view of the Drafting Committee: "The word "incorrectness" is taken in the current sense of allegations inconsistent with the truth."<sup>94</sup> The French word '*inexactitude*' seems somewhat more open to a wider interpretation, but, ultimately, the purpose of Article 3 is to counter false information, not incorrect interpretations or a certain presentation of facts. The League of Nations already used the category of 'distorted' news for the latter.<sup>95</sup>

<sup>86</sup> See the Draft Broadcasting Convention, *supra* note 69, at 15. The term's meaning remaining obscure, the *travaux préparatoires* may be subsidiarily resorted to. Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331, Art. 32.

<sup>87</sup> VCLT, *supra* note 86.

<sup>88</sup> League of Nations, *supra* note 8, at 47, 91, 157.

<sup>89</sup> E. Menghetti, *Die völkerrechtliche Stellung des internationalen Satellitenfernsehens im Spannungsfeld von Völkerverständigung und Propaganda* (1992), at 138.

<sup>90</sup> M. Gets, *Meinungsausüßerungs- und Informationsfreiheit im Internet aus Sicht des Völkerrechts* (2002), at 134–135.

<sup>91</sup> Cf. Dausers, 'Direct Television Broadcasting by Satellites and Freedom of Information', 3 *Journal of Space Law* (1975) 59, at 71; Krause, 'Der Rundfunkfriedenspakt von 1936', 9 *Jahrbuch für Internationales Recht* (1961) 31, at 46.

<sup>92</sup> Affirmative: Krause, *supra* note 91, at 49; Lange, *supra* note 79, at 109; Gornig, *supra* note 83, at 427.

<sup>93</sup> For an overview, see Searle, 'Why Should You Believe It?', *New York Review of Books* (24 September 2009), at 88.

<sup>94</sup> See the Draft Broadcasting Convention, *supra* note 69, at 16.

<sup>95</sup> League of Nations, *supra* note 8.

Would fake news such as Pizzagate, the White House attack and the Lisa case violate the Broadcasting Convention?<sup>96</sup> The first two include false statements, the incorrectness of which at least ought to be known to its original authors. But are they likely to harm good international understanding? In themselves, they have no international component. Whether these broadcasts were transmitted from within another state's territory is unclear and also an explicit requirement of Article 3. Consequently, the Broadcasting Convention, in substance, prohibits false news, but, in practice, it may often be hard to know if its more formal requirements are fulfilled.

With regard to the Lisa case, the harm to good international understanding is palpable, as evidenced by the ministers' exchange on the issue, but no statements that are incorrect were made, so Article 3 of the Broadcasting Convention was not violated. Moreover, only the broadcast by Channel One, for certain, had its source within the territory of the Russian Federation. *RT*, as well as *Sputnik*, also operates facilities in Berlin.<sup>97</sup> Broadcasts from this location would not be covered by the convention, which is solely meant to provide redress for broadcasts from abroad, for which the receiving state has no territorial jurisdiction.

## 4 Remedies against Fake News

Remedies against fake news may be reactive (sections A and B), but they may also be preventive (section C).

### A *A Right to Correction*

When false news violates the principle of non-intervention, its correction and acknowledgement as false could be demanded as restitution and satisfaction respectively under Articles 35 and 37 of ARSIWA. Article 3(2) of the Broadcasting Convention also requires states parties to establish a procedure to publicly rectify incorrect – that is, false – statements that harm good international understanding, regardless if that incorrectness could have been known in advance.

### B *A Right to Reply*

The somewhat misnomered 1953 Convention on the International Right of Correction (Correction Convention)<sup>98</sup> gives, in Article II(1), a special right to states parties against news material that is distributed by news agencies to end-user media ('news dispatches' within the meaning of Article I):

<sup>96</sup> Leaving aside the question of ratification to assess the treaty's potential effectiveness. The USA never acceded, and reunified Germany did not automatically succeed the German Democratic Republic. Odendahl, 'Article 29', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (2012), para. 33.

<sup>97</sup> Spahn, *supra* note 12, at 19, 21.

<sup>98</sup> 1953, 435 UNTS 191 (Correction Convention).

