

PROCEEDINGS OF THE SPRING MEETING

held on Tuesday 13 June 2017 at the The Hague Institute for Global Justice

FAKE NEWS AND NATIONAL SOVEREIGNTY

THE DANGERS OF POLITICALLY AND MILITARILY MOTIVATED FAKE NEWS

AND ITS IMPACT ON NATIONAL INTERESTS

The annual Spring Meeting of the Royal Netherlands Society of International Law is attended by more than 50 members and non-members. The Chairman, prof. Willem van Genugten, opens the meeting by announcing the unexpected absence of the special guest Dr. K.H.D.M. Dijkhoff, Minister for Migration (Staatssecretaris Veiligheid en Justitie), who was invited for the book presentation at the beginning of the meeting. The collapse, yesterday, of the negotiations for a new government, means that Dr. Dijkhoff has to attend a meeting in parliament tonight. Under the circumstances the presentation is replaced by a brief introduction of the two books.

The first book, *Discover International Law*, the Chairman explains, was written, because the authors, Prof. Nico J. Schrijver, Daniela Heerdt, LL.M., both present tonight, and the Chairman himself, felt there was a need to make international law more accessible to non-experts. It explains international law, both public and private, in a way that is “user friendly”. It covers not only such subjects as international climate law and law of the sea, but also conceptual issues, reflecting on trends in international law, for example changing views on sovereignty and the imbalance of power. It is currently being translated into French and Dutch. When these translations are ready, there will be another presentation, later this year, most likely with the new mayor of The Hague. The book will be on sale at the end of the meeting.

The second book, entitled *The Art of Making Peace* is introduced by one of its editors, Mr. Steven van Hoogstraten, former director of the Carnegie Foundation and at this time CEO ad interim of the The Hague Institute for Global Justice. This book, Mr. Van Hoogstraten tells the audience, goes back to a conference organised in 2013, when the Peace Palace celebrated its centenary. At the time, a team was formed to investigate what can be learned from international peace treaties. It included, not only the editors of the book, again, prof. Schrijver, together with dr. Otto Spijkers and drs. Anneleen de Jong, but also Prof. Fred H.A. Soons and former ministers of foreign affairs Bernard Bot and Jaap de Hoop Scheffer. The treaties on which the book focuses are (1) the Versailles Peace Agreement (1919), (2) the Dayton Peace Agreement (1995) and (3) the Sudan Peace Agreement (2005). Finally, the book discusses how the UN Security Council was able to impose a ceasefire on Iran and Iraq, who fought a war from 1980 until 1988 and were unable to reach a settlement themselves. The Versailles Treaty, although very often referred to as a failure, is important for The Netherlands for two reasons. Firstly, it laid the groundwork for the International Court of Justice. Secondly, it was the first time a head of state, Kaiser Wilhelm II, was accused of international crimes. You will recall that Kaiser Wilhelm had fled to The Netherlands, who refused to extradite him, presumably because The Netherlands had been neutral during WW I. Another important aspect of Versailles is that it is a treaty that was imposed on the losing side rather than being negotiated with it.

The 2013 conference also spent some time discussing negotiation and mediation, which is an aspect of justice that receives less attention in The Hague with its focus on international adjudication. Accordingly, the book contains an interview with Barney Afako, a master mediator in Sudan, in which he explains the role of the mediator. Mr. Van Hoogstraten concludes by presenting a copy of the book to the Chairman, adding that this book also will be on sale at the end of the meeting.

The meeting then moves on to the main topic of the evening: “Fake News and National Sovereignty” and the Chairman introduces the speaker, Mr. **Jan Kleijssen**, Director of Information Society and Action against Crime of the Council of Europe, and the respondent, Ms. Rosa Toxopeus, Analyst National Security, working for the National Coordinator for Security and Counterterrorism. He also announces, as a little surprise, the presence of Ms. Carmen Gonsalves, Head International Cyber Policy at the Ministry of Foreign Affairs, and that he has invited Ms. Gonsalves to sit at the speakers table later on and participate in the discussion.

