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Propaganda and armed conflict

– analysing the legal framework through the
ongoing conflict between Ukraine and Russia

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PROPAGANDA AND ARMED CONFLICT

– ANALYSING THE LEGAL FRAMEWORK THROUGH THE ONGOING CONFLICT BETWEEN UKRAINE AND RUSSIA

By Dr Sally Longworth¹

I. INTRODUCTION

Debates relating to the role of propaganda, information warfare and disinformation have been ongoing in the armed conflict between Ukraine and Russia since the outbreak of hostilities in 2014. Following the escalated invasion of Russia in February 2022, these debates have yet again come to the fore. The legal responsibility of propagandists is of keen interest to those in Ukraine and has been raised in the context of discussions around establishing a special tribunal to prosecute international crimes committed by the Russian leadership.² In the fog of war, it is difficult to determine the boundaries between the lawful exercise of freedom of expression and expressions that States are obliged to prohibit or even prosecute individuals for. It is, however, essential so as to properly ensure the rights under international human rights law (IHRL) and protections under international humanitarian law (IHL) are upheld.

This article will explore the international legal standards applicable to propaganda activities in armed conflict settings, using examples from the Ukrainian and Russian armed conflict. It will set out specific prohibitions on propaganda in armed conflict. The article will also demonstrate how propaganda promoting, denying or misrepresenting violations of IHL can lead to further violence in breach of international norms, even amounting to international crimes. The discussion will highlight how freedom of expression is an essential tool to address propaganda in armed conflict for all States, whether they are party to an armed conflict or not.

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² See UN General Assembly Resolution, 'Furtherance of remedy and reparation for aggression against Ukraine', UN Doc.A/RES/ES-11/5, 15 November 2022; Patrick Wintour, 'Russian war crimes draft resolution being circulated at the UN', *The Guardian*, 4 December 2022, <https://www.theguardian.com/law/2022/dec/04/russian-war-crimes-draft-resolution-circulated-un-ukraine-zeleuskiy>; and Peter Pomerantsev, 'Russia's genocidal propaganda must not be passed off as freedom of speech', *The Guardian*, 16 October 2022, <https://www.theguardian.com/commentisfree/2022/oct/16/propaganda-russia-ukraine-war-crimes-accountability>.

2. SETTING THE FRAMEWORK – IDENTIFYING THE APPLICABLE LAW

Propaganda can be defined as the sharing or dissemination of information, ideas and opinions with the intent of influencing or manipulating the opinions and behaviour of others.³ Propaganda in armed conflict is broadly governed by IHRL, IHL and international criminal law (ICL).⁴ These three fields stand out in the realm of public international law, as they include rights and obligations on individuals, rather than only being addressed at States. All three also share structural principles aimed at protecting human dignity and humane treatment.⁵

There is nothing under international law that prohibits propaganda *per se*. However, IHRL, IHL and ICL include limitations on the contents of the propaganda, the means by which it is delivered or received, and who may be

³ Knut Dörmann, Liesbeth Lijnzaad, Marco Sassòli and Philip Spoerri (editorial committee), *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War* (2nd ed., CUP: 2021) (2020 Commentary to GCIII), para. 1668; and Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (2nd ed., NP Engel: 2005) (Nowak, CCPR commentary, 2005), Art. 20, 472.

⁴ This list is not exhaustive and other fields of law may also be relevant, such as the developing customary international law norms relating to the regulation of international relations between States through digital means and telecommunications technologies, and international legal regulation of space.

⁵ Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 A(III) of 10 December 1948 (UDHR), preamble paras. 1 and 5; International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR) preamble paras. 1 and 2; American Declaration on the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948 (American Declaration), preamble para. 1; American Convention on Human Rights OEA/ser. K/XVYI.1, Doc. 65, Rev. 1, Corr. 1 OASTS, No. 36 (1970) (ACHR), preamble paras. 1 and 2; Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 1950, ETS 5 (ECHR), preamble paras. 4 and 5; and African Charter on Human and Peoples' Rights (the Banjul Charter), OAU Doc. CAB/LEG/67/3 rev. 55, 1520 UNTS 217, 21 ILM 58 (1982), 1986 (ACHPR), preamble paras. 2 and 7. See also Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November (11 December) 1868, preamble. See also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31 (GCI), Art. 6; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85 (GCII), Art. 6; Geneva Convention relative to the Treatment of Prisoners of War 1949, 75 UNTS 135 (GCIII), Art. 6; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287 (GCIV), Art. 7; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3 (API), Art. 1(2). See further Rome Statute of the International Criminal Court 1998 (last amended 2010), 2187 UNTS 90 (ICC Statute), preamble paras. 1 and 2; and International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Furundžija*, Case No. IT-95-17/I-T, Trial Chamber Judgment, 10 December 1998, para. 183.

subjected to propaganda. All three also include prohibitions on certain propaganda content.⁶ Norms under both IHRL and IHL refer to propaganda in specific provisions but do not define the term.⁷ The commentaries to these provisions and the case law of the IHRL monitoring bodies indicate that the dissemination of information, ideas or opinions aimed at influencing an individual's opinions and behaviour fall within the scope of propaganda under both bodies of law.⁸

The exact legal framework applicable to propaganda activities varies depending on a wide range of factors, including the classification of the conflict, the status of the actor creating and spreading the propaganda, where the information is spread, and the intended audience. These factors together with the content of the propaganda materials will all impact on the precise rules that apply. A full account of all the different variables is beyond the scope of this article. However, a number of generally applicable norms are worth noting.

2.1 INTERNATIONAL HUMANITARIAN LAW

Propaganda in armed conflict must respect and ensure respect for IHL.⁹ IHL is the body of law applicable in armed conflicts that aims to limit the impact of hostilities on those who do not or no longer participate in the conflict and to regulate the conduct of hostilities between the parties.¹⁰ IHL applies throughout the territory of the States in which the armed conflict is ongoing.¹¹ Which norms apply depends on whether the situation constitutes an international armed

⁶ ICCPR Art. 20; Convention on the Elimination of Racial Discrimination 1969, 660 UNTS 195 (CERD) Art. 4; GCIV Art. 51; and ICC Statute Arts. 7(h), 8(2)(a)(ii), 8(2)(a)(v), 8(2)(b)(vi), 8(2)(b)(xii), 8(2)(b)(xv), 8(2)(b)(xxi), 8(2)(b)(xii), 8(2)(c)(i), 8(2)(c)(ii), 8(2)(e)(vi), 8(2)(e)(x) and Art. 25(3)(e).

⁷ ICCPR Art. 20; CERD Art. 4; and GCIV Art. 51.

⁸ 2020 Commentary to GCIII, Art. 14, paras. 1668–1672; Jean S. Pictet (general editorship), *Commentary III Geneva Convention on Prisoners of War (ICRC: 1960)* (Pictet Commentary to GCIII, 1960), Art. 14, 145; and UN Human Rights Committee (HRC), *Yong-Joo Kang v. Republic of Korea*, Communication No. 878/1999, UN Doc. CCPR/C/78/D/878/1999, 16 July 2003 (HRC, *Kang v. Republic of Korea*, 2003).

⁹ See e.g. North Atlantic Treaty Organization (NATO), 'Allied Joint Doctrine for Information Operations', AJP-3-10, November 2009, para. 0105, and United States Department of Defense, *Law of War Manual*, June 2015 (updated December 2016), Washington D.C., 5.26.1.3, 332–333.

¹⁰ GCI-GCIV Common Arts. 2 and 3; API, Art. 1; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (APII), Art. 1. See further Mary Ellen O'Connell, 'Historical Development and Legal Basis' in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (4th ed., OUP: 2021), 10–49, 44–46, paras. 2.33–2.37.

