

# *State lies as violations of human rights*

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# State Lies as Violations of Human Rights

*Marko Milanovic\**

## ABSTRACT

This article examines how lying by state agents can violate human rights, including freedoms of opinion and expression, the right to health, and the right to participate in public affairs. The article argues that a lie – a statement, made by one person to another, that is untruthful and is made with the intention of deceiving the addressee – by a state agent can interfere with the interests of individuals protected by human rights law. Not all lies interfere with human rights, however. Whether they do so depends on the harms they cause. The article shows that lies that interfere with human rights can be justified only very exceptionally within the human rights framework, since they are most often motivated by an illegitimate purpose. The article also argues that human rights law will apply equally regardless of whether states lie to their own people or to peoples of other states.

One purpose of this article is to conduct a mapping exercise, demonstrating the integral role that lies by state agents play in all kinds of human rights violations. The article also demonstrates how, in some instances, lies are a necessary condition for human rights violations, which cannot be committed without them – a good example here is that of states fabricating election results. In other cases, lies by state agents are a sufficient condition for a human rights violation. That is, the lie alone violates individual rights – systematic lying by state agents that pollutes the information space and thereby inhibits their people's right to seek and receive information of all kinds is an example of such practice, as is the dissemination of lies that harm public health.

International and regional human rights bodies, especially those acting in a judicial or quasi-judicial capacity, rarely accuse states of deliberately lying, or of otherwise acting in bad faith. This is understandable, for all sorts of practical and prudential reasons. The article is not arguing that human rights bodies or activists must change their approach radically. But neglecting the role that lying by states plays in human rights violations has consequences, as it impedes the ability of human rights bodies (or activists) to tell the truth about what the state concerned is really doing. Put differently, if human rights bodies avoid dealing with state lies and their consequences, they risk normalizing them. In a world in which an increasing number of states is led by rapacious liars, this is not a risk that we can afford to ignore.

*Then if any one at all is to have the privilege of lying, the rulers of the State should be the persons; and they, in their dealings either with enemies or with their own citizens, may be allowed to lie for the public good. (Plato, The Republic)*

*Truth is mighty and will prevail.*

*There is nothing wrong with this, except that it ain't so. (Mark Twain)*

## **I. INTRODUCTION**

Can lies by a state's officials and other agents violate the state's obligations under international human rights law? This is the question at the core of this article. States lie to their own people, or to the population of other states, all the time. Authoritarian states are almost by definition systematically deceiving their own populations, attempting (and often succeeding) in devaluing the whole idea of truth. They do so using both traditional media (e.g. state-controlled TV and radio stations) and the tools of the digital age.<sup>1</sup> Today, for example, during Russia's war against Ukraine, the "average" Russian citizen, who is unable to determine for herself, through any kind of direct observation, what exactly is happening in Ukraine (e.g. whether cities there are being shelled indiscriminately), is constantly being fed a diet of falsehoods by state-controlled media – that there is no "war," that Russia attacked no-one, that it is being victimised by the West, that civilians are not being harmed, that Ukraine was run by Nazis and was preparing to use nuclear or biological weapons against

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<sup>1</sup> The Oxford Internet Institute found evidence of organized social media manipulation campaigns in 70 countries in 2019, with such operations being executed either by government agencies or by political parties. Misinformation was spread intentionally in 75% of the countries surveyed. See Samantha Bradshaw & Philip N. Howard, The Global Disinformation Order: 2019 Global Inventory of Organised Social Media Manipulation (2019) Computational Propaganda Research Project, Oxford Internet Institute, <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2019/09/CyberTroop-Report19.pdf>, at 15.

Russia, and so forth. The propaganda is unrelenting, pervasive and all-consuming.<sup>2</sup> While some individuals will be resistant to it, a great many will not be – the state is basically “bombing their minds,” to quote the EU’s chief diplomat.<sup>3</sup>

It is not only dictatorships that lie – democracies can do so too.<sup>4</sup> Inveterate liars can be elected to high office, despite – or maybe because of – habitually lying to their own people, especially their own supporters. Democratically elected leaders can, for instance, lie to their own people to mobilize them to support an aggressive war – as arguably happened with Bush, Blair and the 2003 invasion of Iraq.<sup>5</sup> They can also harm the health of their own people by lying about infectious diseases, therapeutics or vaccines. And they can lie to cover up human rights violations or other serious misconduct.

States can also lie to the populations of other states. Thus, at the height of the Covid-19 pandemic, the United States military ran a disinformation campaign targeting the Filipino public with the aim of discrediting Sinovac, a Chinese Covid vaccine, and other life-saving aid provided by China to the Philippines.<sup>6</sup> In other countries, including several Muslim ones, the campaign amplified “the disputed contention that, because vaccines sometimes contain pork gelatin, China’s shots could be considered forbidden under Islamic law.”<sup>7</sup> According to a senior military officer involved in the program, its purpose was to discredit China, and the collateral impacts on individuals in the targeted countries were not considered: “We weren’t

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<sup>2</sup> See Masha Gessen, *The War That Russians Do Not See*, The New Yorker (Mar. 4, 2022); Stephen Cushion, *Russia: the West underestimates the power of state media*, The Conversation (Mar. 11, 2022), <https://theconversation.com/russia-the-west-underestimates-the-power-of-state-media-178582>.

<sup>3</sup> Disinformation: Speech by High Representative/Vice-President Josep Borrell at the EP debate (Mar. 8, 2022), [https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/112403/Disinformation:%20Speech%20by%20High%20Representative/Vice-President%20Josep%20Borrell%20at%20the%20EP%20debate](https://eeas.europa.eu/headquarters/headquarters-homepage_en/112403/Disinformation:%20Speech%20by%20High%20Representative/Vice-President%20Josep%20Borrell%20at%20the%20EP%20debate).

<sup>4</sup> See generally JOHN MEARSHEIMER, *WHY LEADERS LIE: THE TRUTH ABOUT LYING IN INTERNATIONAL POLITICS* (2011).

<sup>5</sup> See Philippe Sands, *A Grand and Disastrous Deceit*, 38 London Review of Books (2016).

<sup>6</sup> See Christopher Bing and Karen Lema, *U.S. told Philippines it made ‘missteps’ in secret anti-vax propaganda effort*, Reuters (July 26, 2024), <https://www.reuters.com/world/us-told-philippines-it-made-missteps-secret-anti-vax-propaganda-effort-2024-07-26/>.

<sup>7</sup> See Chris Bing and Joel Schectman, *Pentagon ran secret anti-vax campaign to undermine China during pandemic*, Reuters (June 14, 2024), <https://www.reuters.com/investigates/special-report/usa-covid-propaganda/>.

looking at this from a public health perspective ... We were looking at how we could drag China through the mud.”<sup>8</sup> China itself was hardly innocent in this department – it disseminated various kinds of Covid-related disinformation to domestic and international audiences alike, including with respect to Western-made vaccines.<sup>9</sup>

Most of us would agree, I imagine, that it is both immoral and bad policy to disseminate vaccine disinformation during a pandemic. Any hoped-for gains of such a campaign, in terms of discrediting one’s adversary, are not worth the harm caused to individuals or to the reputational harm the state would be exposed to if its clandestine operation was uncovered.<sup>10</sup> But, policy aside, is this kind of operation contrary to international law, for example because it violates the human rights to life or health?

This article will attempt to answer this question. My central argument is that state lies can violate human rights law in various scenarios, dealing with many different human rights. This argument is in line with the position of the U.N. General Assembly and Human Rights Council, which emphasized that “disinformation can negatively impact the enjoyment of human rights and fundamental freedoms.”<sup>11</sup> However, despite their importance and impact, state lies have generated little international jurisprudence and scholarly attention.

One purpose of this article is to conduct a mapping exercise, demonstrating the integral role that lies by state agents play in all kinds of human rights violations. I will also show that lies that interfere with human rights can be justified only very exceptionally within the human rights framework. We will also see how, in some instances, lies are a *necessary* condition for human rights violations, which cannot be committed without them – a good

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<sup>8</sup> Id.

<sup>9</sup> See, e.g., Robin Emmott, *Russia, China sow disinformation to undermine trust in Western vaccines: EU*, Reuters (April 28, 2021), <https://www.reuters.com/world/china/russia-china-sow-disinformation-undermine-trust-western-vaccines-eu-report-says-2021-04-28/>.

<sup>10</sup> See Editorial, *The Guardian view on the US and vaccine disinformation: a stupid, shocking and deadly game*, The Guardian (June 18, 2024), <https://www.theguardian.com/commentisfree/article/2024/jun/18/the-guardian-view-on-the-us-and-vaccine-disinformation-a-stupid-shocking-and-deadly-game>.

<sup>11</sup> Resolution 76/227, U.N. Doc. A/RES/76/227 (Jan. 10, 2022), op. para. 1. See also Resolution 49/21, U.N. Doc. A/HRC/RES/49/21 (Apr. 8, 2022), op. para. 1 (using nearly identical language).

example here is that of states fabricating election results. In other cases, lies by state agents are a *sufficient* condition for a human rights violation, that is, the lie alone violates individual rights – systematic lying by state agents that pollutes the information space and thereby inhibits their people’s right to seek and receive information of all kinds is an example of such practice, as is the dissemination of lies that harm public health.