Fake news is nothing new, Mr. Kleijssen begins. Authoritarian regimes discovered long ago that the freedom to express an inconvenient truth could be suppressed by describing it as fake, and he takes the audience back to 1615 when Galileo Galilei’s theory about the earth revolving around the sun was treated as such. Much more recently, during a recent major election campaign, climate change was referred to as fake news. At the other end of the spectrum, incitement to hatred and violence have been, and continue to be, presented as ideological or religious truth, from Hitler’s *Mein Kampf* to the terrorist propaganda of Daesh.

Fake news plays a role in well-established democracies as well, however. It appears, for example, that hackers interfered with the U.S. presidential election campaign by spreading propaganda and misinformation. That in itself is nothing new, but these days, such misleading information is spread ever faster and on a global scale, often via social media by the exploitation of user profiles and the willingness of users to forward news that they “like” but have not verified. Advantage is taken of the human tendency to look for, remember and share information that confirms one’s pre-existing beliefs. This poses a huge threat to the concept of pluralist democracy.

1. *What is fake news?*

It is trendy, but also vague and research differentiates between various different types, depending on, for example, content, degree of misinformation, motivation and means of dissemination. Misinformation may be negligent in the absence of proper analysis or understanding of context (traditional media are faced with on-line competitors for whom careful fact-checking is not always a priority), or it may be criminal when intentionally spread for financial, political or military gain.

Recent high-profile cases involve the U.S. presidential candidate Hillary Clinton and the then French presidential candidate Emmanuel Macron.

The Council of Europe was set up to defend human rights, democracy and the rule of law. Consequently, the rise of fake news is of major concern to it, as was stated in detail in the recent annual report of the Secretary-General, entitled *Populism - How strong are Europe’s*

checks and balances.¹ Fake news may be viewed from various different angles: freedom of expression, data protection, criminal law (cyber crime) and counter-terrorism. This makes the work of the Council of Europe, which considers the problem from all of these angles (in fact, everything except the military angle), very complex and requires a comprehensive and nuanced approach.

2. *What should we do about fake news?*

Cooperation between governments and internet companies is increasingly important in the face of fast growing levels of crime and extremism, including terrorist propaganda, online. Last year, the Committee of Ministers decided to set up a platform for such direct cooperation, and it is expected to become a reality later this year. An example will give you an idea of why this is important. In the wake of the recent terrorist attacks in France (Charlie Hebdo, Bataclan, Nice) French judicial process led to some 400 twitter accounts being closed. During the same period, Twitter, the company, closed more than 140,000 accounts. In other words, it is vital to enlist the help of these companies to make law enforcement more effective.

Cyber crime, these days, enjoys virtual impunity. Less than 0.001% of the cases are solved. Part of the problem is that evidence is often stored “in the cloud” and if it is capable of being seized at all, often to be found in jurisdictions beyond the reach of law enforcement agencies. With a view to improving their success rate the parties to the Cybercrime Convention² recently agreed to start negotiations on an Additional Protocol that will make it easier for law enforcement agencies to obtain subscriber information from service providers in other jurisdictions.

In Europe, fake news for the purpose of political gain often attacks migrants and religious or ethnic minorities. In order to combat this the Council of Europe started the No Hate Speech Movement, a youth campaign in which all of its member states participate. Other initiatives include research into mis- and disinformation on social media and support for First Draft, a global research and training organisation with a network of more than 300 people who work at major media outlets, social platforms and technology companies, as well as in more than 100 news rooms world-wide. Among other things First Draft is engaged in a number of fact-checking and verification projects across Europe. One example is the CrossCheck France project, supported by Facebook and by French media organisations. Users can identify information they believe to be fake. Information flagged as such is gathered on a special portal to which partner media organisations have access, so the information can then be verified. Anything considered to be inaccurate by at least two partners will be made visible to users earmarked “truthfulness questionable”. Users are warned not to share such content. A similar project has been started in Germany: CrossCheck Germany, and very recently Facebook announced that it was doubling its current number of content moderators by hiring 3,000 extra staff.