¹¹ Note that IHL also applies to the activities of the parties to the conflict on the high seas and airspace above. See further Katja Schöberl, 'The Geographical Scope of Application of the Conventions', in Andrew Clapham, Paola Gaeta, and Marco Sassöli (eds.), *The 1949 Geneva Conventions: A Commentary* (OUP: 2015), 67–83.

conflict (IAC) or a non-international armed conflict (NIAC). IACs involve the use of armed force between States, whereas NIACs are the use of violence between States and organised armed groups, or between organised armed groups, that reach a sufficient level of intensity.¹² The facts, rather than the subjective view of the parties, determines whether the situation has reached the threshold of classifying as an armed conflict.¹³ Therefore, States cannot use propaganda as a means of displacing the application of IHL. As such, it made no difference to the classification of the conflict that Ukraine previously referred to the armed conflict with organised armed groups in the east of the country as an “anti-terrorist operation”, rather than an armed conflict.¹⁴ The fact that Russia routinely refers to the ongoing hostilities as a “special military operation” similarly makes no difference to the legal classification of the conflict.¹⁵

As an armed conflict between two States, the armed conflict between Ukraine and Russia is an IAC. Further rules apply to situations of occupations,¹⁶ such as in Crimea and other parts of the territory in eastern Ukraine, where Russia exercises effective control over the territory.¹⁷ The law of occupation applies in situations where no armed resistance to the occupation is met, as was seen in Crimea in 2014.¹⁸

Propaganda in this armed conflict has been used to obscure facts making determination of the classification difficult. For example, in the outbreak of hostilities in February 2014, armed groups without insignia took over buildings of

¹² GCI-GCIV Common Art. 3. See further APII Art. 1(1) which includes further requirements to apply. NIACs are sometimes referred to colloquially as “civil war” or “internal armed conflicts”.

¹³ 2020 Commentary to GCIII, Common Art. 2, paras. 243–247.

¹⁴ UN Office of the High Commissioner for Human Rights (OHCHR), ‘Report on the human rights situation in Ukraine: 15 May 2014’, 15 May 2014, paras. 95; and Gabriela Baczynska, Thomas Grove, ‘Ukraine launches ‘gradual’ operation, action limited’, Reuters, 15 April 2014, <https://www.reuters.com/article/cnews-us-ukraine-crisis-idCABREA3A1B520140415>.

¹⁵ Andrew Osborn and Polina Nikolskaya, ‘Russia’s Putin authorises ‘special military operation’ against Ukraine’, Reuters, 24 February 2022, <https://www.reuters.com/world/europe/russias-putin-authorises-military-operations-donbass-domestic-media-2022-02-24/>; and ‘Russia had ‘no choice’ but to launch ‘special military operation’ in Ukraine, Lavrov tells UN’, UN News, 24 September 2022, <https://news.un.org/en/story/2022/09/1127881>.

¹⁶ GCIV and API. See further Yoram Dinstein, *The Law of Belligerent Occupation* (2nd ed., CUP: 2019).

¹⁷ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (1907 Hague Regulations (IV)) Art. 42; GCI-GCIV Common Art. 2.

¹⁸ See further UN OHCHR, ‘Report on the human rights situation in Ukraine: 15 April 2014’, 15 April 2014 (HRMMU Report on the human rights situation in Ukraine published 15 April 2014), paras. 18–22.

the local government and parliament in Crimea.¹⁹ These groups were labelled “little green men”, “polite people”, and “polite, armed men” by Russian and pro-Russian media,²⁰ obscuring the fact that they were Russian armed forces.²¹ Similar methods of obscuring information were also used to create confusion about the relationship between Russia and the organised armed groups in eastern Ukraine that declared the ‘Donetsk People’s Republic’ and the ‘Luhansk People’s Republic’ in April 2014. However, this has become more evident since the escalated invasion in February 2022. In a decision from 25 January 2023, the European Court of Human Rights provided a detailed analysis of the relationship between Russia and these groups. This related to the Court’s finding that Russia had jurisdiction over the alleged violations of human rights that took place in the territories controlled by the armed groups.²² Although the test applied was for the purposes of determining jurisdiction under the European Convention on Human Rights 1950 (ECHR), the factors analysed by the Court indicate that Russia exercises overall control over these organised armed groups so that these groups are to be considered as part of Russia’s armed forces under IHL.²³

2.2 INTERNATIONAL HUMAN RIGHTS LAW

IHRL continues to apply within the territories of the two States, and Ukraine and Russia continue to have obligations under this body of law towards individuals within their jurisdiction.²⁴ In contrast to the protections under IHL,

¹⁹ UN OHCHR, ‘Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)’, 25 September 2017, para. 23.

²⁰ Gregory F. Treverton, Andrew Thveldt, Alicia R. Chen, Kathy Lee, and Madeline McCue, ‘Addressing Hybrid Threats’, Swedish Defence University Center for Asymmetric Threat Studies and The European Centre of Excellence for Countering Hybrid Threats, 2018, 16.

²¹ See further European Court of Human Rights (ECtHR), *Ukraine v. Russia (Re Crimea)*, Applications nos. 20958/14 and 38334/18, Grand Chamber, Decision on Admissibility, paras. 321–337.

²² ECtHR, *Ukraine and the Netherlands v. Russia*, Application nos. 8019/16, 43800/14 and 28525/20, Decision on Admissibility, 25 January 2023 (ECtHR, *Ukraine and the Netherlands v. Russia*, Admissibility Decision, 2023).

²³ ECtHR, *Ukraine and the Netherlands v. Russia*, Admissibility Decision, 2023, paras. 583, 590–594 and 600–602. See also paras. 618–621, 628–639, 643–644, 650–654, 659–662, and 671–675. Paras. 684–689 outline the findings of the Court on the economic support provided by Russia to the separatist entities. See further Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP: 2012), 225–228; and Tristian Ferraro, ‘The ICRC’s legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict’, *IRRC Vol. 97(900)* 2015, 1227–1252.

²⁴ See further Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law: Further Reflections and Perspectives* (Edward Elgar Publishing: 2022); Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing: 2013); and Erika de Wet and Jann Kleffner (eds.), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law

IHRL does not automatically apply beyond the State's territory. However, the obligations under IHRL can apply extra-territorially in exceptional circumstances. For instance, where a State exercises effective control of another State's territory through military operations or exercises authority over individuals or State power in another State's territory.²⁵ As such, Russia can have IHRL obligations in Ukraine, including in relation to propaganda that unlawfully interferes with the human rights of individuals within that territory.²⁶

2.2.1 THE RIGHT TO FREEDOM OF EXPRESSION

The right to freedom of expression is one of the most relevant rights when considering the impact of propaganda. Freedom of expression is an individual right,²⁷ but the protection and exercise of the right has important functions for the wider society connected with transparency, plurality, democracy, justice and accountability.²⁸ It includes the right to form and hold opinions without interference,²⁹ the right to express and impart information, ideas and opinions of all kinds,³⁰ and the right to seek and receive information and ideas.³¹

Press: South Africa, 2014).

²⁵ See further International Court of Justice (ICJ), *Legal Consequences of the Wall*, Advisory Opinion 2004, paras. 106–113; HRC, General Comment No. 36, 'Article 6: right to life', UN Doc. CCPR/C/GC/36, 3 September 2019, paras. 2 and 64; and ECtHR, *Ukraine and the Netherlands v. Russia*, Admissibility Decision, 2023, paras. 547–574.

²⁶ Russia is no longer a member of the Council of Europe, resulting in the ECHR ceasing to apply and the ECtHR no longer being able to receive applications of alleged violations of rights committed by Russia after 16 September 2022. See further ECtHR, 'Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights', 22 March 2022. Russia remains, however, a party to a number of UN conventions on human rights, including the ICCPR. A full list is available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=144&Lang=EN. Russia is also bound by customary international human rights law. See William A. Schabas, *The Customary International Law of Human Rights* (Oxford: Oxford University Press, 2021), 192–200.

²⁷ See UDHR preamble para. 2 and Art. 19; ICCPR Arts. 2 and 19; and ECHR Arts. 1 and 10. See also European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Art. 11.

²⁸ See further Christian Tomuschat, 'Democracy', in Dinah Shelton (ed), *The Oxford Handbook on International Human Rights Law* (OUP: 2013), 494–496.

²⁹ ICCPR Art. 19(1); ECHR Art. 10(1); and ACHR Art. 13(1). See also African Commission on Human and Peoples' Rights (ACoMHPR), *Declaration on Freedom of Expression and Access to Information in Africa 2019*, adopted at its 65th ordinary session, 21 October to 10 November 2019 in Banjul, The Gambia (ACoMHPR, *Declaration on Freedom of Expression 2019*), Principle 2.

³⁰ ICCPR Art. 19(2); ECHR 10(1); ACHR Art. 13(1); ACHPR 9(1) and ACoMHPR, *Declaration on Freedom of Expression 2019*, Principle 10.