International and regional human rights bodies, especially those acting in a judicial or quasi-judicial capacity, rarely accuse states of deliberately lying, or otherwise acting in bad faith. This is understandable, for all sorts of practical and prudential reasons. I am not arguing here that human rights bodies need to radically change their approach. But neglecting the role that lying by states plays in human rights violations has consequences, as it impedes the ability of human rights bodies (or activists) to tell the truth about what the state concerned is really doing. Put differently, if human rights bodies avoid dealing with state lies and their consequences, they risk normalizing them.

Section II will provide a taxonomy of state lies as potential human rights violations, and define more precisely the scope of this article. Section III will place state lies within the established framework of international human rights law. Section IV will look at state lies as means of inciting human rights violations, including incitement to wars of aggression, while Section V will discuss lies as a means of punishment, harassment or intimidation. Section VI will examine state lies as violations of freedoms of expression and opinion. Section VII will explain how state lies can violate procedural obligations to conduct an effective investigation for possible violations of various human rights, including the right to life and the prohibition of torture and other forms of ill-treatment. This section will also look at the so-called “right to truth” in the context of systematic human rights violations, such as enforced disappearances. Section VIII will examine how untruthful denials of historical crimes, such as the Holocaust, can violate the rights of members of affected communities. Section IX will look at how state

lies can violate the right to health, while Section X will do so with regard to the right to participate in public affairs. Section XI will consider the problem of extraterritoriality, that is whether states can, through lying, violate the rights of individuals located in other states.. Finally, Section XII concludes.

## **II. A TAXONOMY OF STATE LIES**

### **A. State Lies Defined**

Discussions of the notion of lying, and the justifiability of lying, are as old as moral philosophy. I will not discuss this literature here in any detail.<sup>12</sup> It suffices to say that there is, in philosophy, a conventional approach to defining a lie. This approach is reasonably good enough for the purposes of this article, especially in the absence of any formal legal definition of the term in international law. Under this approach, a lie is a statement, made by one person to another, that is untruthful and is made with the intention of deceiving the addressee.<sup>13</sup>

This definition captures the core of the phenomenon of state lies that will be examined in this article. In the philosophical literature, objections to this traditional definition turn on whether all of its elements are necessary or sufficient.<sup>14</sup> Debates about it mostly concern marginal cases, which need not detain us here. It is, however, still necessary to unpack the definition's elements somewhat.

First, to constitute a lie, a statement must concern a matter of fact that is capable of being objectively true or false. The statement cannot relate to matters of opinion that are not susceptible to objective proof. There is a substantial difference between a statement that

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<sup>12</sup> For an overview, see James Edwin Mahon, *The Definition of Lying and Deception*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2016 Edition), <https://plato.stanford.edu/archives/win2016/entries/lying-definition/>.

<sup>13</sup> Id.

<sup>14</sup> Id.

vaccines cause autism, which is objectively false and can be proven as such,<sup>15</sup> and a statement that dogs are better pets than cats.<sup>16</sup> There is also a difference between the objective existence of a fact and someone's desire or preference that this fact exists or not, or their normative assessment of that fact as somehow being good or bad.<sup>17</sup> People are entitled to their own opinions, but not their own facts.<sup>18</sup>

The fact/opinion distinction is recognized in human rights law, especially in the defamation context, even if it is also recognized that the distinction is at times blurry. A statement may have both a factual and normative valence.<sup>19</sup> “Donald Trump is as horrible a person as he is a president” would be an example of such a mixed statement.<sup>20</sup> This article will mainly be concerned with “pure” statements of fact.

Second, the statement requirement can be met by all forms of communication, including non-verbal ones, that can be understood as such by their addressee in the particular context. Lies of omission – failures to say something – do not generally satisfy this requirement, unless silence is in that particular context understood as communicating a certain statement.<sup>21</sup> And lies can clearly be communicated using many different media, including today most notably the internet.

The use of fake accounts on social media platforms by state agents would qualify as a lie, even if the content of a specific message on the platform was truthful or contained

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<sup>15</sup> See generally INSTITUTE OF MEDICINE, ADVERSE EFFECTS OF VACCINES: EVIDENCE AND CAUSALITY (2012).

<sup>16</sup> They sure are.

<sup>17</sup> See FREDERICK SCHAUER, THE PROOF: USES OF EVIDENCE IN LAW, POLITICS, AND EVERYTHING ELSE 1 (2022) (“Disliking anchovies is a preference. Believing that anchovies do not exist is an empirical mistake. And taking a dislike for anchovies as a reason for denying their empirical existence is a fallacy.”)

<sup>18</sup> *Id.*, at 3 (quoting Daniel Patrick Moynihan).

<sup>19</sup> See U.N. Hum. Rts. Comm., General Comment No. 34: Article 19: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter General Comment No. 34], para. 47 (truth has to be a defence to defamation); *Lingens v. Austria*, App. No. 9815/82 (1986), para. 46 (“a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof.”)

<sup>20</sup> See also Schauer, *supra* note 17, at 8 (discussing thick ethical concepts, that is descriptions combining the factual with the evaluative).

<sup>21</sup> Mahon, *supra* note 12. On how silence by states should be regarded across different areas of international law, see generally STATE SILENCE ACROSS INTERNATIONAL LAW (Danae Azaria ed., 2025).



statements of opinion rather than fact, because in that context the statement includes both its content and the designation of the author of the message. In other words, in this scenario there are two statements being communicated on the platform: one is the content of the speech in question, and the other is an assertion as to the identity of the person making it (which is false). Thus, if the US military ran a network of fake accounts, posing as regular individuals, who were posting (rightly) critical messages of Russia's conduct in Ukraine or elsewhere in the world, this would nonetheless be a form of lying. Or, if a state deployed propagandistic audio-visual messaging using an AI-generated anchor, this would also be a form of lying.<sup>22</sup> Again, this is simply because such acts include an untruthful explicit or implied statement about the identity of its author (often literally displayed on screen), which is done with the intention of deceiving the audience about the author's identity and thus impacting their understanding of the substantive content in the author's message.<sup>23</sup>

Third, the requirement that the statement be untruthful relates to the state of mind of the person who uttered it. A statement may be untruthful even if it is in fact true, or truthful even if it is false. That is, the objective correctness or falsity of a statement should not be confused with its subjective truthfulness.<sup>24</sup> Of course, there can be degrees of subjective certainty as to the existence of a fact – we can think that some assertions are probably false or probably true, or experience degrees of doubt. For our purposes, a statement will be untruthful if it is not genuinely believed by the speaker to be true.

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<sup>22</sup> See Raquel Vazquez Llorente, Ross Gildea & Shirin Anlen, *Audiovisual Generative AI and Conflict Resolution: Trends, Threats and Mitigation Strategies*, Witness (2024), [https://www.gen-ai.witness.org/wp-content/uploads/2024/08/WITNESS-Report\\_Audiovisual\\_Generative\\_AI\\_and\\_Conflict-1.pdf](https://www.gen-ai.witness.org/wp-content/uploads/2024/08/WITNESS-Report_Audiovisual_Generative_AI_and_Conflict-1.pdf), at 4-5 (documenting such deceptive uses of AI-generated content by state agents).

<sup>23</sup> Whether this type of lie would interfere with and violate a specific right is a separate issue, which I will examine in the scenarios below. My point here is only that using fake accounts to propagate truthful messages is nonetheless a form of lying.

<sup>24</sup> Thus, if I say to somebody that I have fifty dollars in my wallet, and this is what I genuinely believed, then this is a truthful statement even if, in fact, I only had twenty dollars in my wallet and the statement was therefore objectively false. Or, if I said that I had fifty dollars in my wallet, while believing I had only twenty, but in fact there were fifty dollars in the wallet, the statement was objectively true but nonetheless untruthful.

Fourth, the intention to deceive, a condition which is also about the speaker's state of mind, can be conceptualized in several different ways. A traditional approach – which is good enough here – would be that the speaker intends that the addressee believe that the speaker's untruthful statement was, in fact, true. Such a deceptive intent would distinguish lies from other untruthful statements, such as jokes or irony.<sup>25</sup>

Fifth, to this standard definition of a lie we can add that, for the purpose of this article, a *state* lie is a lie made by a person whose conduct is attributable to a state, under the general rules of attribution in the international law of state responsibility.<sup>26</sup> In the great majority of cases this will be a state official, i.e. a *de jure* state organ.<sup>27</sup> A state can lie through its president, a minister, a mayor, a judge, an intelligence agent, or a police officer. The legislature (i.e. its individual members) can lie, by adopting legislation or other instruments containing untruthful statements. Prosecutors and judges can lie, for instance by maliciously and falsely accusing or convicting an individual for committing a crime. Private individuals can also be state agents, for example if they act at the direction, instructions or control of a state.<sup>28</sup> Thus, if an informal hacker group or a private company disseminate lies under a state's direction, instructions or control, their conduct is attributable to the state, and their lies are state lies.<sup>29</sup>

Finally, the standard account of lying is valid apart from the (often legally relevant) question of whether there is some kind of authoritative body, such as a court, that determines what is true and what is false. Thus, the Earth revolves around the Sun even if the supreme

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<sup>25</sup> This is admittedly an oversimplification – there are other, more complex approaches to lies in the philosophical literature. Some focus on distinctions between statements and assertions, while others are non-deceptive in that they do not require an intent to deceive – see more Mahon, *supra* note 12.

