

# **Weaponization of information and attacks on “information sovereignty” – would freedom of expression standards suffice to tame the “information wars”?**

Limitation of Freedom of Expression on the grounds of national security/territorial integrity

## Our goals today:

- to explore the scope and significance of the issues at stake e.g. weaponization of information (WoI) and the related concepts of dis-, mis- and malinformation as well as existing policy responses
- to reflect on the possibilities of responding to weaponization of information under international human rights law and FoE standards

# Structure

**Part 1:** Context, definition, analysis of challenges that weaponization of information poses to FoE, existing policy responses

**Part 2:** International judicial practice related to the issue e.g. balancing freedom of expression and interests of national security/territorial integrity (European Court of Human Rights case law)

**Part 3:** Existing recommendations from various stakeholders and presenter's own concluding recommendations on how to respond to the weaponization of information challenges

# Weaponization of Information: Definition

**the use of information and communication in all forms for the purpose and in pursuit of an aggressive/subversive foreign policy**

*Igor Yakovenko, Russian media expert, at an event in Vilnius, Lithuania hosted by the International Media Support (November 2014):*

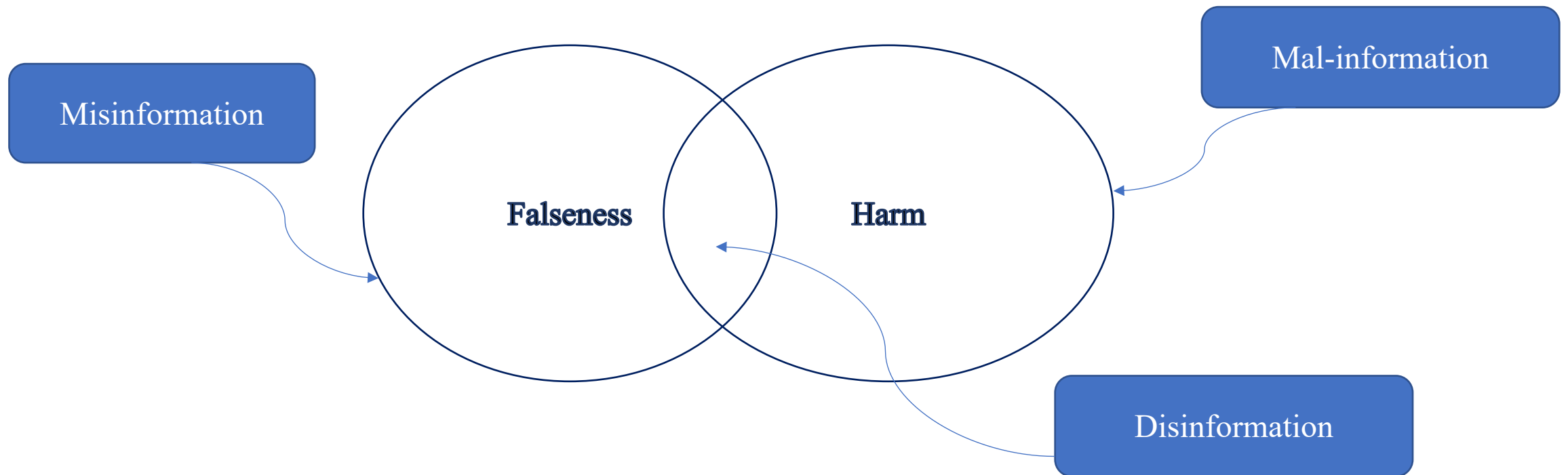
*“In classic cases, fake information is used to support actual warfare. In this case [e.g. Russia-Ukraine conflict] actual warfare was launched to support the information war”.*

Focus on **external source of weaponized narratives**: election meddling, messages undermining sovereignty and capacity of a state

# Weaponization of Information and Information Disorder (Council of Europe Report)

WoI could use all three elements of Information Disorder but most often – Disinformation

<https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-research/168076277c>



# Weaponization of Information: how it relates to

## Propaganda

*(subversive propaganda aims at destabilizing State institutions by influencing nationals of another State towards insurrection, revolt, or civil strife):*

- WoI is a more complex phenomenon, **often a hidden rather than clear incitement** (“Kazakhstan is not country”, “Ukraine is a failed state”)
- WoI is part of foreign policy but also serves internal policy goals e.g. highly multifunctional and multidirectional
- WoI is also about how to make you, based in your country, see the events in other “strategically important” places in a specific light
- **All amplified by the new communication technologies and social networks** (Timothy Snyder’s cyberfascism [https://www.youtube.com/watch?v=gAObqEu\\_tbg&list=LL-XkHhfUnry7UAuzkgusqOA&index=18&t=0s](https://www.youtube.com/watch?v=gAObqEu_tbg&list=LL-XkHhfUnry7UAuzkgusqOA&index=18&t=0s); “How social media took us from Tahrir Square to Donald Trump” <https://www.technologyreview.com/s/611806/how-social-media-took-us-from-tahrir-square-to-donald-trump/>)