³¹ HRC, *Gauthier v. Canada*, Communication No. 633/1995, UN Doc. CCPR/C/65/D/633/1995, 5 May 1999; HRC, *Toktakunov v. Kyrgyzstan*, Communication No. 1470/2006, UN Doc. CCPR/C/99/D/1369/2005, 28 March 2011; Inter-American Court of Human Rights (IACtHR), *Claude*

The protection extends to both the content of the expression, as well as the means of expression.³² The right to freedom of expression is a right 'regardless of frontiers',³³ which means that individuals are able to seek, receive and impart information, ideas and opinions emanating from outside the territorial boundaries they are physically present in.³⁴

Propaganda can facilitate the realisation of human rights. Public information campaigns and similar activities may be essential to implementing the State's obligations, such as was seen during the COVID-19 pandemic.³⁵ However, propaganda can also interfere with individuals' human rights. Propaganda activities aim to influence the opinion and/or will of individuals, which can amount to an unlawful interference with the right to freedom of opinion.³⁶

Reyes and others v. Chile, Series C No. 151, 19 September 2006; and ECtHR Magyar Helsinki Bizottsag v. Hungary, Application no. 18030/11, Judgment, 8 November 2016. See further UN Human Rights Council, 'Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the General Assembly on the right to access information', UN Doc. A/68/362, 4 September 2013.

³² HRC, 'General Comment No. 34: Article 19: Freedoms of opinion and expression', CCPR/C/GC/34, 12 September 2011 (HRC, General Comment No. 34), para. 12; ICCPR Art. 19(2); and ACHR Art. 13(1). See also AComHPR, Declaration on Freedom of Expression 2019, Principle 10. Whilst the means of expression are not listed in ECHR Art. 10 in the same way as the ICCPR Art. 19, they have been recognised as protected under the right within the jurisprudence of the ECtHR. See further William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP: 2015), 451.

³³ ICCPR 19(2); ECHR 10(1); and ACHR Art. 13(1).

³⁴ ECtHR, Ahmet Yildirim v. Turkey, Application no. 3111/10, Judgment, 18 December 2012 (ECtHR, Ahmet Yildirim v. Turkey, 2021); UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 'Disease pandemics and the freedom of opinion and expression', UN Doc. A/HRC/44/49/Add.2, 4 July 2020, para. 10.

³⁵ Governments of States where armed conflicts were ongoing also engaged in information campaigns aimed at spreading awareness about the virus. See e.g. 'In Iraq, no resting place for coronavirus dead', *France 24*, 30 March 2020, <https://www.france24.com/en/20200330-in-iraq-no-resting-place-for-coronavirus-dead>; Stephanie Busari and Bukola Adebayo, 'Here are the African countries with confirmed coronavirus cases', *CNN*, <https://edition.cnn.com/2020/03/09/africa/nigeria-coronavirus-cases-intl/index.html>; and Agnieszka Pikulicka-Wilczewska, 'We're not ready': coronavirus looms over the fragile Afghan health system', *The Guardian*, 30 March 2020, <https://www.theguardian.com/global-development/2020/mar/30/were-not-ready-coronavirus-looms-over-the-fragile-afghan-health-system>. In situations of occupation, IHL provides complementary obligations, such as GCIV Art. 56 which includes 'education of the public' as one of the ways in which Occupying Powers can implement their obligation to ensure and maintain the healthcare system in the occupied territory.

³⁶ HRC, Kang v. Republic of Korea, 2003; and UN Human Rights Council, 'Disinformation and freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan', UN Doc. A/HRC/47/25, 13 April 2021, paras. 33–36.

Propaganda can also interfere with other aspects of the right to freedom of expression, such as the right to seek, receive and impart information, through direct or indirect censorship, or blocking of access to information or alternative information sources.³⁷

2.2.2 LIMITATIONS TO FREEDOM OF EXPRESSION

Freedom of expression is a limited right and States may introduce restrictions limiting its exercise. To lawfully limit the right, the State must introduce a law doing so, the aim for limiting the right must be based on a ground set out in the relevant treaty, it must be necessary in the society to do so, and the restrictions must be proportionate to the aim to be achieved.³⁸ Furthermore, the International Convention on Civil and Political Rights 1966 (ICCPR) and ECHR permit extraordinary limitations, known as derogations, to the right to freedom of expressions in exceptional circumstances of emergencies threatening the life of the nation.³⁹ Ukraine lodged notifications of derogations from Article 19 ICCPR and Article 10 ECHR since 1 and 4 March 2022.⁴⁰ However, no derogation is permitted under Article 4(1) ICCPR in relation to Article 20 ICCPR. Article 20 ICCPR prohibits States from engaging in propaganda for war or in advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁴¹ In addition, the right to access information and public debate has been recognised as important safeguards in ensuring that States comply with IHRL when resorting to emergency powers in derogation of their obligations under IHRL.⁴² The UN Human Rights Committee which monitors compliance with the ICCPR has also described the right to form and hold opinions without interference as absolute and considers this to be protected ‘unconditionally’.⁴³

³⁷ HRC, General Comment No. 34, 2011, paras. 13 and 20; ECtHR, *Ürper and Others v. Turkey*, Application nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, Judgment, 20 October 2009; and ECtHR, *Ahmet Yildirim v. Turkey*, 2021.

³⁸ ICCPR Art. 19(3); ECHR Art. 10(2); and ACHR Art. 13(2). See also HRC, General Comment No. 34, para. 22; ACHPR Art. 9(2); and AComHPR, *Good v. Botswana*, Communication No. 313/05, 26 May 2010, para 188.

³⁹ ICCPR Art. 4; and ECHR Art. 15. See also ACHR 27.

⁴⁰ See UN OHCHR, ‘Update on the human rights situation in Ukraine: 24 February – 26 March 2022’, 28 March 2022, para. 5 (‘HRMMU Report’, ‘Update on the human rights situation in Ukraine: 24 February – 26 March 2022’, 28 March 2022’).

⁴¹ HRC, General Comment No. 29, ‘Article 4 – Derogations during a State of Emergency’, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 13(e). See further section 3.1 below.

⁴² HRC, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2, 24 April 2020, para. 2(f).

⁴³ HRC, General Comment No. 34, para. 5 and HRC, General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 3.

In the context of an armed conflict, some measures may be necessary and proportionate restrictions on freedom of expression.⁴⁴ For example, TV news in Ukraine has been consolidated to one channel, with each of the main TV news providers having a daily slot to broadcast. The streamlined broadcast is shown simultaneously on all the main TV news channels. This was an initiative of the TV news broadcast at the outset of the escalated invasion, but emergency legislation has since been passed establishing this unified platform approach.⁴⁵ There may be technical advantages to this set-up by which Ukrainian people are more likely to be ensured access to information. Television broadcasting masts have been targeted and damaged in the hostilities previously,⁴⁶ and such consolidation of broadcasting may therefore be a means of ensuring access to information. In addition, alternative sources of news, including print and online sources, remain available,⁴⁷ although access may obviously be impacted due to the impact of the hostilities. Whilst the consolidation of broadcasting may have been a necessary and proportionate interference with freedom of expression in the beginning of the escalated invasion, that does not automatically mean that it will continue to be so as the conflict continues and hopefully comes to a swift conclusion. The set-up also raises concerns about the State control of information broadcast. In other areas, Ukraine has also been criticised for disproportionately restricting Russian publications and music.⁴⁸

However, investigative journalism in Ukraine does continue, such as the example of alleged corruption by senior officials involving inflated prices for

⁴⁴ See e.g. HRC, A.K and A.R v. Uzbekistan, Communication No. 1233/2003, UN Doc. CCPR/C/95/D/1233/2003, 31 March 2009; and ECtHR, Karataş v. Turkey, Application no. 23168/94, Grand Chamber Judgment, 8 July 1999, para. 44.

⁴⁵ Isobel Koshiv, 'Death to the enemy': Ukraine's news channels unite to cover war', *The Guardian*, 25 May 2022, <https://www.theguardian.com/world/2022/may/25/death-to-the-enemy-ukraine-news-channels-unite-to-cover-war>.

⁴⁶ See e.g. UN OHCHR, 'Report on the human rights situation in Ukraine 16 August to 15 November 2016', 8 December 2016, para. 94.

⁴⁷ One publication that has become well-known international is the *Kyiv Post*: <https://www.kyivpost.com/>. The conflict has also inspired new publications. See, for example, Steven Watson, 'We created our own weapon': the anti-invasion magazines defying Putin in Ukraine', *The Guardian*, 27 April 2023, <https://www.theguardian.com/world/2023/apr/27/magazines-art-photography-war-ukraine-russia>.