¹ State of the Democracy, Human Rights and the Rule of Law, Report by the Secretary General of the Council of Europe, 127th Session of the Committee of Ministers, Nicosia 19 May 2017. A link to the report may be found at <https://tinyurl.com/COE-SG-2017-Report>.

² European Convention on Cybercrime, Budapest, 23 November 2001, European Treaty Series no. 185.

Finally, the Council of Europe is promoting digital education and media literacy programmes, especially, but not exclusively, for children, to help citizens to develop the necessary critical skills when dealing with information on the Internet, so they will have a better idea when information is worth sharing.

3. *What should we not do?*

It is unclear what impact fake news has on public opinion. Even so, we must take deliberate manipulation of news very seriously. Where, as may have happened in the U.S., elections are concerned, it even may be viewed as a threat to national security.

While the rise of populist discourse tends to be linked with misinformation campaigns, we should be aware that it also is a symptom of citizens' loss of trust in the media and, more importantly, in governments, parliaments and courts. This trust in society must be re-established, because it is needed as a foundation for democratic security.

With the help of critical journalists and civil society organisations we need to question fake news, and in open dialogue discuss its motivation and why it may seem plausible to some.

Freedom of expression is the cornerstone of our democracies and protected as a fundamental right in all European constitutions. It is not restricted to true information, but, as was confirmed by the European Court of Human Rights in 2005³, it comprises opinions and that includes biased, objectionable and even shocking opinions.

Despite being anchored in the Convention as a fundamental right freedom of expression is not guaranteed in the European Member States, as is shown in the Secretary General's report mentioned before.⁴ Increasingly, journalists are exposed to threats and violence and a growing number of them has been imprisoned. National security concerns often are quoted as justifying the restrictions imposed.

There is no question that freedom of expression is not an absolute right, but restrictions for the protection of others or other legitimate interests must satisfy certain requirements, also stated in Article 10 of the Convention. This means that these restrictions (1) must have a statutory basis, (2) serve a legitimate aim and (3) be necessary and proportionate.

Some European countries are in the process of drafting laws to penalise fake news. A draft law in France imposes a fine of €15,000 or imprisonment for the intentional spreading of false facts (not opinions) with the intention to manipulate the public. Germany has drafted a law with fines of up to EUR 50 million for large internet platforms (with more than 2 million users) if they fail to remove manifestly illegal content within 24 hours and any illegal content within seven days, although it is not entirely clear what amounts to "illegal" in this context. Given the fundamental importance of the structure of our democracies and of the freedom of expression

³ *Salov v. Ukraine*, ECtHR 6 December 2005, Appl. No. 65518/01 at para. 113, where the Court said that "Article 10 of the [European] Convention [on Human Rights (*Freedom of expression*)] as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions [...] and thus place an unreasonable restriction on the freedom of expression set forth in Article 10".

⁴ See n.1 *supra*.

within that structure it is the courts (not internet companies) who should determine the boundaries of free speech, subject to guarantees of transparency and the right to a fair trial. The European Court of Human Rights has done so in a number of cases.

Prohibiting or censoring speech has never been particularly effective. According to the Secretary General we should trust in the self-healing forces of democracy.⁵ Our societies will benefit much more from more speech, including counter-speech, and the promotion of media literacy, independent media and investigative journalism. What is needed in order to confront the fake news challenge is more media diversity, more pluralism and a strong independent broadcasting system.

Through active cooperation with governments (including law enforcement), the private sector (by giving them, in the near future, a seat at the negotiating table), civil society and the media community the Council of Europe tries to gain a better understanding of fake news and to develop effective and comprehensive responses. The Council aims to enable law enforcement entities to become more active and effective across borders in their fight against the impunity of cyber criminals and against terrorists, who remain a major concern. Support is provided to youth organisations, because young people are very much key to this. Freedom of expression is defended. It should not be jeopardised due to our fears and anxieties. On the contrary, we need to cherish it, today more than ever.