## Freedom of Expression

- FoE applies ‘not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population’ (ECtHR cases Handyside, Lingens)
- WoI often expressed by formally “media actors”
- **WoI is highly strategic (not spontaneous or genuine), advances political and/or military goals**

# WoI and Challenges to FoE

- Evaporation of truth
- Abuse of freedom of expression standards and protection mechanisms
- De-legitimisation of and increasing mistrust in media
- ‘All or nothing’ approach of the international FoE organizations may lead to ‘nothing’ rather than ‘all’

# Policy responses to WoI

*Restricting weaponization of information as a form of expression is often justified on the grounds of national security/territorial integrity interest (not the least because of its “external” origin targeting sovereignty)*

## Challenges:

- any discourse, which can be described as weaponization of information, is usually also represented as an exercise of free expression rights by the speaker/producer of such content, especially as most of such ‘speakers’ are de jure media actors (Russia Today, Sputnik etc.)
- nature of modern communications often makes legal regulation of speech technically complicated or relatively easy to overcome (In March 2019, Facebook demanded state regulation on harmful content, privacy, protection of elections and data portability)
- States’ anxieties about the loss of control and threats to “information sovereignty” – Professor Monroe Price predicted that trend years ago
- “Globalisation” of challenges but still rather regional/national responses and pressing jurisdiction issues
- how to prevent abuse of freedom without rolling back into the tenets of censorship?
- “online” is going to be the place of the new major battles of the 21st century (“The first world cyber war” <https://www.ridl.io/en/the-first-world-cyberwar/>; Digital “Geneva Conventions” ideas <https://www.justsecurity.org/58838/protecting-civilians-cyberspace-ideas-road/>; <https://blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention/>; <https://www.irinnews.org/analysis/2017/11/15/bots-and-bombs-does-cyberspace-need-digital-geneva-convention>)
  - Hartford Guidelines on Speech Crimes in International Criminal Law – guidelines for the “next Nahimana case” <https://www.ejiltalk.org/the-hartford-guidelines-on-speech-crimes-in-international-criminal-law/>



## Examples:

- StratCom Centres (NATO, EU, Finland)
- Policies and strategy documents (Scandinavia, UK White Paper on Online Harms)
- EU Commission’s proposal for one-hour content removal rule and fines worth 4% of global turnover for the last business year to liable service providers <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-preventing-the-dissemination-of-terrorist-content-online>
- Broadcasting and social media restrictions (Ukraine, Latvia, Lithuania, Moldova)
- Thematic laws (France, Germany, Belarus, Singapore, Russia), often these initiatives target specifically either online expression or media with “foreign roots”
- Vatican: Disinformation = “Serious information sin”
- Tech giants as the most contested but the most effective regulators: “Community standards” – 100% enforceable unlike international human rights norms (24 April 2018, Facebook: internal enforcement standards published and appeals process created)
- May 2020: Oversight Board is established to review Facebook’s content decisions <https://www.oversightboard.com/news/announcing-the-first-members-of-the-oversight-board/>
- February 2019: Stanford’s Global Digital Policy Incubator, ARTICLE 19, and United Nations Special Rapporteur David Kaye: **Report – Social Media Councils: From Concept to Reality**. “Original proposal recommended the creation of councils at the national level that would serve as an appeals body for content moderation decisions made by platforms. These national councils would all be governed by a global code of principles grounded in international human rights standards, but these principles would be applied within a local context. Moreover, the national councils would all be linked through a global association of councils that would set best practices in relation to the principles and work of the councils.” <https://cddrl.fsi.stanford.edu/global-digital-policy-incubator/content/social-media-councils-concept-reality-conference-report>



# International Judicial Practice: ECtHR

## Limitation Clause – Article 10 ECHR

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, **in the interests of national security, territorial integrity** or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

## Tripartite Test

It is well-established in the international human rights law that limitations to rights should meet the requirements of the tripartite test, namely:

- 1) they should be prescribed by law,
- 2) should pursue legitimate aim, and
- 3) should be necessary in a democratic society.

It is usually less complicated for a respondent government to satisfy the first two requirements; therefore, **the Court often pays more attention to assessing whether a limitation in question satisfies the third criterion of necessity.**

This criterion is unfolded in the ECtHR case-law through explaining the existence of **the ‘pressing social need’** to impose certain limitation of the right as well as through the notion that the restrictive measure applied should be **proportionate** to the aim sought and reasons adduced to justify interference with the right should be **‘relevant and sufficient’**.