[I]n cases where a Contracting State contends that a news dispatch capable of injuring its relations with other States or its national prestige or dignity transmitted from one country to another by correspondents or information agencies of a Contracting or non-contracting State and published or disseminated abroad is false or distorted, it may submit its version of the facts (hereinafter called 'communiqué') to the Contracting States within whose territories such dispatch has been published or disseminated.

The state receiving a communiqué satisfying the formal requirements of Article II(2) must, 'whatever be its opinion concerning the facts', distribute it through the channels it usually uses for communications on international affairs and to the news agency responsible (Article III). If the state fails to comply with its obligations under Article III, the UN Secretary-General shall 'give publicity to the information' (Article IV). All of these obligations are subject to strict time limits.

Like the Broadcasting Convention's duty to rectify, the 'right of correction' established by the Correction Convention's unwieldy language applies to private and public news agencies, irrespective of any prior knowledge of the shortcomings of the statement made and only in an international context. Unlike it, the Correction Convention's right explicitly applies even to distorted news and is directed against any state party in whose territory a foreign news agency's dispatch was disseminated, even if its origin is in a non-contracting state. The convention allows aggrieved states to have their side of the story heard. The 'international right of correction' is thus really a right to reply for states supported by the duty of other states parties and the UN to amplify it.

Could the Correction Convention have been a tool for Germany in the Lisa case? Leaving aside the question of ratification (neither Germany nor Russia is a party), the answer would probably be that it would not. Germany would not have had a right to have a communiqué disseminated in Russia, since the news dispatch from the news agency *Sputnik* originated domestically in Russia, not from abroad. Moreover, it was its effects inside Germany, not in other states, that mattered. An example from the Cold War to which the convention could have been applied in a sensible manner is a dispatch by *Novosti*, *Sputnik*'s predecessor news agency, that stated in 1987 that the USA had developed an 'ethnic weapon' that would kill only 'Africans'.<sup>99</sup>

### C Counter-Propaganda

In 2015, the European Council took action against 'Russia's ongoing disinformation campaigns'<sup>100</sup> by creating, under the auspices of the EU External Action Service, an 'East StratCom Task Force', which seeks to raise awareness of, and to debunk, fake news.<sup>101</sup> In addition, national units could be established that monitor the news cycle for items that seem to be pushed strategically, like the Lisa case.<sup>102</sup> Their task would be to alert relevant authorities and actors to the potential impact of such news and

<sup>99</sup> 'Soviets Accuse U.S. of "Ethnic Weapon" in War of Words', *Chicago Tribune* (7 June 1987), at 20.

<sup>100</sup> European Council, Conclusions of 19/20 March, Doc. EUCO 11/15, 20 March 2015, para. 13.

<sup>101</sup> European Parliament, *supra* note 13, at 42–44.

<sup>102</sup> J. Janda, *The Lisa Case: STRATCOM Lessons for European States*, German Federal Academy of Security Policy, Security Policy Working Paper no. 11/2016 (2016).

to allow them to respond in a more timely and coordinated manner with appropriate information of their own.

For example, German police could have pooled more resources into solving the Lisa case more quickly. Instead of refusing to release more information on the case, as they initially did, they could have given – carefully – appropriate additional weight to the public's information interest when balancing it against the privacy rights of Lisa and her family. Of course, this is only one aspect in a complex balancing exercise from a legal, as well as policy, perspective. Institutions need to be careful not to be driven by others' agenda setting.

## 5 The Lessons Learned and Contemporary Challenges for Countering Fake News

To date, over 30 states remain party to the Broadcasting Convention – in particular, the Russian Federation, Hungary, Latvia and Estonia as well as Brazil, India, Egypt, Norway, Sweden and Switzerland. Most recently, in 2005, Liberia acceded to it.<sup>103</sup> The Correction Convention has 17 parties.<sup>104</sup> Most recently, in 2005 and 2006 respectively, Liberia and Montenegro acceded to it. These conventions may yet play a role in the future if states parties choose to rely on them in disputes within their ambit. But their general importance as hard law is certainly limited. Neither convention has ever been applied in practice so far, and, as far as can be seen, Sweden has been the only state to implement the Broadcasting Convention in its national law since World War II.<sup>105</sup> Nonetheless, from their drafting process, from the Broadcasting Convention's late ratification by socialist states and from the fact that these conventions have never been applied in practice, insights may be gained for future attempts at regulating fake news. On the other hand, modern developments and insights need to be taken into account when applying the conventions today.