The next speaker is Ms. **Rosa Toxopeus**, who starts off by saying that she works for the National Coordinator for Security and Counterterrorism and that she is not an expert on counterterrorism, but has been invited because of her knowledge of disinformation as a tool in hybrid warfare or hybrid conflict. In reaction to one of the first things Mr. Kleijssen said, Ms. Toxopeus remarks that disinformation is aimed at meddling with sovereignty. It is an instrument in a bigger toolbox and as such extremely useful and successful. It comes in many shapes: fake news, i.e. fiction meant to move an audience in a certain direction, but also misinformation, which is unintentionally incorrect and then shared. It is as old as the world, but relevant today due to the Internet and social media, which enable very speedy dissemination, directly reaching the target audience, adapting the framing of the storylines, real time according to the achieved results. It is relatively cheap and, and because attribution is difficult, relatively anonymous. In short, it is a good tool for interfering with the decision-making of governments and individuals. It is meant to delay and confuse, to make us indecisive, confronting us with faits-accomplis (e.g. in Ukraine), but also to enhance polarisation within society and to discredit and destabilise governments, the European Union and to mobilise people. It is used by both state actors and non-state actors. We know that terrorists want to destroy our societies through polarisation, through mobilising people to either take their side or the other side.

Here Ms. Toxopeus refers to the notes she made during Mr. Kleijssen's presentations. She comments that the flood of news about possible manipulation of the U.S. elections, especially at a time when elections in several European countries were approaching, helped much to raise awareness and make the media more critical. Also important are the non-governmental fact-check organisations that are appearing in many places. There should be even more of them and they should become more visible and also easily accessible, so people can do their own fact-checking. Somehow, fake news often sounds more attractive and travels faster, so the

⁵ Interview on 17 January 2017.

sooner it is exposed as such, the better, but that is a challenge. It requires coordination and information sharing among national partners and cooperation with NGOs and the media and, in particular, a strong and positive narrative as an antidote.

The problem is that our achievements: democracy, freedom of expression and press freedom are, at the same time, our vulnerability and our strength. They make it easier to introduce disinformation into our environment, but also provide our best defence.

A more practical measure would be to try and eliminate elements of the disinformation chain, for example by cutting out botnets used for spreading it.

Fora, such as Google and Facebook are becoming aware of their new role as generator of news and of the fact that this brings a new responsibility. We will have to see how this develops.

At this point Ms. Toxopeus turns to the Chairman, who then invites Ms. **Carmen Gonsalves** to join the speakers at the table.

Ms. Gonsalves begins by saying that she would like to look at the subject from the perspective of the Ministry of Foreign Affairs, where she leads the Cyber Task Force, which assists the Minister of Foreign Affairs in conducting international cyber policy. It is no secret that in the last few years the global security situation has deteriorated. In this volatile environment coercive cyber operations increasingly are a weapon of choice. Digital technology not only stands for threats and dangers, however, but also for benefits and opportunities, and economic growth depends on it more and more. In The Netherlands, for example, more than 30% of economic growth depends on ICT-related activities.

One of the threats we are discussing tonight is the use of coercive cyber operations for the purpose of destabilising democracies, elections and other political processes by means of disinformation, undue influence and manipulation. Cyber operations are only the means used, but their danger lies in the speed with which (dis)information can be spread. In this it differs very much from methods used in the past, for example by the Soviet Union.

The Ministry of Foreign Affairs is engaged in promoting a global normative framework for state actors, in other words better behaviour by state actors. This normative framework should be solid and based on existing international law. These efforts are not merely aimed at combating the spread of disinformation, but also at, for example, preventing sabotage of critical infrastructure by means of cyber operations, which has an even greater potential to disrupt and could amount to an act of war.

Because this work is so important, the Ministry of Foreign Affairs has joined forces with the Ministries of Security and Justice, Defence, the Interior and Economic Affairs, who are also actively involved internationally. In 2015, we organised a successful conference on cyber space with many world leaders, the big private sector actors of the world and academia, as well as the technology community. International peace and security were high on the agenda, as was capacity-building.