<sup>26</sup> See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 56 UN GAOR Supp. No. 10, Art. 2, UN Doc. A/56/10 (2001), reprinted in 2 Y.B. INT'L L. COMM'N 26 (2001), UN Doc. A/CN.4/SER.A/ 2001/Add.1 (Part 2) [hereinafter ILC ASR].

<sup>27</sup> *Id.*, Art. 4.

<sup>28</sup> *Id.*, Art. 8.

<sup>29</sup> Consider the example of the vaccine disinformation operation conducted by the United States against the Philippines, which included the work of private contractors – see *supra* note 6.

leader (or court) of a state officially proclaim otherwise. From a human rights law perspective, this problem is to my mind more relevant for any issues of enforcement, than it is for assessing whether, as an objective matter, a state is lying through its agents.

In sum, the notion of a (state) lie that I will be using is a standard one in moral philosophy, and good enough for my purposes in this paper. There can be objections to this definition, philosophical or otherwise. Two may be particularly relevant. First, there may be states in which indoctrination is so prevalent that the society as a whole, including the ruling elite, may gradually start believing their own falsehoods. Second, there will also be societies, even relatively free and democratic ones, which become so polarized that groups within it inhabit completely different realities.

In both situations, the whole idea of truth becomes devalued even on purely objective questions of fact, such as the existence of anthropogenic climate change. In such societies, many individuals will honestly believe in pernicious falsehoods, and cannot be dissuaded from such beliefs.<sup>30</sup> This may include state agents, who could therefore disseminate falsehoods *without lying*, because they subjectively believe these falsehoods to be true. The standard definition of (state) lies would exclude this type of behaviour.

As I will explain below, there will be situations in which the dissemination of falsehoods alone could violate human rights, even if it is done truthfully, for instance in the context of harms to public health. But there is still something distinctive about lying. The standard definition of a lie entails that a state cannot lie without a human being, who is acting on its behalf, doing so with the requisite level of subjective fault. In the great majority of cases, in my view, even in the two situations set out above, there will be state agents who are

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<sup>30</sup> See, e.g., Marko Milanovic, *The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-Mortem*, 110 AJIL 233 (2016); Marko Milanovic, *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences* (2016) 47 GEO. J. INT'L L. 1321 (2016) (documenting how factual accounts of crimes against international law established by international tribunals are disbelieved by local audiences, and explaining the psychological mechanisms that lead to these outcomes).

lying on the standard account (e.g. the cynical ruling echelon of a state, sitting on top of an indoctrinated mass of other state officials or the regular public). The two objections explained above do not, therefore, require a different approach to (state) lying.

## **B. Lies and Other Forms of Deception; Standalone Lies or Lies as Part of Package**

The definition of state lies above substantially overlaps with what is today frequently called disinformation, especially in the cyber or digital context.<sup>31</sup> As with lies, there is no legal or otherwise universally accepted definition of disinformation. But it is commonly regarded as involving the dissemination of objectively false information with the intention to deceive, and usually also entails a further intention to cause some kind of harm, or at least a possibility that such harm may be caused.<sup>32</sup> As noted above, however, lies involve statements that are untruthful (which is not the same thing as being objectively false), and do not require an intent to cause harm, or the causation of harm, although such intent or causation are relevant for their justifiability. (The existence of harm is, of course, be relevant for establishing whether lies interfere with or violate human rights.) I will therefore prefer to use the term lies in this article, in part also to avoid the impression that states only lie online. That said, most state lies that will be examined here would also qualify as disinformation under various definitions of that term. They would not, however, qualify as a misinformation, a term most

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<sup>31</sup> See generally Kate Jones, *Online Disinformation and Political Discourse: Applying a Human Rights Framework*, Chatham House Research Paper (Nov. 2019), at 7; Nicky Deluggi & Cameran Ashraf, *Liars, Skeptics, Cheerleaders: Human Rights Implications of Post-Truth Disinformation from State Officials and Politicians*, 24 Hum. Rts. Rev. 365, 370-2 (2023); Pentney, *supra* note 39, at 13-16.

<sup>32</sup> See Countering disinformation for the promotion and protection of human rights and fundamental freedoms, Report of the Secretary-General, U.N. Doc. A/77/287 (August 12, 2022), para. 3; Irene Khan, 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, U.N. Doc. A/HRC/47/25 (April 13, 2021), paras. 9-15; European Commission, Communication on the European Democracy Action Plan, COM(2020)790 final (December 3, 2020), section 4.

commonly understood as entailing the unknowing or unintentional dissemination of falsehoods.<sup>33</sup>

As defined above, lies exist alongside other forms of deception – any conduct other than statements that intentionally cause another to have a false belief that is known or believed to be false.<sup>34</sup> Clearly, in addition to lying, states can and do engage in such deception. They also can and do engage in manipulation, defined (rather broadly) as forms of influence that are neither coercion nor rational persuasion.<sup>35</sup> And they can also, covertly or overtly, engage in propaganda – systematic or concerted efforts at persuasion, targeting a particular audience, which can include both truthful and untruthful messages.<sup>36</sup>

There is substantial overlap between state lies and other forms of state deception, manipulation or propaganda. In particular, they share some notion of deceptive or manipulative intent. While lies are untruthful statements of fact, they can be wrapped up with ideas, ideologies and narratives laced with opinion, as part of a broader deceptive or manipulative agenda. To take modern Russia as an example, the average Russian citizen is not being bombarded by the state with single, isolated lies about the war in Ukraine – for example, as to whether Russian soldiers committed atrocities in a specific place, like Bucha. Rather, hundreds of individual lies are woven together with ideas ranging from distortions of Russian history, grievances against the West, to Christian morality and the incitement of hatred against sexual minorities, to form a package of deception and manipulation.<sup>37</sup>

The package may include measures that go far beyond other forms of deception – conduct that is not deceptive as such, but is meant to amplify certain messages and suppress

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<sup>33</sup> See, e.g., Jones, *supra* note 31, at 7. Such falsehoods can be disseminated recklessly, negligently, or even entirely innocently. See also the documents cited in *supra* note 32. States may also be responsible for violating human rights by disseminating such falsehoods – see Section VIII below on public health.

<sup>34</sup> Mahon, *supra* note 12.

<sup>35</sup> See generally Robert Noggle, *The Ethics of Manipulation*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2022 Edition), <https://plato.stanford.edu/archives/sum2022/entries/ethics-manipulation/>.

<sup>36</sup> See also Jones, *supra* note 31, at 7, 58-61.

<sup>37</sup> See Gessen, *supra* note 2.

others. For example, the state may punish individuals for speaking, intimidate and harass journalists, close down dissenting media outlets, or block websites and apps. Lies will be part of this package, but the severity and scale of these other measures may be such that they overshadow the lies in any legal discussions of the state's compliance with its human rights obligations. This is only natural, but it also generates a tendency to disregard lies themselves as human rights violations.

### **C. Conclusion as to the Scope of the Article**

To conclude, for the purposes of this article, a state lie is defined as an untruthful statement of fact, made by a person whose conduct is attributable to a state, with the intention of deceiving its addressee to believe that the statement is true. The primary purpose of this article is to analyse the compatibility of such lies with international human rights law. However, as explained, lies will often be part of a much broader package of state conduct that can violate human rights. Indeed, lies are inextricably linked to other, ostensibly more serious types of state misconduct, including violence. To quote Solzhenitsyn:

To prop itself up, to appear decent, [violence] will without fail call forth its ally—Lies. For violence has nothing to cover itself with but lies, and lies can only persist through violence. And it is not every day and not on every shoulder that violence brings down its heavy hand: It demands of us only a submission to lies, a daily participation in deceit—and this suffices as our fealty.<sup>38</sup>

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<sup>38</sup> Aleksandr Solzhenitsyn, *Live Not By Lies* (1974), <https://www.solzhenitsyncenter.org/live-not-by-lies>.

### III. STATE LIES WITHIN THE FRAMEWORK OF INTERNATIONAL HUMAN RIGHTS LAW

#### A. State Lies Distinguished from the State Regulation of Lying

In this article, I will exclusively be addressing the question whether lying by states can violate their human rights obligations, as in the example of (say) the US military targeting the population of the Philippines with lies over social media platforms. That question is categorically different from the one whether states (or social media platforms) may justifiably limit false speech that harms certain interests, such as public health, in line with international standards on freedom of expression.<sup>39</sup> In this latter scenario, the state is attempting to protect certain interests from harm by false speech disseminated by third parties. The issue then is to what extent it can justifiably do so. Can it, for instance, punish an individual who intentionally lies on social media and claims that vaccines cause autism, to prevent the harms to public health, such as lower vaccination rates, that such false speech can cause? Would, in fact, its positive obligation to protect the right to health *require* it to suppress certain types of harmful false speech, by means of criminal law or otherwise?