### A *The Complexities of the Information Age*

When addressing fake news, the League of Nations, just like the UN, operated on the assumption that there is a way of reporting news that is not only factually correct but also objective, in the sense that the image of reality that emerges for the recipients from this information is an undistorted and non-tendentious representation of reality: 'The press should not be propagandist, but should simply purvey the raw material, the good with the bad.'<sup>106</sup> Strictly speaking, this ideal is unattainable for modern mass media.

<sup>103</sup> For the ratification status, see [https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=513&chapter=30&clang=\\_en](https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=513&chapter=30&clang=_en).

<sup>104</sup> For the ratification status, see [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVII-1&chapter=17&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVII-1&chapter=17&clang=_en).

<sup>105</sup> UN (ed.), *Freedom of Information: A Compilation* (1950), vol. 2, at 115.

<sup>106</sup> US Representative Carroll Binder, in Sub-Commission on Information and the Press, Commission on Human Rights, Sub-Commission on Information and of the Press, Fifth Session, Summary Record of the Hundred and Fourth Meeting, Held at Headquarters, New York, on Monday, 17 March 1952, Doc. E/CN4/Sub.1/SR.104, 25 March 1952, at 5.

Just like a map that can never correspond entirely to the territory it represents, information can never correspond to reality in every detail.<sup>107</sup> The selectivity of news, its purposeful reduction of reality's complexity, is not a bug but, rather, a feature; it performs the important function of reducing all of the available information to a form that is processable for humans.<sup>108</sup> Taking this into account, mass media cannot but distort reality – even if the information reported is in itself correct – if what is meant by 'distortion' is that the picture emerging from the information is not a perfect representation of reality.<sup>109</sup>

The necessity to select information always has existed, but it is exacerbated by the modern overabundance of information that threatens to overburden our cognitive capacities. Modern habits of information intake, or, rather, coping mechanisms (such as reading only the headline), may aggravate the situation further, just like algorithms that create 'filter bubbles' or 'echo chambers'.<sup>110</sup> Automated 'bots' try to profit from mechanisms such as these.<sup>111</sup> Knowing all this, how is it still possible to accept the information available to us as reality? The answer is trust. We trust in the reliability of the available information while, at the same time, being critically aware of its insufficiency and incompleteness – and even of the possibility of manipulation.<sup>112</sup> Trust allows us to compensate for a lack of information that we, individually and in groups, can never completely avoid.<sup>113</sup>

Fake news seeks to undermine this trust. It may have always existed, but its reach has increased greatly due to modern social media mechanisms.<sup>114</sup> A seemingly widespread 'post-truth' attitude that cares not so much for the information's objective accuracy as its 'truthiness' – that is, a subjective ring of truth in conformity with one's worldview<sup>115</sup> – is widely held to have contributed to its success. It may explain why a significant number of people seem to consider partisan media more objective than 'mainstream media', which adhere to traditional journalistic standards. In a sense, fake news feeds on post-modern insecurities and the complexity of the contemporary information situation. Interviewed in 2015, RT's editor-in-chief told *Time* magazine: 'No one shows objective reality. ... The Western media are not objective, reality-based

<sup>107</sup> Luhmann, *supra* note 52, at 56–57, 138ff.

<sup>108</sup> See White, "'The Gatekeeper": A Case Study in the Selection of News', 27(1) *Journalism Quarterly* (1950) 383.

<sup>109</sup> Cf. H. Gans, *Deciding What's News: A Study of CBS Evening News, NBC Nightly News, Newsweek, and Time* (1979), at 304–308; Luhmann, *supra* note 52, at 173–174.

<sup>110</sup> Helbig *et al.*, *supra* note 50.

<sup>111</sup> See, e.g., J. Echeverria and S. Zhou, 'The "Star Wars" Botnet with >350k Twitter Bots', *ArXiv* (10 January 2017), available at <https://arxiv.org/pdf/1701.02405v1.pdf>.

<sup>112</sup> Cf. N. Luhmann, *Vertrauen* (5th edn, 2014), at 68.