⁴⁸ UN OHCHR, 'Report on the Human Rights Situation in Ukraine: 1 February to 31 July 2022', 27 September 2022 (UN OHCHR, Report on the human rights situation in Ukraine published 27 September 2022), paras. 134–135. See further Carly Orison, 'Ukraine bans some Russian music and books', *New York Times*, 19 June 2022, <https://www.nytimes.com/2022/06/19/world/europe/ukraine-bans-russian-music-books.html>; and 'Ukraine withdraws 19 million Russian, Soviet-era books from libraries', *Reuters*, 23 February 2023, <https://www.reuters.com/world/europe/ukraine-withdraws-19-mln-russian-soviet-era-books-libraries-2023-02-07/>.

food purchased for the armed forces in January 2023.⁴⁹ Another example is the Ukrainian parliament's dismissal of the human rights ombudsman following journalist investigations into comments the ombudsman made about sexual violence in the armed conflict.⁵⁰ These examples demonstrate how the important role of freedom of expression in enabling public debate and scrutiny of public authorities takes on a new level in armed conflict, enabling monitoring of the obligations to respect and ensure respect under IHL and highlighting violations. Without freedom of expression in armed conflict, it is not possible to share information on the conduct of hostilities and implementation of protection obligations. As such, other States cannot ensure that the parties to the armed conflict are upholding their obligations under IHL.⁵¹ In contrast, as mentioned above, the extreme disproportionate restrictions on freedom of expression in Russia have resulted in many journalists fleeing the country.⁵²

The situation in Ukraine can be contrasted with the extreme limitations of freedom of expression introduced in Russia following the escalated invasion after February 2022, where “discrediting the Russian armed forces” is now a criminal offence. This has been used against those referring to the hostilities as an armed conflict or war.⁵³ The UN Human Rights Monitoring Mission in Ukraine (HRMMU), which was established in March 2014,⁵⁴ has reported extensively since its establishment on unlawful restrictions on freedom of expression introduced in Crimea by Russia and by the organised armed groups under the

⁴⁹ Fabrice Deprez, ‘War Hasn’t Deterred Ukraine’s Anti-Corruption Fighters’, *Foreign Policy*, 28 February 2023, <https://foreignpolicy.com/2023/02/28/ukraine-russia-war-anti-corruption-civil-society-ngos-journalists/>.

⁵⁰ Matthew Roscoe, ‘Sacked Ukrainian official “exaggerated” reports of sexual crimes by Russian soldiers’, *EuroWeekly*, 10 June 2022, <https://euroweeklynews.com/2022/06/10/top-ukraine-official-fired-for-sexual-abuse-claims-against-russian-soldiers/>.

⁵¹ See further Knut Dörmann and Jose Serralvo, ‘Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations’, *IRRC Vol. 96, No. 895/896*, 2014, 707–736.

⁵² See e.g. ‘Russia journalist who made TV protest describes escape to France’, *France 24*, 10 February 2023, <https://www.france24.com/en/live-news/20230210-russia-journalist-who-made-tv-protest-describes-escape-to-france>. See also ‘1K Journalists Have Fled Russia Since Ukraine Invasion – Report’, *The Moscow Times*, 3 February 2023, <https://www.themoscowtimes.com/2023/02/03/1k-journalists-have-fled-russia-since-ukraine-invasion-report-a80135>.

⁵³ Human Rights Watch, ‘Russia Criminalizes Independent War Reporting, Anti-War Protests’, *Press Release*, 7 March 2023, <https://www.hrw.org/news/2023/03/07/russia-criminalizes-independent-war-reporting-anti-war-protests>. See also Pjotr Sauer, ‘Russian man detained after daughter’s anti-war drawings flees house arrest’, *The Guardian*, 28 March 2023, <https://www.theguardian.com/world/2023/mar/28/russian-man-detained-after-daughters-anti-war-drawings-flees-house-arrest>.

⁵⁴ See further UN OHCHR, *Report on the human rights situation in Ukraine* published 15 April 2014, paras. 14–23.

overall control of Russia in the areas of Donetsk and Luhansk, including the mistreatment, detention and prosecution of individuals for expressing pro-Ukrainian opinions.⁵⁵

3. PROHIBITIONS ON PROPAGANDA CONTENT UNDER IHRL

3.1 THE PROHIBITION OF PROPAGANDA FOR WAR

Under Article 20(1) ICCPR, States should not engage in propaganda for war and must introduce legislation prohibiting individuals within their jurisdiction from doing so.⁵⁶ Propaganda for war is the dissemination of information, ideas or opinions aimed at creating or reinforcing the willingness to conduct a war of aggression.⁵⁷ Article 20(1) ICCPR was introduced with the aim of addressing atrocities like those committed in World War II that were enabled and furthered by propaganda within Germany and occupied territories.⁵⁸ Examples of propaganda for war within the ongoing armed conflict between Ukraine and Russia include false allegations made in Russia of genocide within Ukraine and false claims relating to Ukrainian territory and sovereignty as a pretext for carrying out the invasion in February 2022 by the Russian State, and by members of the Russian media. The efforts taken to isolate those within Russia from alternative sources of information through blocking access to the BBC, Facebook, and Instagram, to name a few,⁵⁹ also fall within the definition of propaganda for war as it hinders ‘mutual comprehension and understanding between people’.⁶⁰

⁵⁵ See e.g. UN OHCHR, ‘Report on the human rights situation in Ukraine, 1 August 2022 – 31 January 2023’, 24 March 2023 (UNOCHR, Report on the human rights situation in Ukraine, 1 August 2022 – 31 January 2023 published 24 March 2023), paras. 76–81; and UN OHCHR, Report on the human rights situation in Ukraine published 27 September 2022, paras. 112–119. See also UN OHCHR, ‘Report on the human rights situation in Ukraine 15 June 2014’, 15 June 2014, para. 58; and UN OHCHR, ‘Report on the human rights situation in Ukraine 16 May to 15 August 2016’, 15 September 2016, para. 117.

⁵⁶ See also ACHR Art. 13(5). The prohibition is not included as a separate obligation in the ECHR. However, limitations to freedom of expression based on the obligation under the ICCPR and customary international law would not be unlawful under the ECHR if done in accordance with the requirements set out in ECHR Art. 10(2).

⁵⁷ Nowak, CCPR commentary, 2005, Art. 20, 473. See further Michael G. Kearny, *The Prohibition of Propaganda for War in International Law* (OUP: 2007), 133–189. GCIV Art. 51 was adopted with a similar aim. See further section 4 below.

⁵⁸ Nowak, CCPR commentary, 2005, Art. 20, 475; Jean S. Pictet (general editorship), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC: 1958), Art. 51, 292.

⁵⁹ See e.g. UN OHCHR, Report on the human rights situation in Ukraine published 27 September 2022, para. 119.

⁶⁰ UN General Assembly, Resolution 381 (V), ‘Condemnation of propaganda against peace’, UN Doc.A/RES/381, 17 November 1950, para. 2.

Reporting on the conflict is also impacted by the implementation of this norm in jurisdictions beyond the conflict zone. Swedish and Western media reporting on the conflict are dominated by reports from, or about, Ukraine. In contrast, the news on Russia's position in relation to the conflict is presented more cautiously.⁶¹ In the current context, the prohibition of propaganda for war requires a careful balance in the media coverage of the armed conflict. Journalists need to present objective, accurate and impartial reports without directly or indirectly promoting propaganda for war and not resulting in self-censorship.

3.2 THE OBLIGATION TO ADDRESS INCITEMENT TO VIOLENCE

States are obliged to prohibit and address expressions inciting violence, including international crimes. Under Article 20(2) ICCPR, State parties must prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁶² Incitement to terrorism and international crimes have been noted as extreme examples of this.⁶³ However, expressions that are not incitement must not be prohibited. These may be addressed through introducing limitations on the right in accordance with the requirements under IHRL, and/or facilitating the exercise of freedom of expression of others.