When we talk about cyber, it is not only about resilience, which is fundamental, but also - and this has been neglected for a long time - about influencing the behaviour of state actors. I already mentioned our work on developing a global normative framework, in the first place through the United Nations. The Netherlands has been invited to participate, for the first time,

in a (fourth) U.N. Group of Governmental Experts (GGE) on Developments in the Field of Information and Telecommunications in the Context of International Security, which is expected to report to the UN General Assembly later this year. The latest report, in 2015, achieved a fair amount of progress. It recognised the importance of international law also for governing cyber space, but further progress is needed. That will not be easy, because some countries, such as China and Russia, do not regard the body of international law developed for the physical world as adequate for the cyber domain.

International law is not enough, however. We also need to create a set of voluntary norms of behaviour that are politically binding, for example the rule, included in the 2015 GGE report, that states should not attack the critical infrastructure of other states, not only in times of war, when international humanitarian law governing cyber space would apply, but also in times of peace.

The Ministry of Foreign Affairs also tries to engage other important stakeholders, not only internet service providers and other private actors, because more than 90% of the Internet is in the hands of the private sector, but also the tech community and civil society, because they keep the Internet functioning. In this context, in February of this year, the Minister of Foreign Affairs launched the Global Commission on the Stability of Cyberspace, chaired by Marina Kaljurand, former minister of foreign affairs of Estonia, who is an authority in this field. The Commission comprises, among others, representatives of Microsoft, experienced politicians, such as Carl Bildt, and distinguished academics, such as prof. Joseph Nye. It is very diverse, geographically and otherwise. We hope that this Commission will come up with proposals for additional norms of behaviour based on a broad consensus and that it will act as an ambassador for good behaviour in cyber space, so that, in the foreseeable future we will have a more stable cyber space with less impunity for those who behave badly.

Questions, Answers and Debate

Mr. Ties O. Schelfhout, M.A., LL.M.

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Addressed to Mr. Jan Kleijssen, Ms. Rosa Toxopeus and Ms. Carmen Gonsalves

Where do you see the field of fake news in five to ten years' time and what kinds of concrete measures do you expect to be taken by then?

Mr. Jan Kleijssen

It is difficult to be specific, but what I do know is that there is a kid in a garage somewhere, inventing something that will dramatically change our lives in ten years' time. Fifteen years ago, there was no Facebook and twenty-five years ago there was no Internet and look where we are today. What the Council of Europe intends to focus on is artificial intelligence. According to the award-winning British scientist dr. Stephen Hawking the year 2025 will be the point of no-return. If we allow self-learning machines to develop as they are doing now and do not stop them before then, mankind will be on a losing streak. This sounds dramatic, but remember how the Internet took over the world. The combination of artificial intelligence and big data produces a very disturbing picture. It is what is what we hope to concentrate on. We have identified it as one of the new challenges in our proposals to the Committee of Ministers, who, I expect, will decide on this later this year. Personally, I feel very strongly that

we should deal with this and I expect that a conference on the subject will be organised, perhaps before the end of the year, attended by people like Stephen Hawking.

Ms. Rosa Toxopeus

Confining myself to disinformation I think we can learn much from countries that are more advanced in their fight against disinformation, for example the Baltic states and Scandinavia, where disinformation is monitored, detected and recognised. There is much cooperation with, and support of, media, NGOs and the population. There is training, not only of civil servants and journalists, but also of experts and citizens. You see enhancement of resilience, which means not only source-criticism, but also having your own strong(er) narrative and standing up for your own values. In addition, you see outreach towards communities that are especially vulnerable to disinformation. These are also the communities where trust in the authorities needs to be restored. These are some of the things we could be doing in the next five years and then we will have to see what the world throws at us at that time.