The scenario that concerns us here, however, is the one in which the state itself lies, to its own people or to those of other countries. And states agents routinely lie, often at the highest level. As noted above, autocracies will do so as a matter of course, but so do democracies. Indeed, their policy to do so may even be baldly stated in some kind of formal document. In some circles, lies will be regarded as somehow obviously justified as a

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<sup>39</sup> See generally Marko Milanovic and Philippa Webb, *False Speech*, in FREEDOM OF SPEECH IN INTERNATIONAL LAW (Amal Clooney and David Neuberger eds., 2024) 220. See also Katie Pentney, *Tinker, Tailor, Twitter, Lie: Government Disinformation and Freedom of Expression in a Post-Truth Era*, 22 HUM. RTS. L. REV. 1, 4-9 (2022); Rebecca K. Helm & Hitoshi Nasu, *Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation*, 21 HUM. RTS. L. REV. 302 (2021).

necessary tool of statecraft. Consider, for example, the following paragraph from a recent unclassified policy paper issued by the U.S. Joint Chiefs of Staff:

With appropriate authorities, the Joint Force can weaponize information to manipulate an adversary's perception of reality by influencing and disrupting social systems and technical connections that are foundational to a modern society. Disinformation, misinformation, and propaganda can trigger a chain of events in an adversary's society that gradually degrades its domestic unity, undermines societal trust in its government and institutions, and diminishes its international stature. Cyberattacks, disinformation spread across social media, false narratives disguised as news, and similar subversive activities weaken societal trust by undermining the foundations of government (e.g., law and order, societal relations, internal politics).<sup>40</sup>

Note just how much hinges here on what the “appropriate authorities” are in considering what kinds of lies directed at the populations of adversary states are considered justified – but clearly, the U.S. military would regard at least some such operations to be such.

The question that falls to be examined in this article is when these lies, as such, violate international human rights law. This, in turn, requires an examination of when lies can interfere with individual rights, and whether such interferences can be justified within the established framework of international human rights law. These questions have not been explored in the literature so far, at least not systematically.

But, a legal analysis of state lies, such as the one that I propose to do here, has deeper roots in international law than one might think. Can we go any deeper than the Ur-international lawyer, Hugo Grotius, whose *De jure belli ac pacis* contains an extensive analysis of the notion of lies and their lawfulness or justifiability?<sup>41</sup> Thus, for Grotius, “a Lye strictly taken, as it is naturally unlawful ... can be nothing else than, the Violation of a real Right,” and this is the right of every person to exercise liberty of judgment.<sup>42</sup> Yet, that right

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<sup>40</sup> U.S. Joint Chiefs of Staff, Joint Concept for Competing (February 10, 2023), <https://www.documentcloud.org/documents/23698400-20230213-joint-concept-for-competing-signed?responsive=1&title=1>, at 27.

<sup>41</sup> Hugo Grotius, *The Rights of War and Peace* (edited and with an Introduction by Richard Tuck, from the Edition by Jean Barbeyrac, Indianapolis: Liberty Fund, 2005), Volume 3, Chapter I, [https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1427/Grotius\\_1032-03\\_EBk\\_v6.0.pdf](https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1427/Grotius_1032-03_EBk_v6.0.pdf).

<sup>42</sup> *Id.*, at 15.



can in some cases be forfeited or overridden by other considerations. Relying on Plato, Grotius argues that a sovereign can lawfully lie to his subjects, at least partly because “Sometimes the common Good requires that some Falshoods should be maintained.”<sup>43</sup> He regards lying as justified to save the life of an innocent (or something equal to it), and also regards it lawful for one to “save his country by deceiving an Enemy”<sup>44</sup> – up to a point. Promises made to the enemy must still be kept, and Grotius indeed devotes several chapters to keeping faith among enemies in wartime.<sup>45</sup>

An investigation of how international law could apply to state lies therefore already reaches back centuries, although that was a very different kind of international law than the one we have today. My purpose here is to present an overarching framework of how state lies should be analysed under modern human rights law, which focuses on the rights of individuals or groups, rather than states. The article will not be looking at other rules of international law which might be implicated, such as the principle of non-intervention.<sup>46</sup> It will cover a broad array of rights, but not all rights and issues that could be examined in this context.

## **B. Lies by State Agents as Interferences with Human Rights**

Because the article exclusively addresses scenarios in which state agents lie, it is mainly concerned with the state’s negative duty to respect human rights, that is, its obligation to refrain from conduct (which may consist solely of lies, or lies in combination with other

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<sup>43</sup> Id., at 17.

<sup>44</sup> Id., at 18.

<sup>45</sup> Id., Chapters XIX-XXV. In this article, I will not be discussing specific issues that may arise out of lying in wartime, includign the relationship between human rights and international humanitarian law.

<sup>46</sup> See more MARCO ROSCINI, INTERNATIONAL LAW AND THE PRINCIPLE OF NON-INTERVENTION (2024); Marko Milanovic, *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, 117 AJIL 601 (2023); Henning Lahmann, *Infecting the Mind: Establishing Responsibility for Transboundary Disinformation*, 33 EJIL 411 (2022).

acts) that adversely affects a protected human right. Therefore, the main question that arises in the scenarios I will examine below is whether the state lie constitutes an interference (restriction, limitation) with a protected right.

As the examples discussed below will show, the existence of an interference is a function of the harm that the state lie causes, or could cause. Only those state lies that by their impacts or effects on individuals interfere with the interests of those individuals, interests that properly fall within the scope of a recognized human right, can be evaluated from a human rights standpoint. Most state lies will not do so. If, for example, a state official untruthfully denies that the state conducted espionage against an adversary and stole their military secrets, this has nothing to do with human rights. There is no individual here whose interests, as protected by international human rights law, are in any way implicated by that lie. The legality of that lie can only be assessed against some other benchmark.

Most lies by state officials are a political or moral problem, to be addressed in the political arena. Consider the example of an inveterate liar such as the former British Prime Minister, Boris Johnson, a man to whom lying is as natural as breathing.<sup>47</sup> But even his most brazen and consequential lies, such as the one that leaving the European Union would release hundreds of millions of pounds per week that could be used to bolster British public services, are not really a human rights problem. It is not law, but politics, that can provide a solution (or not) to his poisoning of the public discourse.<sup>48</sup> However, some lies by state officials are a human rights problem.<sup>49</sup> This will be the case when a lie affects the specific legal interests of individuals protected by human rights law.

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<sup>47</sup> See, e.g., Sarah Lyall, *Johnson's Lies Worked for Years, Until They Didn't*, The New York Times (July 8, 2022), <https://www.nytimes.com/2022/07/08/world/europe/boris-johnson-lies-britain-parliament.html>.

<sup>48</sup> See also *R (Boris Johnson) v Westminster Magistrates Court* [2019] EWHC 1709 (Admin) (High Court dismissing a private prosecution against Johnson for misconduct in public office on account of his lying, ruling that the statements in question were not made in his capacity as a public official, but as a political campaigner).

<sup>49</sup> As affirmed by the U.N., OSCE, OAS and African special mandate-holders on freedom of expression: "State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda)." Special Mandates on Freedom of Expression, Joint Declaration on Freedom of Expression and

### C. Justified State Lies?

If a state lie constitutes an *interference* with a human right due to the harm that it causes, or could cause, the lie would constitute a *violation* of that right if it cannot be justified. I will deal with this justification issue relatively briefly. This is perhaps surprising, since the justifiability of lies is the *central* question of the moral philosophy of lying. It is the question on which the various approaches to ethics – for instance, deontological, consequentialist or aretaic – show their differences.<sup>50</sup> Consider, here, Kant’s famously absolutist approach to the prohibition against lying in his example of the murderer knocking at the door and asking about the whereabouts of his intended victim.<sup>51</sup>

Philosophers have also examined the justifiability of *state* lies. For Plato, for example, it is the rulers of the state – his ideal republic, governed by philosopher-kings rather than by the Trumps of the world – that can have the privilege of lying, exercised for the public good. In his view, it is wrongful for ordinary citizens to lie to their rulers, much like it would be wrong for a patient to lie to their doctor, but rulers can lie to their subjects.<sup>52</sup> (A position that would be more antithetical to democracy and human rights than this one would be difficult to imagine.) For Grotius, too, lying can sometimes be justified,<sup>53</sup> because “it is not a criminal Lye, when he who has an absolute Right over all the Rights of another [i.e. the sovereign],

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“Fake News”, Disinformation and Propaganda, FOM.GAL/3/17 (Mar. 3, 2017) [hereinafter “Joint Declaration on Fake News”], para. 2(c).

<sup>50</sup> See more Noggle, *supra* note 35; THOMAS L. CARSON, LYING AND DECEPTION: THEORY AND PRACTICE (2010); Paul Faulkner, *What Is Wrong with Lying?*, 75 *Philosophy and Phenomenological Research* 535 (2007).

<sup>51</sup> See, e.g., Helga Varden, *Kant and Lying to the Murderer at the Door ... One More Time: Kant's Legal Philosophy and Lies to Murderers and Nazis*, 41 *Journal of Social Philosophy* 403 (2010).

<sup>52</sup> Plato, *The Republic* (book III), at <https://www.gutenberg.org/files/1497/1497-h/1497-h.htm>. Book III later sets out the notion of a “noble lie” through the so-called parable of the metals, which I will not discuss further.