Incitement may be expressed or implied, and focused on an individual or group with the purpose or aim of influencing the conduct of others so as to create a risk that individual members of the group will be subjected to violence or discrimination.⁶⁴ Factors identified by international human rights bodies to

⁶¹ See e.g. Marwan Bishara, 'Western media and the war on truth in Ukraine', Al Jazeera, 4 August 2022, <https://www.aljazeera.com/opinions/2022/8/4/western-media-and-the-war-on-truth-in>; and James Rodgers, 'Ukraine war 12 months on: the role of the Russian media in reporting – and justifying – the conflict', 16 March 2023, <https://theconversation.com/ukraine-war-12-months-on-the-role-of-the-russian-media-in-reporting-and-justifying-the-conflict-199820>.

⁶² See also CERD Art. 4(1); 2019 Declaration of Principles on Freedom of Expression in Africa Principle 23(1); and ACHR Art. 13(5). There is no similar provision within the ECHR, but the ECtHR has generally found cases constituting incitement to violence or discrimination as inadmissible or as having been lawfully restricted under Art. 10(2) ECHR. See e.g. ECtHR, *Le Pen v. France*, Application no. 18788/09, Decision on admissibility, 20 April 2010; ECtHR, *Delfi AS v. Estonia*, 2015; and ECtHR, *Atamanchuk v. Russia*, Application no. 4493/11, Judgment, 11 February 2020.

⁶³ UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 35: Combating racist hate speech', UN Doc. CERD/C/GC/35, 26 September 2013 (CERD Committee, General Recommendation No. 35, 2013), para. 6.

⁶⁴ *Ibid.*, para. 16; ARTICLE 19, 'Towards an interpretation of article 20 of the ICCPR', 2010, 10–12; ECtHR, *Behar and Gutman v. Bulgaria*, Application no. 29335/13, Judgment, 16 February 2021 (ECtHR, *Behar and Gutman v. Bulgaria*, 2021); ECtHR, *Budinova and Chaprazov v. Bulgaria*, Application no. 12567/13,

identify ‘hate speech’ include the content and form of the speech, the style in which it was delivered, the position or status of the speaker in society and the audience to which the speech is directed, the reach, objectives and effect of the speech, the frequency and extent of the communications, and the means it was communicated through.⁶⁵

3.3 THE RELATIONSHIP BETWEEN INCITEMENT TO VIOLENCE AND IHL

Armed conflicts are inherently violent contexts and as such, the consequences of incitement to violent action can have a greater impact.⁶⁶ In addition, hate speech and incitement to violence have been used by military forces in such a way as to breach the obligations under IHL.⁶⁷ The result of conflating whole communities with the opposing forces can result in civilians being targeted in attacks. It can also impact the implementation of other fundamental protection obligations under IHL, such as the prohibition of distinguishing between protected persons adversely based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.⁶⁸

The denial of violations or glorification of actions that breach standards of IHL also leads to further violations and atrocities, as it is a signal that those who commit such actions are immune from prosecution.⁶⁹ The use of dehumanizing rhetoric combined with fostering a climate of impunity is

Judgment, 16 February 2021 (ECtHR, *Budinova and Chaprazov v. Bulgaria*, 2021); HRC, *Ross v. Canada*, Communication No. 736/1997, UN Doc CCPR/C/70/D/736/1997, 18 October 2000, para. 11.5; and UN General Assembly, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’, UN Doc. A/67/357, 7 September 2012, para. 45. See further UN General Assembly, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’, UN Doc. A/74/486, 9 October 2019.

⁶⁵ CERD Committee, General Recommendation No. 35, 2013, para. 15. See also UN Human Rights Council, ‘Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’, Appendix to the Report of the United Nations Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, UN Doc. A/HRC/22/17/Add.4, 11 January 2013, para. 34; ECtHR, *Behar and Gutman v. Bulgaria*, 2021, para. 67; and ECtHR, *Budinova and Chaprazov v. Bulgaria*, 2021, para. 63.

⁶⁶ ECtHR, *Süreç v. Turkey* (No. 1), Application no. 26682/95, Grand Chamber Judgment, 8 July 1999, para. 62.

⁶⁷ See e.g. UN Human Rights Council, ‘Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar’, UN Doc. A/HRC/39/CRP.2, 17 September 2018 (UN FFM on Myanmar, 2018 Report), paras. 1376–1381.

⁶⁸ GCI-GCIV Common Art. 3; GCI, Art. 12(2); GCII Art. 12(2); GCIII Art. 16; GCIV Arts. 13 and 27(3); API Art. 9(1) and APII Art. 2(1).

⁶⁹ UN FFM on Myanmar, 2018 Report, para. 1383.

a significant concern in the conflict between Russia and Ukraine. One of a number of reasons given by Russia to justify the use of force against Ukraine was to “de-nazify” the country.⁷⁰ The term ‘nazi’ has a dehumanizing effect and has been used by officials and in Russian media reporting as synonymous with the term ‘Ukrainian’.⁷¹ The brutality of the conflict and significant impact on civilians has been a feature since the escalated invasion in February 2022, reported on and investigated extensively.⁷² Despite this, the HRMMU has reported that it is not aware ‘of any measures taken at the national level in the Russian Federation to hold its combatants or those in command to account for[...]violation[s]’.⁷³ This lack of measures to investigate or hold individuals to account for violations of IHL by the Russian side contributes to creating a climate of impunity and could amount to indirect approval for such actions.

One example that stands out was the Russian response to allegations of war crimes in Bucha, following the release of shocking images in the press, including of civilian dead bodies placed to line streets.⁷⁴ Immediately after, Russia called for an emergency UN Security Council meeting, referring to ‘heinous provocation from Ukrainian radicals’.⁷⁵ This example demonstrates a number of disinformation tactics. Disinformation has been described as ‘statements known to be or that should reasonably be known to be false’⁷⁶

⁷⁰ See further Anton Troianovski, ‘Why Vladimir Putin Invokes Nazis to Justify His Invasion of Ukraine’, *New York Times*, 17 March 2022, <https://www.nytimes.com/2022/03/17/world/europe/ukraine-putin-nazis.html>.

⁷¹ Chris Brown, ‘A Kremlin paper justifies erasing the Ukrainian identity, as Russia is accused of war crimes’, *CBC News*, 5 April 2022, <https://www.cbc.ca/news/world/kremlin-editorial-ukraine-identity-1.6407921>.

⁷² See e.g. Wolfgang Benedek, Veronika Bilková and Marco Sassòli, ‘Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine since 24 February 2022’, *OSCE Office for Democratic Institutions and Human Rights*, ODIHR.GAL/26/22/Rev.1, 13 April 2022 (OSCE Moscow Mechanism Report 2022).

⁷³ UN OHCHR, Report on the human rights situation in Ukraine published 27 September 2022, para. 95.

⁷⁴ OSCE Moscow Mechanism Report 2022, 8, 22 and 56; and Daniel Boffey and Martin Farrer, ‘“They were all shot”: Russia accused of war crimes as Bucha reveals horror of invasion’, *The Guardian*, 3 April 2022, at: <https://www.theguardian.com/world/2022/apr/03/they-were-all-shot-russia-accused-of-war-crimes-as-bucha-reveals-horror-of-invasion>.

⁷⁵ ‘Russia seeks Monday UN Security Council meet on Bucha, Ukraine’, *Voice of America*, 4 April 2022, <https://www.voanews.com/a/russia-seeks-monday-un-security-council-meet-on-bucha-ukraine-/6513990.html>. See also Guy Faulconbridge, ‘Kremlin says Bucha is ‘monstrous forgery’ aimed at smearing Russia’, *Reuters*, 5 April 2022, <https://www.reuters.com/world/europe/putin-ally-says-bucha-killings-are-fake-propaganda-2022-04-05/>. See further UN News, ‘Ukraine’s President calls on Security Council to act for peace, or ‘dissolve’ itself’, 5 April 2022, <https://news.un.org/en/story/2022/04/1115632>.

⁷⁶ OSCE, ‘Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda’, adopted by the UN Special Rapporteur on Freedom of Opinion and Expression,

or accurate information framed and/or presented in a way to make the recipients likely to draw false or inaccurate conclusions.⁷⁷ Accusations that the massacres were conducted by Ukrainian forces and not Russian forces reverses the facts, deflecting responsibility and distracting from the issues at hand. This deflect requires time and resources to address, delaying responses to the actual atrocities.⁷⁸ Similar tactics have been used in response to allegations of the use of chemical weapons in the armed conflict in Syria⁷⁹ and in the Russian campaign to discredit the work of the civil defence unit, the White Helmets.⁸⁰

These activities impact on the societal dimension to freedom of expression in accessing information and knowing of matters of public interest.⁸¹ In the context of armed conflicts, they also constitute a violation of the obligation

the OSCE Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the AComHPR Special Rapporteur on Freedom of Expression and Access to Information in Vienna, 3 March 2017, Principle 1(c).