Ms. Carmen Gonsalves

Not taking into account the speed of technological advancement, I hope that in ten years' time, across the globe, we will have broad acceptance of international law governing cyber space and also a set of broadly accepted norms of behaviour, as well as a common understanding, not only of the implementation of these norms, but also of how to deal with the issue of attribution, which often is seen as a major obstacle to taking any action. Advanced and very capable state actors are able to achieve a high level of technical attribution. For others it is more difficult, but the issue of attribution is not merely technical. In the end it is political and it should not keep countries confronted with a wrongful act from reacting by making use of international law. Apart from that, I hope there will be cooperation among liberal democracies to defeat those actors who refuse to abide by these rules. The means could range from using diplomatic instruments to imposing sanctions.

Mr. Steven van Hoogstraten

Addressed to Mr. Jan Kleijssen and Ms. Carmen Gonsalves

It seems to me that you are all on the side of normative development. I wonder what can be done against a real campaign of disinformation. You could say: Our rules are not respected, but that in itself does not solve the problem. Do you think we should develop some sort of blocking technology that prevents the disinformation from being spread further? Or are you thinking of creating a Big Brother who will rule over cyber space? It sounds to me very much like policy development without any practical response being provided.

Ms. Carmen Gonsalves

At the moment we are indeed focusing on norms, but at the same time we focus on how we can make these norms actionable, in other words how we can use these norms to punish bad behaviour - that is to say, by diplomatic means, because I am a diplomat. We operate below the threshold of armed conflict. Above this threshold it is the responsibility of our Ministry of Defence and our armed forces. What we are talking about here is behaviour, and norms concern behaviour, not technical resilience, even though that requires standards too. That is a different kind of discussion, however. If I speak of designing ways to keep state actors from

using cyber means to manipulate internal affairs and democratic processes in other countries - and not interfering in the internal affairs of other is a well-known principle in this context -, I am talking about norms of behaviour and about punishment for countries that fail to behave in accordance with the norms. It may sound somewhat theoretical, but in the physical world we are able sometimes to punish a wrongdoer. For example, we have been able to put pressure on Russia in response to its actions in Ukraine.

Mr. Jan Kleijssen

Let me start by saying that I too am a civil servant and that I work for an organisation committed to the rule of law. If we are dealing with a crime, it is covered by the Cybercrime Convention⁶ and we have ways of dealing with the offenders, but only if they are private actors, not state actors. Through the Convention states can cooperate more effectively, not only to punish criminals, but also to prevent crimes. Where the perpetrator is a state actor, within the Council of Europe system, in theory, it is possible to file an inter-state complaint, but this has not happened so far. Alternatively, perhaps a state might be sued before the International Court of Justice in The Hague. If you are talking in terms of cyber security and are asking whether a cyber attack merits a kinetic response, that would be a completely different matter, far beyond our subject tonight.

Mr. Steven van Hoogstraten

In this same room, a few weeks ago, there was a lawyer from Paris, Shefet,⁷ who was very adamant about the fact that the European Court of Human Rights had decided that someone is responsible for the news that is published on the Internet; that if anything is put on the Internet, someone somewhere is responsible. It concerned the Delfi case in Estonia.⁸ With this in mind, imagine that in another European country a film is made that pokes fun, in a very unpleasant way, at the Dutch royal family and is put on YouTube. Surely, we would want to be able to *do* something in response.

Ms. Carmen Gonsalves

I appreciate what you are saying, but I would like to avoid discussing content, because that would take us into a debate on the boundaries of freedom of expression and what our legislation says about that. When we are talking about manipulation or the coercive use of cyber means for the purpose of creating a geopolitical effect by undue influence on the political processes in another state, we are dealing with internationally wrongful acts. Take the example of the recent U.S. elections, where the accounts of a political organisation or of individuals belonging to a political organisation were hacked and the information found there was spread. The recent French elections are another case in point. There, the account of the

⁶ See n.2 *supra*.

⁷ Mr. Dan Shefet, special advisor to UNESCO and keynote speaker at a seminar at the The Hague Institute for Global Justice on 19 April 2017, entitle "An Accountable Internet".