# International Judicial Practice: ECtHR

## Types of cases where national security/territorial integrity interests were favoured over FoE

- access to and use of classified information - state secrets and the like. Two major international principles of dealing with classified data: first, when already publicised, information on national security cannot be banned or its disseminators punished; second, it is prohibited to unconditionally define all information in the area of national security as classified and to establish a prior limitation on accessing it. (cases of Brambilla, Pasko)
- limits of political expression of civil servants (cases of Karapetyan, Kosiek, Rekvenyi)
- Turkish cases related to Kurdish separatism and Refah Partisi

## Key factors that lead the Court to favour national security over freedom of expression

- **contextual approach** e.g. Court considered the details of the impugned speech in the light of a given political, social and security context as well as the role of the ‘speaker’ in question.
- **potential of the impugned speech to incite violence** as opposed to proposing ways of peaceful resolution of disputes and conflicts

Cases of Zana, Surek (1 and 3), Halis Dogan, Karatepe, Karatas

# International Judicial Practice: ECtHR

## Abuse of Rights

Article 17, ECHR:

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention

## Militant Democracy

a democratic system that has adopted and applies pre-emptive *prima facie* undemocratic legal instruments to defend itself against the risk of being overthrown by anti-democratic actors that make use of political rights and democratic procedures with the aim of abolishing it

# International Judicial Practice: ECtHR

## Conclusions

- Weaponization of information would be a significantly new challenge for the Court
- Inconsistent application of Article 17 of ECHR (apart from the Holocaust denial cases). What are our “democratic values”?
- Focus on violent character of the speech will fail to prevent weaponization of information
- Genuine speaker v. Strategic Subversive Speaker
- Internal trouble v. external threat
- Focus on context including national history as a positive factor

## **Weaponization of information v. freedom of expression**

What would the collision between the two mean **for the media development actors?**

- Increased tendencies of regulation by the states
- Need for conceptual innovations within the international legal framework for freedom of expression
- Split in the camp of the media development actors: FoE absolutists v. supporters of regulatory intervention
- Possible alienation of our constituencies when real life threats are met with the absence of adequate regulatory response

## Weaponization of information & Covid-19 emergency responses

- What came in first: pandemic or *Disinfodemic*? The novelty of the virus is conducive to disinformation flood  
[https://en.unesco.org/covid19/disinfodemic?fbclid=IwAR1I81f76\\_uQLwJ3jGvlsfNOiz3inrMeLN6PWDWDgUR8vo4VZLvIWtEZj9c](https://en.unesco.org/covid19/disinfodemic?fbclid=IwAR1I81f76_uQLwJ3jGvlsfNOiz3inrMeLN6PWDWDgUR8vo4VZLvIWtEZj9c)
- Business as usual for the major “information warriors” like Russia and China but with even more globalised and “harmonised” outreach: <https://euvsdisinfo.eu/eeas-special-report-update-short-assessment-of-narratives-and-disinformation-around-the-covid-19-pandemic/>
- Sovereignty could be threatened not only in times of elections or conflict
- States with authoritarian inclinations are using the momentum
- In the absence of preceding consensus re: the criteria of proportionate regulation, crisis regulatory responses to disinformation are often awkward and over-restrictive (Hungary, Sri Lanka)
- Restrictions readily accepted by the public influenced by fear and uncertainty

# Recommendations

## Intergovernmental and non-governmental organizations, media/ legal experts

- “perceived wisdoms”: multi-stakeholderism, media literacy and fact-checking
- Responses to disinformation should consider three dimensions: *manipulative Actors, deceptive Behaviour, harmful Content*  
[https://www.ivir.nl/publicaties/download/ABC\\_Framework\\_2019\\_Sept\\_2019.pdf](https://www.ivir.nl/publicaties/download/ABC_Framework_2019_Sept_2019.pdf)
- self-regulation may not be enough in terms of electoral disinformation; possible restriction of digital electoral activities by foreigners <https://book.coe.int/en/international-law/7985-disinformation-and-electoral-campaigns.html>
- sanctions and limitation of access to disinformation resources
- advertising regulation in social media
- new take on Internet intermediaries: two types (Council of Europe as a pioneer  
[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680790e14](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14) )
- de-monopolisation of tech giants (limiting new acquisitions, “redistribution” of income)



## Presenter

*“The systemic question for our historical moment is whether there is a shift from the norm of a democratic state to a norm of a security state or some novel melding of the two” (Price, Stremlau, “Speech and Society in Turbulent Times”)*

- Finding balance between deontological and instrumentalist approaches to freedom of expression (equality is relative, rights do not exist in vacuum)
- Linking the privileged status of media/journalist to professional ethics and social responsibility (media privilege v. who is media/journalist?)
- Defining “democratic values” (stop our complicity in faking democracy)
- Assessing rights limitation requirement of being “necessary in a democratic society” through the lens of the concepts of **abuse of rights** and militant democracy

*This presentation and my work on the topic is devoted to **Uladzimir Jofe-Marhoŭcaŭ** (15 May 1934 – 12 August 2019), **my grandfather** and the person who always supported me in pursuing my dreams...*







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