⁷⁷ Nicholas O'Shaughnessy, 'From Disinformation to Fake News: Forwards into the Past', in Paul Baines, Nicholas O'Shaughnessy, and Nancy Snow, *The SAGE Handbook of Propaganda*, (SAGE Publications Ltd: 2020), 55–68. The use of these techniques is not a new phenomenon. For example, the 1936 International Convention on the Use of Broadcasting in the Cause of Peace included a provision that State parties were to prohibit and stop the transmission of statements 'the incorrectness of which is or ought to be known to the persons responsible for the broadcast' whose transmission would likely 'harm good international understanding'. The Convention was a response to activities undertaken by the parties to the World War I, but ultimately had very little impact then and now. See further Björnsterjn Baade, 'Fake News and International Law', *European Journal of International Law*, Volume 29, No. 4, 2019, 1357–1376. The speed, breadth and spread of the impact of disinformation has been greatly increased with technological innovations in the digital age, however.

⁷⁸ Further examples in the Ukraine and Russia armed conflict include the Russian government's allegations of genocide in eastern Ukraine as a justification for its actions and disinformation spread about the International Committee of the Red Cross (ICRC). See further ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, paras. 37–43; and ICRC, 'Ukraine: As humanitarian crisis deepens, parties urgently need to agree on concrete measures; misinformation risks lives', New Release, 29 March 2022, <https://www.icrc.org/en/document/ukraine-humanitarian-crisis-deepens-parties-urgently-need-agree-concrete-measures>.

⁷⁹ See UN Security Council Media Coverage, 'In Emergency Meeting, Security Council Speakers Voice Grave Concern over Alleged Chemical Weapons Use in Syria, as Versions of Recent Attacks Sharply Differ', Meeting Coverage, SC/13284, 8225th Meeting (PM), 9 April 2018, <https://www.un.org/press/en/2018/sc13284.doc.htm>.

⁸⁰ The Syria Campaign, 'Killing the Truth: How Russia is Fuelling a Disinformation Campaign to Cover Up War Crimes in Syria', <http://thesyriacampaign.org/wp-content/uploads/2017/12/KillingtheTruth.pdf>.

⁸¹ ECtHR, *Bladet Tromsø and Stensaas v. Norway*, Application No. 21980/93, Grand Chamber Judgment, 20 May 1999, para. 68. See also ECtHR, *Observer and Guardian v. the United Kingdom*, Application no. 13585/88, Judgment, 26 November 1991, para. 60.

to ensure respect for IHL.⁸² Knowingly creating confusion around events that raise questions of compliance with IHL undermines the very purpose of this body of law to protect those who do not or no longer take part in the conduct of hostilities.⁸³ As an obligation of good faith, the consequences of failing to uphold the obligation to ensure respect is that more violations of IHL are likely to occur.

4. SPECIFIC RULES RELATING TO PROPAGANDA UNDER IHL

The application of IHL makes a significant difference to the legal norms regulating propaganda activities in armed conflict. IHL is complementary to the protections under IHRL and includes specific requirements aimed at addressing the vulnerabilities individuals face in armed conflict. One such vulnerability is that those speaking out about violations of IHL are often silenced.⁸⁴

Propaganda that undermines the protections afforded under IHL is prohibited⁸⁵ and propaganda content can breach specific rules of IHL. For example, in the armed conflict between Ukraine and Russia, the spreading of images and recorded interviews with prisoners of war (POWs) captured by both States has been highlighted as breaching the obligation to protect POWs against insults and public curiosity under Article 13 GCIII.⁸⁶

⁸² GCI-IV Common Art. 1.

⁸³ GCI-IV Common Art. 3 and GCIV preamble.

⁸⁴ See e.g. GCIII Art. 13(2); GCIV Arts. 25, 27(3), 31 and 70; and API Arts. 40 and 77. See further Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication', in Ziv Bohrer, Janina Dill, Helen Duffy (eds.), *Law Applicable to Armed Conflict* (CUP: 2020); and Andrew Clapham, 'The Complex Relationship Between the Geneva Conventions and International Human Rights Law', in Andrew Clapham, Paola Gaeta and Marco Sassöli (eds.), *The 1949 Geneva Conventions: A Commentary* (OUP: 2015), 701–735.

⁸⁵ Pictet Commentary to GCIII, 1960, Art. 14, 145.

⁸⁶ See HRMMU, 'Update on the human rights situation in Ukraine: 24 February – 26 March 2022', 28 March 2022, paras. 48 and 51. The practice of Ukraine of releasing video footage via the encrypted social media platform, Telegram, is particularly noteworthy in this. See Amnesty International, 'Russia/Ukraine: Prisoners of war must be protected from public curiosity under Geneva Convention', News, 7 March 2022, <https://www.amnesty.org/en/latest/news/2022/03/russia-ukraine-prisoners-of-war-must-be-protected-from-public-curiosity-under-geneva-convention/>; and Isabelle Khurshudyan and Sammy Westfall, 'Ukraine puts captured Russians on stage. It's a powerful propaganda tool, but is it a violation of POW rights?', *Washington Post*, 9 March 2022, <https://www.washingtonpost.com/world/2022/03/09/ukraine-russia-prisoners-pows/>. See also Carl Schreck, 'Video raises concerns over Ukraine's treatment of Russian prisoners', *The Guardian*, 20 May 2015, <https://www.theguardian.com/world/2015/may/20/ukraine-russia-pow-video-war-crimes>. There are also examples of non-State actors releasing footage of captured Ukrainian and Russian armed forces personnel. See Alec Luhn, 'Captured Ukrainian sailors broadcast giving 'confessions' on Russian television', *The Telegraph*, 27 November 2018, <https://www.telegraph.co.uk/news/2018/11/27/captured-ukrainian-sailors-broadcast-giving-confessions-russian/>.

Propaganda promoting adherence to the requirements of IHL, however, is not prohibited. Indeed, State parties to the Geneva Conventions of 1949 and the Additional Protocols of 1977 are obliged to ensure respect for IHL by the whole population under their control, which requires States to implement measures so that those within their jurisdiction are aware of the requirements of IHL.⁸⁷ In addition, there are specific obligations to disseminate information to both the civilian population and military personnel.⁸⁸

There is only one provision in the four Geneva Conventions of 1949 that prohibits propaganda content directly. Article 51 GCIV provides that no pressure or propaganda that aims at securing voluntary enlistment of protected persons under GCIV is permitted.⁸⁹ The HRMMU has highlighted breaches of this obligation by Russia in its occupation of Crimea in numerous reports.⁹⁰ According to the HRMMU, the Russian Federation has conducted media and information campaigns encouraging people within Crimea to sign up, including offering military service as an option in local employment centres.⁹¹ Under Russian legislation, military service is compulsory and draft evasion is punishable by up to two years of imprisonment.⁹² The HRMMU has also reported on numerous incidents

See further section 6.2 below.

⁸⁷ 2020 Commentary to GCIII, Common Art. 1, para. 183.

⁸⁸ GCI Art. 47; GCII Art. 48; GCIII Art. 127; GCIV Art. 144; API Art. 83; and APII, Art. 19. See further Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules (CUP: 2005)* (Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules, 2005*), Rule 143 (Dissemination of International Humanitarian Law among the Civilian Population).

⁸⁹ See further GCIV Art. 4.

⁹⁰ UN OHCHR, *Report on the human rights situation in Ukraine, 1 August 2022 – 31 January 2023* published 24 March 2023, paras. 71–72; UN OHCHR, *Report on the human rights situation in Ukraine from 16 November 2019 to 15 February 2020*, 1 March 2020, paras. 113–115; and UN OHCHR, *Report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, 13 September 2017 to 30 June 2018*, 1 September 2018, paras. 73–75.

⁹¹ UN OHCHR, *Report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, 13 September 2017 to 30 June 2018*, 1 September 2018, paras. 73–75. See also Human Rights Watch, *Crimea: Conscripted Violates International Law, Russia Flouting Human Rights Obligations Five Years into Occupation*, 1 November 2019, <https://www.hrw.org/news/2019/11/01/crimea-conscription-violates-international-law>.