<sup>53</sup> See *supra* note 43 and accompanying text.

makes use of that Right, in telling something false, either for his particular Advantage, or for the publick Good.”<sup>54</sup>

From the perspective of human rights law, the justifiability of lying by state agents is a simpler matter. If a lie by a state official is, on some specific facts, an interference with the human rights of an individual, its justifiability depends on the nature of the right being restricted. An absolute right can never be justifiably limited. This is why much depends on how the scope of that right is to be understood, and why threshold inquiries regarding the applicability of absolute rights often involve implied judgments about justifiability. In the context of state lies, the three absolute rights that are most relevant are the freedom of opinion, the prohibition of enforced disappearances, and the right to be free from ill-treatment.

Thus, for example, in the context of the prohibition of torture, cruel, inhuman or degrading treatment or punishment, the key question is whether certain treatment of an individual by a state agent rises to a minimum threshold of severity or suffering to constitute a violation of the protected interests of that individual. So, if a police officer threatens the kidnapper of a child with torture to compel him to disclose the child’s location, and *lies* when making that threat (i.e. he would never have carried it out), the threat, truthful or not, causes mental suffering that rises, at a minimum, to the level of inhuman treatment.<sup>55</sup> Or, a police officer who, in order to extract a confession, lies to a person in custody about their loved ones being dead or tortured would be causing through that lie harm that would cross the minimum threshold of absolutely prohibited ill-treatment. In this scenario, no further justification

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<sup>54</sup> Id., at 17.

<sup>55</sup> See *Gäfgen v. Germany*, App. No. 22978/05 (2010), paras. 107-8.

analysis would legally be allowed, since the right concerned is absolute and admits of no limitations.<sup>56</sup>

However, most human rights are qualified, and can be justifiably limited if certain requirements are met. There are textual differences between treaties and between different provisions within any given treaty, with unjustified restrictions often framed as those that are arbitrary, unreasonable or unnecessary. These textual differences aside, the jurisprudence of human rights bodies has now coalesced around a structured proportionality test which applies to most qualified rights, and has the following steps:

- (1) Legality – the restriction must be provided for (prescribed by) law;<sup>57</sup>
- (2) Legitimacy – the restriction must pursue an enumerated legitimate aim;<sup>58</sup>
- (3) Necessity and proportionality – a combined operation that involves a series of sub-steps: (a) the restriction must be capable of advancing the legitimate aim being pursued; (b) less restrictive means must have been exhausted or contemplated; (c) the restriction must strike a fair balance between the legitimate aim pursued and the harm done to the individual whose rights are being restricted (proportionality *stricto sensu*).<sup>59</sup>

This justifiability test incorporates several modes of moral reasoning. The legitimacy prong of the test will categorically preclude justification if the purpose being pursued is seen as illegitimate (for example, the suppression of pluralism or dissent). Proportionality *stricto sensu*, on the other hand, is generally consequentialist in character.

The first, legality requirement, which includes elements of clarity, accessibility and transparency, is an odd fit for state lies. It is not easy to think of national laws expressly

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<sup>56</sup> Gäfgen, para. 107 (“The philosophical basis underpinning the absolute nature of the right under Article 3 [ECHR] does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.”)

<sup>57</sup> See General Comment No. 34, paras. 24-27.

<sup>58</sup> See General Comment No. 34, paras. 22-23.

<sup>59</sup> See General Comment No. 34, paras. 33-36; see also AHARON BARAK, PROPORTIONALITY (2012).

saying that, in some appropriate circumstances, a state official may lie. If such circumstances exist, the law will either not be in place at all, and the justification test will fail for that reason, or the law being relied on will be very vague.

I can think only of a couple of examples in which domestic laws explicitly authorize lying. First, laws authorizing the use of undercover police agents in the context of an investigation, e.g. to infiltrate a criminal organization. Such undercover agents will be lying all the time, but normally with a legitimate aim, protecting public order and preventing crime. The same would go, in principle, for laws authorizing lying or deception by state agents conducting espionage or counter-espionage for national security purposes, although, as I explained above, most such instances will not involve an interference with individual rights. Second, laws authorizing police agents to impersonate a victim or a potential victim in order to snare a suspect – for instance, an agent posing as a vulnerable child on a digital platform in order to obtain evidence against persons producing or trafficking in child sexual abuse material.<sup>60</sup> Again, these state agents will inevitably be lying in their work; to the extent that such lying would interfere with the human rights of the suspects (and it would rarely do so), it would be regarded as justified under other prongs of the test.<sup>61</sup> Obviously, in both types of cases the authority to lie can be abused and any justification would be lost.<sup>62</sup> For example, the state agent may enter into deceptive relationships, even those resulting in children, with the

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<sup>60</sup> See, e.g., *Richard Dewitte condamné à trois ans de prison pour corruption de mineure* (Sept. 9, 2023), <https://www.20minutes.fr/justice/4053726-20230919-richard-dewitte-condamne-trois-ans-prison-corruption-mineure> (French police officer impersonating a 13-year old girl on an online forum).

<sup>61</sup> See *Sutherland v Her Majesty's Advocate* (Scotland) [2020] UKSC 32 (UK Supreme Court holding that the right to private life was not interfered with when citizen “paedophile hunters” impersonated children online in order to snare suspects and transferred that information to the police).

<sup>62</sup> See, e.g., the Undercover Policing Inquiry in England and Wales, documenting since 2014 abuses of undercover policing for decades, including deceiving women into intimate relationships and spying on social justice organizations, at <https://www.ucpi.org.uk/about-the-inquiry/>.

express purpose of bolstering their fake identity, causing injury to their partner's right to private life.<sup>63</sup>

The legitimacy prong of the justification test will capture most cases of states lies examined in this article. In almost all these cases, in communicating a lie, state agents are acting not only with an intention to deceive. They are also doing so without pursuing any aim regarded as legitimate for the restriction of qualified human rights. In fact, they most often do so with an ulterior purpose, such as the suppression of criticism and dissent, which is categorically impermissible. This is evident in scenarios, discussed below, in which journalists, civil society or political activists are targeted with smear campaigns, or voters are being manipulated, or elections are being stolen. Most state lies will, therefore, fail the legitimacy prong of the justification test – not because of the lie, but because of the reason behind the lie.

There may, however, be exceptional cases in which a lie both interferes with a human right and pursues a legitimate aim in doing so. One possible example would be a situation in which state officials lie to the public about the impact of a health crisis, a natural disaster or an act of violence, in order to prevent panic, disorder or riots that could ensue if they told the public the truth. The notion that lying can be justified to save lives has substantial support in the philosophical literature.<sup>64</sup>

Similarly, in the undercover policing context discussed above, the state lies do pursue a legitimate aim – protecting public order by investigating crime. And we could also think of cases in which lying could be justified by reasons of national security, although most such cases will not entail an interference with human rights at all.

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<sup>63</sup> See Rob Evans, *Revealed: at least 25 UK 'spy cops' had sex with deceived members of public*, The Guardian (Mar. 2, 2025), <https://www.theguardian.com/uk-news/2025/mar/02/revealed-at-least-25-uk-spy-cops-sexual-relations-deceived-women>.

<sup>64</sup> See, e.g., Grotius, *supra* note 41, at 17. See also Carson, *supra* note 50, at 208-231 (arguing that lies by state leaders may exceptionally be justified to save life, in particular to prevent war).

In this limited number of cases in which a legitimate aim could be adduced for interfering with human rights by means of a lie, the state would still need to satisfy the criteria of necessity and proportionality. Cases in which these criteria will be met will be rare. It is easier to point to cases in which they are not met.

Consider, for instance, the US disinformation campaign regarding Chinese vaccines targeting the population of the Philippines.<sup>65</sup> Even on the generous assumption that this campaign pursued the legitimate aim of protecting US national security, the adverse impact of such lies on the public health of the population of the Philippines is clearly disproportionate when compared to any speculative national security advantage the US could have gained – which could have been obtained through many other measures, such that did not entail harm to the right to health of ordinary Filipinos.

A somewhat more difficult example would be the use of lying or other forms of deception by the police (or other security services) during their interrogation of suspects. For example, in order to elicit a confession, a police officer might lie to a suspect, e.g. by falsely claiming that there is physical evidence connecting them to the crime or that one of their accomplices has already confessed. It is safe to say that the police in many states lie in this manner – in some states this practice is even formalized through interrogation policies or manuals and approved of in case law.<sup>66</sup>

Such a practice of police deception can interfere with human rights, in particular the right to a fair trial, which includes the right not to incriminate oneself. If it obtains judicial or legislative approval, it can satisfy the legality criterion of the justification test, and, as a general matter, it also satisfies the legitimacy criterion, since it pursues the protection of public order. The difficult issue is whether this kind of lying fails the necessity and

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<sup>65</sup> *Supra* note 6 and accompanying text.