<sup>113</sup> *Ibid.*, at 125–126.

<sup>114</sup> Brennan, 'Making Sense of Lies, Deceptive Propaganda, and Fake News', 32(3) *Journal of Media Ethics* (2017) 179, at 180.

<sup>115</sup> Perlman, 'How Truthful Is Your "Truthiness"?', *Columbia Journalism Review*, 11 August 2015, available at [www.cjr.org/analysis/how\\_truthful\\_is\\_your\\_truthiness.php](http://www.cjr.org/analysis/how_truthful_is_your_truthiness.php).

news sources.<sup>116</sup> All there is are different perspectives, all of which are equally valid. Ultimately, ‘nothing is believable, or worth believing, anymore’.<sup>117</sup>

Basically, it is claimed that there is no free press that tries as well as humanly possible to inform the public accurately and in a balanced manner about events judged to be relevant. It confuses the necessity of choosing selection factors with the choice of a political selection factor that systematically strives to downplay inconvenient information and gives great prominence to information believed to be politically expedient.<sup>118</sup> Avoiding such a factor is precisely what makes media objective.<sup>119</sup>

It is submitted that distinguishing between false and distorted news is of crucial importance for the general discourse about fake news and any attempt at regulation. Fact-checkers – journalists as well as institutions like StratCom – should not, as they apparently currently do, ‘use almost interchangeably’ the terms ‘false’ and ‘misleading’.<sup>120</sup> When *RT* labelled the recurring claim by traditional media that its coverage of the Lisa case had been ‘fake news’<sup>121</sup> as fake news,<sup>122</sup> it was right if one defines ‘fake news’ solely as ‘false news’. Had the other media called out *RT* for the distortive quality of its coverage, that charge would have been much harder to refute.

## B The Limits of Legal Regulation

False news is, and can be legitimately, regulated repressively. States are prohibited from deliberately producing false news at least in certain constellations under the Broadcasting Convention and according to the principle of non-intervention. Private actors might also be held to that standard, but their human rights need to be taken into account. It should be noted that even state-owned or state-funded corporate entities may enjoy international human rights protection.<sup>123</sup> According to Article 19 of the International Covenant on Civil and Political Rights<sup>124</sup> and Article 10 of the European Convention on Human Rights (ECHR), the threshold for considering that a person ‘ought to know’ the incorrectness of a statement would have to be set rather high. Under the ECHR, for example, journalists must ‘[act] in good faith and ma[k]e sure that the articles were written in compliance with ordinary journalistic obligations to

<sup>116</sup> Inside Putin’s On-Air Machine, *Time* (26 March 2015), available at <http://time.com/rt-putin/>.

<sup>117</sup> Gendreau, ‘The internet made “fake news” a thing – then made it nothing’, *Wired* (25 February 2017), available at [www.wired.com/2017/02/internet-made-fake-news-thing-made-nothing](http://www.wired.com/2017/02/internet-made-fake-news-thing-made-nothing).

<sup>118</sup> Cf. Frankfurt, ‘On Bullshit’, in H.G. Frankfurt (ed.), *The Importance of What We Care About* (1988) 117, at 130–131.

<sup>119</sup> Gans, *supra* note 109, at 182.

<sup>120</sup> Graves, *supra* note 7, at 75; same approach by the European Commission, *supra* note 5, at 10–11.

<sup>121</sup> J. Röpke and J. Vollmer, ‘Propaganda mit einer angeblichen Vergewaltigung’, *Bild* (26 January 2016), available at [www.bild.de/politik/inland/npd/wie-russland-mit-angeblicher-vergewaltigung-propaganda-macht-44289532.bild.html](http://www.bild.de/politik/inland/npd/wie-russland-mit-angeblicher-vergewaltigung-propaganda-macht-44289532.bild.html).

<sup>122</sup> ‘Der Fall Lisa – Die hartnäckigste Fake News über RT Deutsch’, *RT* (6 December 2016), available at <https://deutsch.rt.com/gesellschaft/43975-fall-lisa-hartnackigste-fake-news/>.

