

INTERNATIONAL LAW AND THE NEW DYNAMICS OF INFORMATIONAL CONFLICT

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As yet, international law provides very limited assistance in combatting the scourge of Fake News and disinformation warfare.

No binding treaties or international agreements have been concluded and, while the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda was adopted by the UN, the OSCE, the Organization of American States and the African Commission on Human and Peoples’ Rights in March 2017, this represents soft law at best, imposing desirable standards of conduct which are not directly enforceable. As such, it is not a great help to those seeking a stronger and more coordinated response to the dissemination of Fake News.

Furthermore, insofar as the Joint Declaration does provide guidance, it conveys a strong presumption in favour of freedom of expression, warning that “prohibitions on disinformation may violate international human rights standards”, and adding that “[g]eneral prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information’, are incompatible with international standards for restrictions on freedom of expression”.

At a regional level, however, we are seeing some efforts to fight Fake News, with the Council of Europe and the European Commission taking significant initiatives. The former advanced a proposal that was adopted by the Committee of Ministers in April 2016 which stated that officials and

public figures should neither accuse journalists and media of disseminating propaganda or disinformation, nor induce them to engage in its dissemination.

The EU Commission has now gone further and is convening a multi-stakeholder forum for cooperation in the battle against disinformation. This platform includes governments, online platforms, advertisers and the advertising industry, and is scheduled to publish an EU-wide Code of Practice in July 2018.

It is at national level, however, that we are witnessing the most determined action on Fake News. Germany and India have passed controversial laws making technology companies and administrators of social media groups accountable, while Israel, Italy, Russia, The Philippines, the UK and the US all have legislation pending, which proposes to impose new obligations on technology companies and in some cases individuals, ISPs and website administrators.

While this action might be seen as encouraging, it has obvious limits in terms of its solely domestic reach. Efforts to deploy existing law are similarly limited. For example, the Democratic Party in the United States has commenced a suit against the Russian Federation (together with the Trump campaign and WikiLeaks) following the latter’s apparent intervention in the 2016 presidential campaign, but in the absence of an appropriate international forum it has been obliged to file its claim in a federal court in the Southern District of New

York and to rely not on international law provisions but solely on US domestic law.

Many would argue that this situation needs to change, so as to meet a fast-evolving threat which already transcends national and jurisdictional boundaries. It would not be the first time such measures were considered; the UN's Draft Convention on Freedom of Information in 1948 provided that limitations on freedom of expression might be legitimate to curtail false reporting. However, the Draft Convention was never ratified. The same language was also proposed for inclusion in the International Covenant on Civil and Political Rights, but did not make it into the final document.

More recently there has been a suggestion that computer-based attacks should be treated as a form of armed conflict and be brought within the provisions of the Geneva Convention. This would, however, seem hard to sustain and those wishing to deploy such provisions in the case of transgression would in all probability find themselves having to demonstrate a level of damage or injury akin to that involving an armed attack using conventional weapons.

The ultimate goal for those seeking to combat Fake News and disinformation warfare would thus seem to be a significant development of the hard international law framework, probably by way of the ratification of a new treaty. Meaningful steps to this end could involve a range of initiatives including multi-stakeholder cooperation around pre-emption

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involving not only governments but regional bodies, technology companies and non-governmental organisations. Common protocols and processes for crisis management, new multi-agency fact-checking mechanisms, intelligence sharing, automated systems and public education programmes could all play their part and, in this way, the world could foster not just a legal and regulatory environment hostile to Fake News, but a culture that detects it, eschews it and nullifies its effect. ●

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