⁸ *Delfi AS v. Estonia*, ECtHR 16 June 2015, Appl. No. 64569/09. Delfi operated a news portal, where an article was published, which elicited much comment, including offensive language and even personal threats against L., who demanded removal of the comments and claimed damages. Delfi argued that, as a neutral intermediary, it was immune from liability, but the Court held that the (small) amount of damages imposed by the local courts did not interfere with Article 10 (*Freedom of Expression*).

campaign team of then presidential candidate Macron was hacked and, although it is not entirely clear what happened exactly, it appears that the information found was even manipulated. There is no doubt that this is criminal behaviour that cannot be condoned. If a state actor was behind this - and there are well-founded suspicions that a state actor was indeed, in both cases - it is obvious that this constitutes an infringement of international law, entitling the international community to take action. At the same time, it is not always easy to act effectively. The means I mentioned are not a panacea. They are merely a means to slowly raise the price of this kind of behaviour. If we can come to a common understanding, internationally, that certain kinds of behaviour are not acceptable, we are in a better position to address these issues with, and if necessary, punish, the perpetrator.

Mr. Jan Kleijssen

Allow me to begin by qualifying, to some extent, the words of my learned French colleague, two weeks ago, as quoted here tonight. You should be aware that the decision in Delfi was based on the particular facts and circumstances of that case and that the responsibility of an Internet provider depends on a number of criteria. Case law in this area is currently being developed and there are some major cases pending. The decisions in these cases, which are expected later this year, may qualify Delfi. Apart from that, a soft-law instrument is in the making. This year the Committee of Ministers will adopt a recommendation on the responsibility of Internet service providers, which will be based not only on existing case law, such as Delfi, but also on a number of the criteria I already mentioned.

Dr. Tarlach McGonagle **University of Amsterdam, Institute for Information Law**

Let me be provocative and say that fake news is a fake concept. It is a siren song that lures us away from some of the real underlying issues and problems. Mr. Kleijssen, in his presentation, very appropriately referred to the problematic nature of the term, saying that it is typically put in inverted commas (I would say 'scare quotes'), thereby showing uneasiness about the term. It was welcome that reference was made to the whole spectrum of different types of expression that potentially could be parked under the term. I do not think the term serves any useful purpose or has any coherence. Even within that wide spectrum there is huge variety, so I think it is very important to stand back from the term and not be seduced by it. We should be very clear-sighted about the types of expression we are dealing with, whether they merit a response and, if so, what kind of response. To my mind, the most explicit and detailed response to 'fake news' has been the joint declaration, earlier this year, by the four specialised international mandates on freedom of expression and/or the media.⁹ In the title of the document itself, where fake news is put in 'scare quotes', you see an acknowledgment that people are responding to 'fake news' as a phenomenon, but, taking back the narrative, if you like, and aligning it alongside the more problematic types of expression we are dealing with here, namely disinformation and propaganda: the Joint Declaration is very detailed and very explicit and even though it was adopted by four special rapporteurs from different parts of the world, I think it is oozing Council of Europe values, principles, norms and practice and this picks up on

⁹ *Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda*, by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Vienna, 3 March 2017.

the discussion earlier about the different norms that are relevant to these issues and how they should be operationalized. Another very important reference in Mr. Kleijssen's speech was to the positive obligation on states to create and maintain a favourable environment for freedom of expression, that is to say an environment in which everyone can participate in public debate without fear regardless of the nature of their opinions. This ties in with the norms that are at issue and how they need to be operationalized, because once you have a clear picture of what you are trying to resolve, you need to differentiate between the responses that are needed. In a conference co-organised by Mr. Kleijssen's staff a few months ago, Judge [NAME] made an excellent point about fake news being a symptom of a broader malaise. You, Mr. Kleijssen, mentioned it yourself: the erosion of trust in the democratic institutions and in public affairs generally, so I think meaningful development of critical faculties, media literacy, verification techniques, fact-checking, in short all of these strategies have their place in a broader, more complicated, rapidly changing style of public debate. The traditional role of public watchdog for the media and journalists is facing new challenges for which new actors are required. In my view the Council of Europe is very well placed to use its norms, both hard law and political standards, to take this forward.