<sup>123</sup> ECtHR, *Islamic Republic of Iran Shipping Lines v. Turkey*, Appl. no. 40998/98, Judgment of 13 December 2007, paras 78–81; on this, see Happold, ‘Who Benefits from Human Rights Treaties?’, in I. Riassetto *et al.* (eds), *Liber Amicorum Rusen Ergeç* (2017) 117, at 123–124.

<sup>124</sup> 1966, 999 UNTS 171.

verify factual allegations [that infringe on people's private life, for example]',<sup>125</sup> 'to the extent permitted by the circumstances'.<sup>126</sup> In addition, the harm to good international understanding that Article 3 of the Broadcasting Convention requires would have to be interpreted narrowly.<sup>127</sup>

Distorted news, on the other hand, is considerably more difficult to grasp legally. The old concerns of overly restricting freedom of speech for legitimate actors are still well founded.<sup>128</sup> It would certainly be possible to decide case by case, taking into account freedom of speech, which kind of news is sufficiently distorted to count as fake news, developing generalizable standards in the process. The British communications regulator Ofcom is doing just that. For example, in 2015, Ofcom found *RT* to be in breach of its Broadcasting Code; *RT* had not shown 'due impartiality' and had 'materially mislead' the audience.<sup>129</sup> However, I would caution against going down that path any further. Considering the degree to which all news – and even its modern sub-genre of fact-checking<sup>130</sup> – struggles with balanced and accurate reporting,<sup>131</sup> only extreme cases could legitimately be taken to violate such provisions, taking into account the right to freedom of expression. Generally, for distorted news, the right to freedom of expression will stand in the way of repressive sanctions – and rightly so. The potential for abuse is immense.<sup>132</sup>

Governmental information can address distorted news, and a right to reply, if available, might also be conducive. From a human rights perspective, the right to reply established by the Correction Convention is indeed entirely unproblematic; it obliges only states and the UN to disseminate the reply, without imposing a duty of publication on any private actor. Since nowadays any state can easily contact any news organization and publish press releases that are available instantaneously worldwide via the Internet, the added value of the right might lie in the help of other states or the UN in giving it more publicity. A noteworthy feature of the Correction Convention, in regard to attribution, is that it allows action to be taken against news emanating from a state that is not a party to it by establishing a cooperative network of other states. It might, to a certain extent, be a role model for mechanisms that do not rely on attribution of conduct at all.

This is all the more important since, in practice, false news is mostly distributed by informal websites and through user-generated content, while distorted news is mostly

<sup>125</sup> ECtHR, *Olafsson v. Iceland*, Appl. no. 58493/13, Judgment of 16 March 2017, paras 53–62; see also W. Schabas, *The European Convention on Human Rights* (2015), at 468–469.

<sup>126</sup> ECtHR, *Heinisch v. Germany*, Appl. no. 28274/08, Judgment of 21 June 2017, paras 67; see also C. Grabenwarter, *European Convention on Human Rights: Commentary* (2014), Art. 10, paras 52–55.

<sup>127</sup> According to VCLT, *supra* note 86, Art. 31(3) lit. c.

<sup>128</sup> Cf. Kearney, *supra* note 46, at 8–11; see also Whitton and Larson, *supra* note 63, at 137–138.

<sup>129</sup> *Ofcom Broadcast Bulletin*, Issue no. 288, 21 September 2015, at 10, 46–48, 49–60, available at [www.ofcom.org.uk/\\_data/assets/pdf\\_file/0017/50507/issue\\_288.pdf](http://www.ofcom.org.uk/_data/assets/pdf_file/0017/50507/issue_288.pdf).

<sup>130</sup> Cf. Graves, *supra* note 7, at 53–54, 77–78, 87–112, 216ff.

<sup>131</sup> See, e.g., Gans, *supra* note 109, at 249ff.