⁹² UN OHCHR, *Update on the Human Rights Situation in Ukraine: 1 August – 31 October 2022*, 2 December 2022, 6.

of forced recruitment to Russian affiliated armed groups, which could amount to a violation of Article 51 GCIV.⁹³

5. PROPAGANDA AMOUNTING TO INTERNATIONAL CRIMES

Academics and practitioners have also raised concerns that propaganda, such as the use of “denazification” rhetoric and anti-Ukrainian sentiments, attributable to the Russian government and military could amount international crimes, such as direct and public incitement to genocide.⁹⁴ The Genocide Convention 1948 lists acts that constitute genocide when committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.⁹⁵ Incitement to genocide was successfully prosecuted before the International Criminal Tribunal for Rwanda (ICTR). One of the most well-known cases is often referred to as ‘The Media Case’, as it involved the prosecution of three media executives for their role in inciting others to commit acts of genocide through radio broadcasting and newspaper publications.⁹⁶ Emphasis was placed on the context and cultural understandings of the broadcasts and publications in the Court’s finding that ‘the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death’ that was ‘clearly and effectively disseminated’.⁹⁷

Propaganda in armed conflict may also have a role in perpetrating the crimes against humanity of persecution against groups based on discriminatory grounds. Crimes against humanity involve the commission of listed acts when committed as part of a widespread or systematic attack directed against the civilian

⁹³ UN OHCHR, Report on the human rights situation in Ukraine published 27 September 2022, paras. 75–76.

⁹⁴ Genocide Convention 1948, 78 UNTS 277, Art 3(d); and ICC Statute, Art. 25(3)(a). See further Andrew Roth, ‘Russian TV presenter accused of inciting genocide in Ukraine’, *The Guardian*, 24 October 2022, <https://www.theguardian.com/world/2022/oct/24/russian-tv-presenter-anton-krasovsky-accused-of-inciting-genocide-in-ukraine>.

⁹⁵ Genocide Convention 1948, Art. 2.

⁹⁶ See International Criminal Tribunal for Rwanda (ICTR), Prosecutor v. Nahimana et al. (The Media Case), Case No. ICTR-99-52-T, Trial Chamber I, Judgment and Sentence, 3 December 2003. See also ICTR, Nahimana et al. v. Prosecutor, Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, paras. 755–758. See further paras. 503–505, 776, 771; ICTR, Prosecutor v. Simon Bikindi, Case No. ICTR-01-72-T, Trial Chamber III, Judgment, 2 December 2008, para. 423; and ICTR, Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, 2 September 1998, paras. 560–556.

⁹⁷ ICTR, Prosecutor v. Nahimana et al. (The Media Case), Trial Chamber Judgment, 2003, para. 953. See further paras. 152–153, 172, 183–184, 211, 217, 225, 299–300, 345, 362, 372, 406–407, 416, 424, 469–470, 481, 484. See further Gregory Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (OUP: 2017), 55–56.

population.⁹⁸ Following World War II, Julius Streicher, a politician and publisher of an anti-Semitic newspaper, was found guilty of persecution of crimes against humanity for inciting murder and extermination of Jews in a context of the Holocaust before the Nuremberg Tribunal.⁹⁹

The use of propaganda as evidence of war crimes has also been raised in the armed conflict between Ukraine and Russia. For example, it is a war crime to compel a POW or nationals of the hostile party to serve in the forces of the opposing side in IACs.¹⁰⁰ The use of propaganda aimed at securing the enlistment of protected persons could constitute such conduct and could at the very least be evidence of attempts to commit this war crime.¹⁰¹ As noted above, there have been allegations of this war crime being committed in territories occupied by Russia.¹⁰² Furthermore, the numerous reports in the media relating to the transfer of children from occupied territories to Russian territory might also be used as evidence of this war crime being committed.¹⁰³ Indeed, the first arrest warrant issued by the International Criminal Court (ICC) relating to the conflict was against the President of the Russian Federation and the Commissioner for Children's Rights relating to this crime.¹⁰⁴ Propaganda could also be the means to deliver declarations of denial of quarter (that is, that there will be no survivors).¹⁰⁵

⁹⁸ ICC Statute, Art. 7. See also International Law Commission, 'Draft articles on Prevention and Punishment of Crimes Against Humanity', Art. 2(h), adopted in ILC Report, A/74/10, paras. 34–35, 2019.

⁹⁹ The International Military Tribunal (Nuremberg, October 1946), Case of Julius Streicher, Trial of the Major War Criminals Before the International Military Tribunal, Official Text in the English Language, Vol XXII, 547–549. Note that the Genocide Convention 1948 was drafted after these trials. For a history on the development of this see Philip Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (Vintage Books: 2017). See also ICTR, Prosecutor v. Georges Ruggiu, ICTR-97-32-I, Judgment and Sentence, 1 June 2000.

¹⁰⁰ GCIII Art. 130; GCIV Art. 147; and ICC Statute Art. 8(2)(a)(v) and 8(2)(b)(xv).

¹⁰¹ Pictet Commentary to GCIII, 1960, Art. 14, 145. See also Knut Dörmann, 'Article 8 para. 2: Meaning of war crimes', in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed., C.H. Beck: 2016), 344, para. 134. See further 342–344, paras. 127–135.

¹⁰² See section 4 above.

¹⁰³ See e.g. ICC Statute, Art. 8(2)(b)(viii); 'Ukraine accuses Russia of forcibly deporting over 210,000 children', Reuters, 13 May 2022, <https://www.reuters.com/world/europe/ukraine-accuses-russia-forcibly-deporting-over-210000-children-2022-05-13/>; and 'UN's Bachelet concerned over Ukraine orphans 'deported' to Russia for adoption', UN News, 15 June 2022, <https://news.un.org/en/story/2022/06/1120412>. See also ICC Statute, Art. 8(2)(b)(viii).

¹⁰⁴ ICC, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', Press Release, 17 March 2023, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

¹⁰⁵ ICC Statute Art. 8(2)(b)(xii).

Whether or not propaganda in this armed conflict constitutes any of these crimes, or evidence of international crimes, will be determined by domestic and international criminal courts. Establishing that propaganda activities had a direct causation on the crimes committed can be difficult.¹⁰⁶ Propaganda studies also highlight that quantifying the impact of propaganda is extremely difficult.¹⁰⁷ That said, the technical innovations that enable propaganda to spread faster, further and have a greater impact also enable greater documentation and understanding of these activities.¹⁰⁸ Criminal prosecutions for exercising the right to freedom of expression, however, must be reserved to the most serious cases, namely incitement to violence and international crimes, and where it is established, strictly formulated, even in armed conflict.¹⁰⁹

6. THE IMPACT OF NEW TECHNOLOGIES ON PROPAGANDA IN ARMED CONFLICT

Ukraine has stood out in the armed conflict as utilising technological innovations so as to communicate with the general population, Russian combatants and members of the Russian population. The innovations show that the way societies access, receive and share information, ideas and opinions is changing how armed conflicts are waged. Historically, similar changes brought about through advances in photography, radio and television led to greater understanding and recording of events.¹¹⁰ This in turn contributes to better

¹⁰⁶ See e.g. ICTY, Prosecutor v. Šešelji, IT-03-67-T, Trial Chamber III, Judgment, paras. 294–350; and International Criminal Court, Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011.

¹⁰⁷ Emma Louise Briant, *Propaganda and Counter-Terrorism: Strategies for Global Change* (Manchester University Press: 2015), 2015, 47.

¹⁰⁸ Numerous media organisations and non-governmental organisations have dedicated resources to tracking the use of disinformation in the conflict. See e.g. Centre for Civil Liberties: <https://ccl.org.ua/en/>; Impunity Watch; <https://www.impunitywatch.org/>; and Bellingcat, ‘Ukraine’, <https://www.bellingcat.com/tag/ukraine/>. On the 21 September 2022, Eurojust together with the Genocide Network and Office of the Prosecutor at the International Criminal Court published practical guidelines for civil society organisations on how to document international crimes and human rights violations for accountability purposes: <https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-icc-csos-guidelines.pdf>. The use of open source data compiled by NGOs has also been used in other processes, such as in ECtHR, *Ukraine and the Netherlands v. Russia*, Admissibility Decision, 2023, paras. 398, 420, 472–474, 525, 603, 620 and 650.