<sup>66</sup> In the United States, see *Frazier v. Cupp*, 394 U.S. 731 (1969). See also David Dixon, *Questioning Suspects: A Comparative Perspective*, 26 J. CONTEMP. CRIM. JUST. 426 (2010).



proportionality prongs of the test, due to the tendency of these deceptive practices to produce many false confessions.<sup>67</sup> The psychological pressure resulting from deftly deployed lies can be such that even an innocent suspect, especially a vulnerable one, can find it difficult to resist – to the point of falsely confessing to a crime they did not commit.<sup>68</sup> States that do not resort to deception in interrogation and use non-adversarial, information-gathering interrogation methods can still effectively prosecute crime, which points to an absence of necessity for authorizing state lies in this context.<sup>69</sup>

Even so, it is possible that *some* forms of lying by state agents during interrogations could be justified, especially if the interrogation is not being done for the purpose of eliciting a confession that could later be used in a criminal trial, but is used, for instance, to induce the target to disclose relevant material evidence. To put this differently, this is not a context in which *all* lies by state agents can be said to be *categorically* unjustifiable – the necessity and proportionality of the lies or other deception in question will at least in some cases be heavily factually contingent.<sup>70</sup>

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<sup>67</sup> See, e.g., Irina Khasin, *Honesty is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT'L L. 1029, 1040 (2009); Innocence Project, DNA Exonerations in the United States (1989 – 2020) (29% of cases of post-conviction exonerations using DNA evidence in the US involved false confessions);

<sup>68</sup> See generally Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. Hum. Behav. 3 (2010) (white paper of the American Psychology-Law Society setting out the relevant evidence).

<sup>69</sup> See American Psychological Association, *Resolution on interrogations of criminal suspects* (2022), <http://www.apa.org/about/policy/interrogations.aspx>. See also Jacqueline Ross, *Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany*, 28 OXFORD J. LEGAL STUD. 443 (2008).

<sup>70</sup> To my knowledge, there are no litigated cases before human rights courts and treaty bodies in which lying by state agents during interrogation was directly at issue. However, human rights bodies have had cases on the use of police informants to elicit confessions, such as a prisoner sharing a cell with another inmate, and the impact of the use of such cover techniques on the right to a fair trial. The European Court has relied on a fact-specific inquiry into the voluntariness of such confessions, as in other cases in which police pressure could amount to coercion or duress. The use of lies and deception during interrogations would be subject to the same analysis. See more AMAL CLOONEY & PHILIPPA WEBB, *THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW* 629-632 (2021). Outside the litigation context, the UN Special Rapporteur on torture has criticised the use of lying and deception in interrogation – see Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/71/298 (2016), para. 40 (“Misleading practices include the use of trickery or deception, including by presenting false evidence, confronting persons with false witnesses or leading one to believe that his or her co-defendants have confessed. These methods are improper because they ultimately deprive a person of his or her freedom of decision through the use of false representations.”)

This example helpfully illustrates, I hope, that “hard” cases in which the justification of state lies that interfere with human rights falls under the necessity and proportionality prongs of the test, with an uncertain outcome, will be rare. In most cases the justification issue will tend to be straightforward.

#### **D. Conclusion on State Lies in the Human Rights Framework**

To summarize: if a state agent lies, and that lie constitutes an interference with an absolute human right, that right will *ipso facto* be violated. If, by contrast, the lie interferes with a qualified right, the burden will be on the state to justify this interference. In the great majority of cases, the state will fail to meet this burden under any plausible justification analysis. This will most frequently be the case because the aim the state is pursuing when lying is illegitimate. Even if the legitimacy prong of the justification test is met, state lies will fail the necessity and proportionality prongs of the test in all but the most exceptional cases.

Most of the analysis that follows will therefore explain how state lies interfere with human rights in different contexts. In all but a few cases, the existence of the interference will determine the existence of a violation, since no plausible justification can be offered. My examination of possible justifications will therefore tend to be brief.

When it comes to lies as interferences with human rights, as explained above they can either do so as part of a broader package of state conduct, or standing alone. In both cases it is the harm that the lie causes, or can cause, that produces the interference. In the former situation, lies can simply be a contributing factor, one of many, to the interference and violation. Or, they can be a *necessary* condition, without which the violation cannot be completed. There are numerous situations in which lying by state authorities is integral to the ultimate violation, even if it is somehow overshadowed by it.

Finally, lies can be a *sufficient* condition for the interference and violation, in that it is the lie alone that constitutes the interference, due to the harm it produces. In that case, the lie can be one of many ways in which the violation can be done (for example, to incite violence against, or harass and inflict reputational harm on, a journalist), or it can be fairly unique in how the interference is caused (the latter cases are more interesting, and will be explored in more detail).

State lies can interfere with the rights of a single individual. Or, they can be done on such scale and with such harms that they potentially have millions of victims, implicating not only the interests of the individuals affected but those of the whole of society or democratic governance more broadly. I will not discuss here the practicality of litigating cases before human rights bodies, especially in situations of large-scale violations. I would simply note in that regard that the position here is no different than if a state commits other large-scale violations, for example, if it subjects millions of people to unjustified censorship or intrusive surveillance or inhibits their right to peaceful protest.

Let us now turn to the case studies.

#### **IV. STATE LIES AS MEANS OF INCITING HUMAN RIGHTS VIOLATIONS, INCLUDING UNLAWFUL VIOLENCE**

I will turn to our first scenario both because it is the simplest and because it shows how, depending on the purposes behind the lie and its effects, a state lie can simultaneously violate several human rights. In this scenario, a state uses lies to incite others to commit human rights violations.<sup>71</sup> Consider, for example, the case of a state official falsely claiming that a murder, rape or some other crime was committed by an immigrant or a member of a particular

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<sup>71</sup> See Deluggi & Ashraf, *supra* note 31, at 381.

minority, in order to incite violence against that group, and then proceeding to disseminate that message over social media or otherwise amplify it. In such a situation the lie is a means towards an end, an end that is already categorically unlawful. The lie is but a first step in a chain of conduct that violates, for instance, the right to life or the prohibition of torture and other forms of ill-treatment.<sup>72</sup>

Rights other than those protecting physical integrity can be violated in a similar fashion. If a journalist or an opposition leader are being targeted by the state for what they are saying, there will be a further violation of freedom of expression. If a person is being targeted on the basis of a protected characteristic, such as sex, gender, sexuality, religious or ethnic minority status, there will be a further violation of the prohibition of discrimination.<sup>73</sup> And so forth. A whole group may be targeted in this way – consider, for example, how the military of Myanmar used a network of fake accounts on Facebook (a type of state lie) to systematically disseminate hateful propaganda and incitement to violence against the Rohingya minority.<sup>74</sup>

The legal analysis here is straightforward. If a state incites unlawful violence and other human rights violations, through lies or otherwise, the state will inescapably be responsible for these violations. Even in a scenario in which violence or some other form of ill-treatment does not actually occur, there would still be a human rights violation on account of the (unsuccessful) *incitement* to such acts. The issue, in other words, is not that the state lied, but that the lie was used to incite or harass, and that the acts being incited are themselves unlawful. In some instances, lies may be *necessary* for the incitement to work – in the Myanmar example above, the military was hiding behind thousands of fake accounts because this was a more effective way of mobilizing public opinion than if it was done overtly. In other cases, lies will simply be one among many useful tools of incitement.

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<sup>72</sup> See also Resolution 76/227, *supra* note 11, op. paras. 3, 5 & 6.

<sup>73</sup> See Khan, *supra* note 32, paras. 22-29.

<sup>74</sup> See U.N. Independent Investigative Mechanism for Myanmar, *Anti-Rohingya Hate Speech on Facebook: Content and Network Analysis* (Mar. 27, 2024), <https://iimm.un.org/analytical-reports/>.

A scenario such as this one most commonly arises within state boundaries, when state officials use lies to target minorities, dissidents, human rights defenders or journalists.<sup>75</sup> But it can also easily occur across state boundaries. For example, a state may conduct a disinformation campaign over social media to incite disorder and violence in an adversary state, either more generally or targeting specific individuals. It has been reported, for instance, that during the 2024 racial riots in the UK China used fake social media accounts, which in turn disseminated lies, to incite violence against Hong Kong activists living in the UK.<sup>76</sup>

A somewhat particular variant here is the rule found in Article 20(1) ICCPR, under which “[a]ny propaganda for war shall be prohibited by law.”<sup>77</sup> This article, to which many Western states made reservations upon ratification or accession to the Covenant, does not define either of its core terms, “propaganda” and “war.”<sup>78</sup> The Human Rights Committee has

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<sup>75</sup> See, e.g., Siegfried D. Deduro Vs. Maj. Gen. Eric C. Vinoya, in his capacity as Commanding Officer of the 3rd Infantry Division, Philippine Army, G.R. No. 254753 (July 4, 2023), at 21-24, 33-36 (the Supreme Court of the Philippines ruling that the practice of “red-tagging” or “red-baiting,” that is, falsely accusing an individual of being a communist activist, by a high-ranking military officer was unlawful as a form of threat to the victim’s right to life, liberty or security). See also Neelanjan Sircar, *Disinformation: A New Type of State-Sponsored Violence*, The India Forum (Sept. 15, 2021), <https://www.theindiaforum.in/article/disinformation-new-type-state-sponsored-violence> (reporting on the use of disinformation to incite hatred and violence against the Muslim minority in India); Shakuntala Banaji & Ram Bhat, *Disinformation against Indian Muslims during the COVID-19 pandemic*, LSE Blog (Sept. 24, 2020), <https://blogs.lse.ac.uk/medialse/2020/09/24/disinformation-against-indian-muslims-during-the-covid-19-pandemic/> (same).

<sup>76</sup> See, e.g., Tom Burgis and Maeve McClenaghan, *Revealed: online campaign urged far right to attack China’s opponents in UK*, The Guardian (Apr. 28, 2025), <https://www.theguardian.com/world/2025/apr/28/revealed-online-campaign-urged-far-right-to-attack-chinas-opponents-in-uk>. These cases raise the question of the extraterritorial application of human rights, which is dealt with below, Section X.