<sup>132</sup> 'Predators of Press Freedom Use Fake News as a Censorship Tool', *Reporters without Borders* (16 March 2017), available at <https://rsf.org/en/news/predators-press-freedom-use-fake-news-censorship-tool>.

created and distributed by formal news agencies and outlets.<sup>133</sup> So, while false news could be regulated in a sensible manner, the prospects of finding its source – let alone, attribution to a state – will in practice often be low. Inversely, the source of distorted news is often easier to identify but is, in substance, harder to regulate. While this is certainly a less-than-optimal state of affairs, since it allows for circumnavigating international law, it is hard to see how a change in the rules of attribution could address this without serious side effects.<sup>134</sup> The law, however, may serve to strengthen the trust vested in the free media as an institution in various ways. For example, antitrust law and subsidies can, if applied neutrally, serve to preserve a plurality of media, which is necessary not only as a reflection of the political spectrum but also as an institutionalization of distrust in any one press organ, which verifies trust in the institution as a whole.<sup>135</sup>

## 6 Concluding Observations

Regulating fake news can be lawful and legitimate – up to a certain point. What must be avoided at all costs is developing a double standard: that fake news is illegal only if employed by ‘the others’. Most of the examples in this article concern Russian media, which may appear to be distortive in its own right. In fact, this focus is owed to the allegations levelled against Russian media from many sides and the ready availability of examples provided by Soviet disinformation practices.<sup>136</sup> Western states, it should be noted, also have a track record of information operations.<sup>137</sup> During the Cold War, Western stations were indeed meant to destabilize the Soviet Union and other Eastern European states, but they sought to stay factually correct because this was considered to be more effective.<sup>138</sup>

Any legal standard concerning fake news must therefore be a rather formal and potentially universal one, applicable without reference to overly particularist values or, worse, one’s geopolitical leanings. Otherwise, action taken against outlets such as *Sputnik* or *RT* might well set a precedent that authoritarian regimes can rely on for clamping down on more legitimate news networks. Post-World War II, democratic states widely thought a free and pluralistic press to be the best safeguard against fake

<sup>133</sup> Cf. Pronay and Taylor, ‘“An Improper Use of Broadcasting ...” The British Government and Clandestine Radio Propaganda Operations against Germany during the Munich Crisis and After’, 19(3) *Journal of Contemporary History* (1984) 357, at 365; Spahn, *supra* note 12, at 91ff.

<sup>134</sup> Krieger, ‘Krieg gegen anonymous: Völkerrechtliche Regelungsmöglichkeiten bei unsicherer Zurechnung im Cyberwar’, 50 *Archiv des Völkerrechts* (2012) 1, at 11ff.

<sup>135</sup> Cf. Luhmann, *supra* note 112, at 77, 118–119; Human Rights Committee, General Comment no. 34, Doc. CCPR/C/GC/34, 12 September 2011, at 40.

<sup>136</sup> See, e.g., R. Shultz and R. Godson, *Dezinformatsia: Active Measures in Soviet Strategy* (1984), at 133–157, 149.

<sup>137</sup> Pronay and Taylor, *supra* note 133, at 362; ‘Radio Free Europe’, *Oxford Essential Dictionary of the U.S. Military* (2001).

<sup>138</sup> N. Schlosser, *Cold War on the Airwaves: The Radio Propaganda War against East Germany* (2015), at 57–58, 73–105.

news.<sup>139</sup> While this should still hold true,<sup>140</sup> considering today's overabundance of information, the free flow of information might need some assistance.<sup>141</sup> Since the complexity of the information age will not disappear, strategies to manage it are necessary. Trust and distrust are both tools that allow us to deal with the complexity of the information confronting us. Making it easier for audiences to verify the trust vested in media might be a sensible step. Transparency in regard to media's source of capital and highlighting existing safeguards for their independence may be conducive.<sup>142</sup> For such transparency to be of use, media and digital literacy must be promoted,<sup>143</sup> and the information must be easily accessible. Answering distortion with distortive counter-propaganda, however, only creates more distortion and, therefore, precisely the untrustworthy information environment at which fake news is aimed.<sup>144</sup>

<sup>139</sup> UN, *supra* note 8, at 204–220.

<sup>140</sup> Richardson, 'Fake News and Journalism Education', 27(1) *Asia Pacific Media Educator* (2017) 1, at 3.

<sup>141</sup> See also UN, *supra* note 8, at 56ff; Whitton and Larson, *supra* note 63, at 247–248.

<sup>142</sup> Cf. European Commission, *supra* note 5, at 22, 25.

<sup>143</sup> UN Special Rapporteur on Freedom of Opinion and Expression *et al.*, *supra* note 5, at 3e.

<sup>144</sup> Cf. European Parliament, *supra* note 13, at 46.