

International law and policy on disinformation in the context of freedom of the media
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I.

I will briefly introduce some of the relevant treaty and customary law before focusing on the concept of disinformation in more detail.

II.

International law has addressed false and misleading information for a long time. Already in 1936, the League of Nations drafted the International Convention on the Use of Broadcasting in the Cause of Peace. This Broadcasting Convention obliges States, among other things, to stop transmissions 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”, and to publicly correct such statements. In 1953, the UN created the Convention on the International Right of Correction. This Correction Convention gives States a special right to reply to dispatches of news agencies that they consider false or distorted, and capable of injuring their relations with other States. Other contracting states are obliged to distribute this reply. If they don’t, the injured State may submit its reply to the Secretary General of the UN who shall give appropriate publicity to it. 13 participating States of the OSCE are currently contracting parties to the Broadcasting Convention; 6 to the Correction Convention.

More recently, a debate has begun whether the principle of non-intervention could apply to false or misleading information. This principle, well-established in international law, prohibits one State from coercively intervening in the internal or external affairs of another. States’ freedom of choice is thereby protected, for example, from the direct or indirect use of armed force, as the International Court of Justice recognized in its Nicaragua judgment. But can spreading false or misleading information constitute such intervention, can it be coercive? To my mind, certain false statements can be coercive. They can deprive States of their freedom of choice in the sense that they seek to manipulate decision-makers’ capacity to reason. Circumstances accepted as fact constrain our freedom: some options may no longer seem to exist, others may appear to be inevitable. If a candidate in an election committed a grave crime, people might be inclined not to vote for that person. False information might sometimes achieve its aim even more effectively and with less risk than a threat of armed force. Whether it actually achieves its aim is irrelevant since intervention need not be successful to be prohibited under international law.

Whether and to what extent false or misleading information that is spread by a State really violates the principle of non-intervention, remains subject to debate, among States and scholars. But, for example, Germany recently issued a position paper on the application of international law in cyberspace, in which it recognized that disinformation may indeed constitute prohibited intervention at least in some cases; for example, if it is meant to cause riots that impede the conduct of an election.

III.

You might have noticed that I mostly avoided the term “disinformation” so far. From a legal perspective, the concept of disinformation is problematic because it tends to conflate distinctions that are very important.

There is no universally accepted definition, but it is mostly agreed that statements can constitute disinformation which are intentionally *false* or *misleading*. The European Union’s definition, for example, contains these elements. It also contains additional elements but these do not relate to the questions I would like to point out here. Statements that are false or misleading but *not intentionally* are mostly referred to as *misinformation*. The Broadcasting Convention, the Correction Convention and the principle of non-intervention all apply to false statements. Statements that are *misleading* are only covered by the Correction Convention, which expressly refers to “distorted” statements.

Misleading statements are considered disinformation because they are presented in a way which makes it likely that false conclusions are drawn from them. But they differ from false statements because the stated facts are true. The selection, framing and presentation of facts, however, are value judgments, they cannot be proven to be true or false. For example, if a news outlet chose to report truthfully on each and every person who suffered blood clots after vaccination for Covid-19, this would arguably distort the importance of these very rare cases. It would arguably exaggerate the risks associated with vaccination. But legally, this choice of presentation of true facts must be characterized as an opinion that this presentation is appropriate. Only in rare cases, can statements be so distorted as to be considered false.

With regard to the principle of non-intervention, it is undisputed that mere criticism of other States, and be it biased and unfair, is not prohibited. International human rights law, which will certainly be addressed in more detail later today, likewise recognizes that *false* statements of fact can, in certain restrictive circumstances, be subject to proportionate civil and criminal sanctions. But opinions, in particular on politically sensitive issues, enjoy the highest level of protection, even those that seem entirely wrong to most people.

Another issue with the definitions of dis- and misinformation is that they only address intent and lack of intent. In practice, however, the question whether due diligence duties have been complied with is far more prevalent. The Broadcasting Convention also covers statements the incorrectness of which *ought* to have been known. Journalists who diligently researched a factual statement before publication, may not be sanctioned, even if the statement later turns out to be false. More can be required of journalists in this regard than of other citizens, but not so much that lawful reporting becomes unreasonably difficult.

Taking these shortcomings of the definition of disinformation into account, I would submit that special attention should be paid to its constituent elements, and other aspects not covered by the minimalist core definition I presented here. Legally, we should talk about – and note the differences between – intentionally and unintentionally false and misleading statements, their effects or purpose, and associated duties of due diligence.

Finally, it should be noted that the concept of “fake news”, which arguably covers the same types of statements, is rejected by many scholars and also the EU, primarily because people like the last President of the United States used it to deflect any criticism, whether it was well-founded or not. The concept of disinformation can be abused in the same manner, but so could any concept that refers to the phenomenon described, no matter how you name it.

IV.

Since 2016, disinformation has again come to be perceived as a grave threat to societies, to their political process and their capacity to respond to crises such as the current pandemic. This development has contributed to a certain shift in the way media regulation is perceived. For a long time, a general trend toward decriminalization and less state intervention seemed clear. Now, stronger regulation is often advocated for. A proportionate response that respects human rights is certainly called for. But history and more recent experience show that you need to take into account the possibility that such regulations might be abused, by state actors but also by private actors, to illegitimately stifle the exercise of freedom of speech. The more recent case law of the European Court of Human Rights on Article 18 of the European Convention, which addresses the misuse of human rights restrictions, confirms this danger. Even regulations that are, abstractly, unproblematic, may be applied in an abusive manner in individual cases. The importance of independent courts in safeguarding against such abuse cannot be overstated. It must be emphasized in this regard that any action taken against disinformation must not infringe on the legitimate role of journalists to impart information of public concern to the public. Moreover, States have a duty to protect journalists from unlawful attacks, no matter where they come from.

In my opinion, it is most important to foster an information environment that allows citizens to trust in sources of information because they know that this trust is generally justified. In modern societies, no one can form their convictions about reality without trusting in the integrity of others. Building and maintaining trust to counter disinformation is one of the most important challenges for the media, but also for state institutions. Legal measures can be a part of the answer to disinformation, but ultimately trust cannot be legally mandated. It must be earned.