Mr. Jan Kleijssen

I fully agree with you, but I might mention one sentence out of the Joint Declaration, namely that sanctions based on vague terms, such as false news, are incompatible with international freedom of expression standards.¹⁰ Also, it is important to realise that the four mandates that adopted the Declaration cover a large part of the world.

Ms. Carmen Gonsalves

We very much welcomed the Joint Declaration, because it brought very important notions and principles to the table. This is because, where dealing with fake news by means of legislation is concerned, The Netherlands is inclined to err on the side of caution. We feel that, in order to avoid unnecessary infringement of the freedom of expression, other solutions should be considered. I also should like to mention the work of the EU's East StratCom Task Force, which was set up two years ago by the European External Action Service, the EU's diplomatic service, to address Russia's on-going disinformation campaigns. The Task Force does immensely valuable work, not only in the area of analysing disinformation in Europe, but also by supporting independent journalism in Eastern Europe and helping to debunk news. In my opinion, the EU Member States themselves also should become more active in this area. I realise that it is a great deal of work and not easy to organise, but we should follow the EEAS example and try to solve this problem in a more positive manner.

Ms. Rosa Toxopeus

I think that 'fake news' is not the catch-all phrase that should be used. The term we use is 'disinformation' and 'fake news' is one of the shapes disinformation can take. It is good to have a dictionary that explains the various forms of disinformation. Fake news is intentional

¹⁰ Joint Declaration, supra n. 9, para. 2(a): "General 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 [...] and should be abolished."

and (pure) fiction, but there is also misinformation, that is to say unintentionally incorrect information, and there are many forms in between the two. I should like to stress that the loss of trust is not caused by the disinformation, but the disinformation taps into this loss, so tackling the loss of trust in authorities will help to remove the breeding ground for disinformation. It is up to us to keep the moral high ground. We should not throw away our own values and achievements in our battle against disinformation. Our opponents do not share our values and achievements. They have a very different background and even may be opposed to them. We have to stick to our principles and even if this is difficult, we will get there in the end, I think.

Prof.mr. Rick Lawson
Leiden University

Disinformation is not a major problem in The Netherlands, but what about, for example, Eastern Europe?

Ms. Rosa Toxopeus

Disinformation has been there all along. Our government was concerned about it prior to the recent elections.

Ms. Carmen Gonsalves

In 2015 and 2016 we had to deal with manipulation of facts in connection with the MH17 disaster, when disinformation was being spread from Russia. This was addressed at the time by the Ministry of Foreign Affairs. Disinformation threatens at any time, not just when there are elections. That is why the work of the EU's East StratCom Task Force is so important.

Mr. Jan Kleijssen

Germany, where a new Chancellor will be elected in September of this year, is most concerned about fake news, especially propaganda.

In Ukraine Russian sites are blocked and in Turkey blocking by the government is wide-spread. The situation in Poland and Hungary is problematic.

Ms. Stefanie A. Steinberg
J.D. Candidate, American University Washington College of Law

Addressed to Mr. Jan Kleijssen

You spoke earlier of the impact that the Facebook meta data had on the most recent U.S. election and of the importance of relationship building between governments and private industries. With the impact of micro-targeting audiences, what are your thoughts on asking private industries to change their algorithms to create fewer informational biases in their consumers?

Mr. Jan Kleijssen

It is essential to speak with businesses such as Facebook and Google, because voters may be targeted specifically on the basis of information obtained via Facebook and Google. It should

be kept in mind, however, that the responsibilities of states should not be delegated to businesses.

At this point the Chairman closes the discussion, saying that we should trust in our strength as a society and keep the moral high ground. He thanks the speakers for their contribution and invites everyone present to conclude the meeting informally with a glass of wine.

Abbreviations

ACHPR	African Commission on Human and People's Rights
EEAS	European External Action Service
EU	European Union
OAS	Organization of American States
OSCE	Organisation for Security and Co-operation in Europe
UN	United Nations