<sup>77</sup> A very similar provision is found in Article 13(5) ACHR, which I will not discuss separately.

<sup>78</sup> See MANFRED NOWAK, *CCPR COMMENTARY* 471-4 (2<sup>nd</sup> ed., 2005); PAUL M. TAYLOR, *A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 581, 589 (2020).

provided little guidance on the meaning of this provision, which has rarely featured in its work,<sup>79</sup> and has not received much by way of academic attention.<sup>80</sup>

Article 20(1) ICCPR has recently been examined lucidly by Evelyn Aswad.<sup>81</sup> I have little to add to her analysis. Very briefly, it is reasonably clear that the notion of “war” in this article will only cover *unlawful* uses of force, those contrary to the UN Charter, and not, for example, wars waged on the basis of self-defence or pursuant to a UN Security Council mandate.<sup>82</sup> Nor does it cover conflicts internal to a state. Whether the term “war” should be confined solely to aggression, or would also cover less serious violations of the prohibition on the use of force in Article 2(4) of the Charter, is not as clear.<sup>83</sup>

It is also not clear whether the term “propaganda” *requires* lying or other forms of deception, which are of interest to us here.<sup>84</sup> Propaganda can contain lies or be manipulative or deceitful, but it need not always be such.<sup>85</sup> That is, propagandistic messaging can be truthful, or it can focus on ideas and emotions in a manner that avoids statements susceptible to objective proof. Simply empirically, though, it is difficult to imagine a concerted propaganda effort by a state, targeting internal or external audiences to justify a war of aggression, that would not contain a multitude of lies. Putin’s propaganda regarding the war against Ukraine would be a prime example.

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<sup>79</sup> Its general comment on the provision is now forty years old and is literally a one-pager – see U.N. Hum. Rts. Comm., General Comment No. 11: Prohibition on Propaganda for War and Inciting National, Racial, or Religious Hatred (Art. 20), U.N. Doc. CCPR/C/GC/11 (July 9, 1983) [hereinafter General Comment No. 11]. The Committee has also more recently commented briefly on the connection between the state duty to prevent propaganda for war and the state duty to protect the right to life – see U.N. Hum. Rts. Comm., General Comment No. 36: Article 6: Right to Life, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019), para. 59. The Committee’s General Comment on freedom of expression discusses Art. 20 very briefly – see General Comment No. 34, paras. 50-52.

<sup>80</sup> A notable exception is MICHAEL G. KEARNEY, *THE PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW* (2007).

<sup>81</sup> See Evelyn Aswad, *Propaganda for War & International Human Rights Standards*, 24 CHI. J. INT’L L. 1 (2023)

<sup>82</sup> See General Comment No. 11, para. 2. See also Nowak, *supra* note 78, at 473.

<sup>83</sup> See Aswad, *supra* note 81, at 24-27.

<sup>84</sup> *Id.*, at 8.

<sup>85</sup> See also Jones, *supra* note 31, at 7, 58-61

Article 20 is framed as a positive obligation of the state to punish certain types of statements by individuals, usually by means of criminal law. That leaves the question whether *state* propaganda is covered by this provision, that is, whether a negative duty *not* to engage in such conduct can be implied in the positive obligation. This can be done without much difficulty.<sup>86</sup> It would be manifestly absurd for Article 20 not to directly cover the state lies of a Goebbels or a Streicher.<sup>87</sup>

In sum, state lies that form part of propaganda for war can violate Article 20(1) ICCPR. As with incitement to human rights violations more generally, the core point remains – it is not the lie as such that violates human rights, but the fact that it constitutes (or is part of) propaganda for unlawful war, essentially as a form of incitement to human rights violations writ large.<sup>88</sup> Propaganda for a *lawful* war, even one done through lies, would not violate Article 20(1) – consider, for instance, the case of a state victim of aggression using propaganda, including lies, to mobilize its population to fight against the aggressor.<sup>89</sup> Propaganda using lies by the victim of aggression may, however, violate other human rights.

Some uncertainties remain. In particular, for our purposes, it is unclear whether a violation of Article 20(1) ICCPR by a state is solely a violation of its obligations towards the other states parties to the treaty, or whether it also violates the human rights of some specific individuals, who are properly to be considered victims of such violations. If an aggressor

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<sup>86</sup> See Kearney, *supra* note 80, at 142-7; Aswad, *supra* note 81, at 28; U.N. Hum. Rts. Comm., General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/GC/21/Rev.1/Add. 11 (Aug. 31, 2001), para. 13(e) (a State Party may not invoke a state of emergency to “engage itself, contrary to article 20, in propaganda for war”). See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 166 (Feb. 26) (interpreting Article I of the Genocide Convention, which expressly contains a positive duty to prevent genocide, and holding that it would be paradoxical if this provision did not contain an implied negative obligation for states not to commit genocide through their own organs or agents – “the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide”).

<sup>87</sup> See also Nowak, *supra* note 78, at 472-3.

<sup>88</sup> See OSCE Office of the Representative on Freedom of the Media, Propaganda and Freedom of the Media, Non-Paper (2015), <https://www.osce.org/files/f/documents/b/3/203926.pdf> [hereinafter OSCE Non-Paper], at 14.

<sup>89</sup> See also Aswad, *supra* note 81, at 11, 14, 24, 26.

state primarily directs propaganda for war, including lies, against its own population, is it the population of the aggressor – for instance, Russia – that is the victim of an Article 20 violation? Or is it rather the population of the victim of aggression – for instance, Ukraine? Or is it both? Or is it only the state of Ukraine, together potentially with other parties to the treaty? In the absence of any jurisprudence on this issue, little else can usefully be said on the matter.

## V. STATE LIES AS MEANS OF PUNISHMENT, HARASSMENT OR INTIMIDATION

The second scenario we will look at is closely related to the first. A state may use lies, for instance by inflicting reputational harm, as a means of punishing, harassing or intimidating individuals for exercising their human rights, such as freedom of expression or the right to participate in public affairs.<sup>90</sup> Consider the situation of an individual who is a journalist or a political activist. The state wishes to punish that individual for exercising their rights in a manner that the authorities do not approve of. State agents thus manufacture a sexually explicit deepfake video of that individual, which they circulate on social media platforms.

In such a situation, the individual would be a victim of a violation of the right to private life, on account of injury to their dignity and reputation.<sup>91</sup> Moreover, the nature of the fabrication might be such that the psychological or moral injury caused by it rises to the level

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<sup>90</sup> See, e.g., Patrik Szicherle and Péter Krekó, *Disinformation in Hungary: From fabricated news to discriminatory legislation*, Heinrich-Böll-Stiftung (June 7, 2021), <https://eu.boell.org/en/2021/06/07/disinformation-hungary-fabricated-news-discriminatory-legislation> (documenting state-sponsored disinformation against opposition politicians and civil society activists and organizations in Hungary); Rowan Philp, *Smear Campaigns, Oligarch Media, and Street Gangs: Serbia's Embattled Investigative Media Are a Warning to the World*, GIJN (May 31, 2021), <https://gijn.org/stories/smear-campaigns-oligarch-media-and-street-gangs-serbias-embattled-investigative-media-are-a-warning-to-the-world/> (documenting state-sponsored smear campaigns against independent journalists in Serbia).

<sup>91</sup> See Joint Declaration on Fake News (preamble) (“*Emphasising* that some forms of disinformation and propaganda may harm individual reputations and privacy, or incite to violence, discrimination or hostility against identifiable groups in society”).



of degrading treatment or punishment.<sup>92</sup> Consider, for example, a case in which the state intentionally operated AI chatbots posing as deceased members of an individual's family, in order to cause them psychological injury.<sup>93</sup> The person concerned would also be a victim of a violation of their right to freedom of expression or their right to participate in public affairs – exercising these rights being the illegitimate reason for which the state targeted them, and which the harm caused by the state lie impeded.<sup>94</sup>

A good reference point here would be the European Court's judgment in a case brought by dozens of civil society and media organizations working in Russia, as well as their staff members, to whom the Russian state had applied a law labelling them as "foreign agents," while imposing various other penalties on them.<sup>95</sup> The Court found that the Russian foreign agents law violated the applicants' freedoms of expression and association, as well as the right to private life, holding, in the relevant part, that:

[The applicants] were stigmatised in the eyes of society due to their perceived association with foreign interests. The Court acknowledges that the applicants continue to bear the burden of this stigma, which may, in and of itself, constitute an impediment to establishing contacts with the outside world, whether in the context of employment or otherwise. ... the "foreign agent" designation was not only stigmatising but also misleading, as it gave the distorted impression that the designated individuals were acting in the interests of a foreign entity, despite a lack of evidence to substantiate such a claim. ... As the "foreign agent" designation does not require evidence of any actions undertaken in the interests of foreign entities, it cannot be considered necessary for achieving the declared aim of enhancing national security or increasing transparency. ... This fundamental flaw in the legislation pertaining to "foreign agents" undermines any possible justification for the various forms of interference with the applicants' private lives. Given that the applicants' connection,

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<sup>92</sup> See Amnesty International, *Red-tagging and state violence against young human rights defenders in the Philippines* (Oct. 14, 2024), <https://www.amnesty.org/en/documents/asa35/8574/2024/en/> (documenting the use of false claims of communist affiliation or activism by state actors as a means of punishing or harassing young human rights defenders, and concluding that the practice violates freedom of expression and various other rights).