¹⁰⁹ HRC, General Comment No. 34, 2011, para. 47.

¹¹⁰ See e.g. Nelson Ribeiro, ‘Using a new medium for propaganda: The role of transborder broadcasts during the Spanish Civil War’, *Media, War and Conflict*, Volume 7, Issue 1, April 2014, 37–50 and Sonya de Laat, ‘The camera and the Red Cross: “Lamentable pictures” and conflict photography bring into focus an international movement, 1855–1865’, *IRRC Vol. 102 No. 913*, April 2020, 417–443.

implementation of the applicable international obligations and the continuous development of humanitarian standards. The following section will highlight a number of examples implemented by Ukraine related to this.

6.1 PROPAGANDA FACILITATING IHRL AND IHL OBLIGATIONS

Ukrainian authorities utilise a variety of tools to share information with the general population, including a wide range of social media platforms as well as traditional media sources.¹¹¹ Sharing information on the conduct of hostilities serves the public interest of accessing government activities and demonstrating respect for IHL.

For example, the use of mobile phone applications is an essential tool in communicating air raids.¹¹² This is an important measure in how Ukraine implements its obligation to take precautions against the effects of attack and protect civilians and civilian objects under their control against the dangers resulting from military operations.¹¹³ In September 2022, Ukraine established a hotline for Russian military personnel to call to arrange their surrender.¹¹⁴ Further information is available on a website, the name of which itself has propaganda value (“I want to live”) and business cards with details of the hotline are distributed, including to POWs repatriated in POW exchanges.

6.2 PROPAGANDA UNDERMINING OR BREACHING PROTECTION OBLIGATIONS UNDER IHL

Some of the innovations introduced by Ukraine have, however, raised concerns regarding their compliance with IHL obligations. For example, Ukraine established a hotline and online searchable database with details of persons captured as POWs or Russian soldiers that had been killed in combat.¹¹⁵ This was justified in part on facilitating the exchange of infor-

¹¹¹ See e.g. Patrick Wintour, ‘The phone has become the Ukrainian president’s most effective weapon’, *The Guardian*, 28 February 2022, <https://www.theguardian.com/world/2022/feb/28/the-phone-has-become-the-ukrainian-presidents-most-effective-weapon>.

¹¹² See further Drew Harwell, ‘Instead of consumer software, Ukraine’s tech workers build apps of war’, *Washington Post*, 24 March 2022, <https://www.washingtonpost.com/technology/2022/03/24/ukraine-war-apps-russian-invasion/> (Harwell, ‘Instead of consumer software, Ukraine’s tech workers build apps of war’, 24 March 2022).

¹¹³ API Art. 58.

¹¹⁴ The initiative came following the announcement by Russia of the mobilisation of 300,000 civilians with previous military experience to be conscripted into the Russian forces. See further Daniel Boffey, ‘I want to live’: the Ukraine hotline encouraging Russians to surrender’, *The Guardian*, 26 January 2023, <https://www.theguardian.com/world/2023/jan/26/ukraine-hotline-encouraging-russians-to-surrender>.

¹¹⁵ See e.g. Pjotr Sauer, ‘I had no idea he was there’: families’ shock at video of captured Russian soldiers’, *The Guardian*, 27 February 2022, <https://www.theguardian.com/world/2022/>

mation with families and next of kin, due to Russia's failure to implement its obligations under IHL to inform the family and next of kin of the fate of the individuals killed or captured by the adverse party¹¹⁶ and the extreme restrictions on freedom of expression in Russia resulting in finding information extremely difficult.¹¹⁷ However, the sharing of information in this manner raises concerns of being for the purpose of contributing to the Ukrainian military propaganda efforts, rather than facilitating the protection obligations under GCIII. The Commentary to Article 37 API gives a similar example of 'announcing information about POWs in such a way that it is actually a pretext for the use of a psychological weapon' to invite the enemy population to listen in as not being lawful.¹¹⁸ As noted above, the spreading of images and confessions of POWs on social media by all parties to the conflict has also been raised as breaching Article 13(2) GCIII.¹¹⁹

Another technological innovation that raised concerns from an IHL perspective are apps that involve reporting on Russian troop movements or contributing to cyberattacks against Russia.¹²⁰ It is debatable whether the use of such acts would amount to direct participation in hostilities. Generally, it can be said that the civilians sending information via the app or carrying out activities prompted by it would not lose their protection under IHL, unless the individual was caught in the act.¹²¹ However, there is a risk that a party to the armed conflict promoting such apps could undermine their obligation to protect persons not directly participating in the hostilities.¹²² The use of this technology does expose the protected person to harm and violence by the opposing side.¹²³ There are widespread reports of Russian forces breaching

feb/27/ukrainian-officials-upload-videos-of-captured-russian-soldiers-on-telegram.

¹¹⁶ GCI Arts. 16 and 17; GCII Arts. 19 and 20; and GCIII Arts. 120 and 122–124.

¹¹⁷ See further section 2.2.2 above.

¹¹⁸ Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff Publishers: 1987), API Art. 37, para. 1521 footnote 55.

¹¹⁹ See Marko Milanovic, 'Twitter as Enforcer of the Geneva Conventions', *EJIL: Talk!*, 6 April 2022, <https://www.ejiltalk.org/twitter-as-enforcer-of-the-geneva-conventions/>. See further Pictet Commentary to GCIII, 1960, Art. 14, 144–145.

¹²⁰ Harwell, 'Instead of consumer software, Ukraine's tech workers build apps of war', 24 March 2022.

¹²¹ Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', ICRC, Geneva, 2009, 46. See further David Wallace, Shane Reeves and Trent Powell, 'Direct Participation in Hostilities in the Age of Cyber: Exploring the Fault Lines', *HNSJ* Vol. 12 No. 1, 2021, 164–197.

¹²² API Art. 51. See further Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, 2005, Rule 5 (Definition of Civilians) and Rule 6 (Civilians' Loss of Protection from Attacks).

¹²³ OSCE Moscow Mechanism Report 2022, 35.

IHL obligations to treat protected persons with respect and humanely in searches for information held on mobile phones and individuals being detained, tortured and killed based on this.¹²⁴

7. CONCLUSIONS

Propaganda in the armed conflict between Ukraine and Russia has played a particular role from the beginning of the occupation of Crimea, to the blocking of government websites at the start of the invasion in February 2022.¹²⁵ What has been termed “information warfare” continues to play an extremely important role, but the conflict more broadly demonstrates a profound impact on freedom of expression, both within and beyond the conflict affected areas, and how digital and communications technologies change how armed conflicts are waged today. Given the breadth and scope of activities that might be described as propaganda in this armed conflict, this article has barely scratched the surfaces on exploring the details. The aim is to highlight the many and varied ways propaganda is regulated under IHRL, IHL and ICL.

Addressing harmful propaganda in armed conflict is an area of intricate, overlapping requirements, the implementation of which navigates a finely balanced tightrope. Not doing enough in the short-term risks more violence, more victims and more cracks in the structure of the society affected. But going too far and suppressing lawful expression restricts one of the surest remedies against such propaganda and most important means of monitoring the obligations to respect and ensure respect for IHL, namely the right to freedom of expression.



¹²⁴ Louise Nordstrom, ‘Accounts of interrogations, strip-searches emerge from Russian ‘filtration’ camps in Ukraine’, *France 24*, 9 June 2022, <https://www.france24.com/en/europe/20220609-accounts-of-interrogations-strip-searches-emerge-in-russian-filtration-camps-in-ukraine>. Some of these actions may amount to international crimes.

¹²⁵ See e.g. ‘Internet disruptions registered as Russia moves in on Ukraine’, *NetBlocks*, 24 February 2022, <https://netblocks.org/reports/internet-disruptions-registered-as-russia-moves-in-on-ukraine-W80p4k8K>. See further Sean Lyngaas, Anastasia Graham-Yooll, Tim Lister and Matthew Chance, ‘Ukraine cyberattack is largest of its kind in country’s history, says official’, *CNN*, 15 February 2022, <https://edition.cnn.com/2022/02/16/europe/ukraine-cyber-attack-denial-service-intl/index.html> and Council of the European Union, ‘Russian cyber operations against Ukraine: Declaration by the High Representative on behalf of the European Union’, Press Release, 10 May 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/05/10/russian-cyber-operations-against-ukraine-declaration-by-the-high-representative-on-behalf-of-the-european-union/>.