<sup>93</sup> See Ashley Belanger, *Mom horrified by Character.AI chatbots posing as son who died by suicide*, Ars Technica (Mar. 20, 2025), <https://arstechnica.com/tech-policy/2025/03/mom-horrified-by-character-ai-chatbots-posing-as-son-who-died-by-suicide/> (discussing a lawsuit against a private company negligently allowing such chatbots).

<sup>94</sup> See also U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report on Rights to freedom of peaceful assembly and of association, U.N. Doc. A/HRC/41/41 (2019), para. 79 (calling on states to "[e]nd all acts of government-sponsored online trolling, intimidation and disinformation targeted at civil society actors.)

<sup>95</sup> *Kobaliya and Others v. Russia*, App. Nos. 39446/16 and 106 others (Oct. 22, 2024).

let alone dependence, on any foreign entity has not been established and the misleading label has been applied without evidence, the publication of their personal data online did not serve any public interest.<sup>96</sup>

Like in the first scenario, the lie can simultaneously violate several rights – some directly, because the content of the lie implicates a particular interest of the individual (such as their reputation), and some indirectly, because of the reasons motivating the smear campaign. The Russian “foreign agents” law, and its progeny in other countries, are also good examples of how a *legislature* can lie.

As in the first scenario above, the state lie is a means towards end – punishing the individual for engaging in protected activity.<sup>97</sup> The legal position would be no different if the state used some means of punishment other than lies, for example if the sexually explicit video was actually genuine rather than a fake, or if the punishment was meted out by non-verbal methods, e.g. by arresting or maliciously prosecuting them, or causing a journalist or a whistleblower to get fired from their job.<sup>98</sup>

That said, it is important to note that lying by state agents is *necessary* for many human rights violations of this kind. The paradigmatic example here – one that often involves coordinated lying and deception, and then culminates in other actions of executive, prosecutorial and judicial authorities – is the fabrication of criminal charges against political opponents.<sup>99</sup> State lies are integral to this type of violation, which simply cannot be committed without them. But, in all of the examples above the lie was also a *sufficient* condition for a violation: the lie alone, through the reputational or other harm it produced, or could have produced, sufficed for the violation to occur.

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<sup>96</sup> Id., paras. 111-113.

<sup>97</sup> See also Countering Disinformation, *supra* note 32, para. 60(i).

<sup>98</sup> See, e.g., Gadzhiyev and Gostev v. Russia, App. Nos. 73585/14 and 51427/18 (Oct. 15, 2024) (European Court finding a violation of freedom of expression because two state employees were fired for publicly discussing matters of general interest). See also Nowak, *supra* note 78, at 449-50.

<sup>99</sup> See, e.g., Tolga Şirin, *Judicial Harassment in Turkey: The İmamoğlu Case and the ECtHR’s Crucial Role*, Verfassungsblog (Apr. 2, 2025), <https://verfassungsblog.de/judicial-harassment-in-turkey-imamoglu/> (discussing the arrest of a leading opposition figure in Turkey on trumped-up charges).

Finally, it should be noted that this type of state lie can be directed at entities other than natural persons. To the extent a human rights treaty protects the rights of legal entities, such as companies or non-governmental organizations, state lies against them, which constitute a form of penalization or harassment, could violate the free speech and reputational interests of such entities<sup>100</sup> – consider the example of a state-run smear campaign against an independent investigative organization.<sup>101</sup>

## **VI. SYSTEMATIC STATE LIES AND FREEDOMS OF THOUGHT, OPINION AND EXPRESSION**

### **A. Generally on These Freedoms**

In the two previous cases studies we could see how freedom of expression could be violated by state lies that directly harm other interests, such as privacy or bodily or moral integrity, on the basis that an individual is targeted to punish them for speaking. In this case study, however, we will see how state lies – especially lies done systematically or at scale – can directly, immediately harm interests of individuals that are protected under the rubric of several interconnected freedoms.

The Universal Declaration of Human Rights, the ICCPR and regional treaties all protect freedom of thought, conscience and religion; freedom of opinion; and freedom of expression. There is substantial overlap between these rights. While they are formally regarded as distinct, it is exceedingly difficult – and not terribly helpful – to attempt to strictly delineate them. In particular, it is difficult to distinguish between the freedoms of

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<sup>100</sup> See Kobaliya and Others v. Russia, *supra* note 95.

<sup>101</sup> See, e.g., Eastern Frontier Initiative Consortium, *Smear Campaign Against Our CEE Consortium* (Aug. 26, 2024), <https://easternfrontier.eu/eastern-frontier/7,193611,31253196,smear-campaign-against-our-cee-consortium.html> (detailing a smear campaign by Hungarian authorities, using state-controlled media, against various independent investigative and reporting organizations).

thought and opinion, except that the former is often associated with religious and philosophical beliefs while the latter has no such connotation.<sup>102</sup> Some distinctions drawn in the literature, for example that freedom of thought is about the mental *process* while freedom of opinion is about the *outcome* of that process, are – in my opinion – artificial and do not follow directly from any principle of treaty interpretation.<sup>103</sup> Obviously, conflating the freedoms of thought and opinion could also be said to run against the *effet utile* principle of interpretation, but I personally see no useful difference between them.<sup>104</sup> Indeed, while the UDHR and the ICCPR formally draw this difference by enshrining the two freedoms in different articles,<sup>105</sup> the ECHR, the ACHR and the African Charter do not – they protect freedom of thought (together with conscience and belief), as well as freedom of expression, but they either do not mention freedom of opinion as such or treat it simply as part of expression.<sup>106</sup>

The remainder of this article will thus treat freedoms of thought and opinion as essentially the same right, while preferring for the sake of convenience to speak solely of freedom of opinion. One useful (and conventional) distinction can nonetheless be made. This is the line between the *forum internum*, processes internal to the human mind, and the *forum externum*, our engagement with others, for example through the manifestation of religion or the expression of a certain views orally, in print or over the internet. The distinction is legally important because the rights pertaining to the *forum internum* are regarded as absolute, whereas those pertaining to the *forum externum* are qualified.<sup>107</sup> That is, any interferences

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<sup>102</sup> See more Nowak, *supra* note 78, at 441-2; Taylor, *supra* note 78, at 542-4. On the freedom of thought see generally THE CAMBRIDGE HANDBOOK OF THE RIGHT TO FREEDOM OF THOUGHT (Patrick O'Callaghan & Bethany Shiner eds., 2025).

<sup>103</sup> See Ahmed Shaheed, Interim report of the Special Rapporteur on freedom of religion or belief: Freedom of thought, U.N. Doc. A/76/380 (Oct. 5, 2021), para. 21.

<sup>104</sup> See also Jones, *supra* note 31, at 32.

<sup>105</sup> See Arts. 18 & 19 UDHR; Arts. 18 & 19 ICCPR.

<sup>106</sup> See Arts. 9 & 10 ECHR; Arts. 12 & 13 ACHR; Arts. 8 & 9 African Charter.

<sup>107</sup> See, e.g., David Kaye, Research report on artistic freedom of expression, Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression, U.N. Doc.

with the freedoms of thought and opinion are categorically prohibited, whereas interferences with freedom of expression (or the manifestation of religion or belief) can be justified, so long as they meet the legality, legitimacy, necessity and proportionality test under human rights law.<sup>108</sup>

When it comes to state lies, then, the first question is whether they can ever, either standing alone or as part of a package, interfere with one of these freedoms. If a state lie constitutes an interference with an individual's freedom of opinion (thought), this right will *ipso facto* be violated. That said, even with regard to absolute rights justifiability considerations may be dealt with implicitly when analysing the scope of the right and the existence of an interference. If, by contrast, a lie is an interference with someone's freedom of expression, it would only be a violation of that right if it fails the justification test.<sup>109</sup>

This section will argue that state lies can interfere with, and thus violate, the absolute right to freedom of opinion. However, they will do so rarely and almost invariably as part of a broader package of deceptive and manipulative measures. Lies can also interfere with, and violate, the aspect of freedom of expression that pertains to *seeking and receiving* (rather than imparting) information. Finally, state lies can violate the right of access to information of public interest, which is today commonly seen as part of freedom of expression.

## **B. Interference with the *Forum Internum***

There are three ways in which a state may violate its negative duty to respect the freedom of opinion.<sup>110</sup> First, it can compel individuals to disclose their opinions. Second, it can penalize

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A/HRC/44/49/Add.2 (2020), paras. 12-14; Jones, *supra* note 31, at 32-34; Joint Declaration on Fake News, para. 1(a).

<sup>108</sup> See General Comment No. 34, paras. 9 & 21-22. The absolute nature of the freedoms of thought and opinion is explicit in the text of Arts. 18 and 19 ICCPR. This is not the case with other human rights treaties, but the jurisprudence of their monitoring institutions confirms the absolute nature of these rights. See also Taylor, *supra* note 78, at 543.

<sup>109</sup> See also Jones, *supra* note 31, at 45.

<sup>110</sup> See Evelyn Aswad, *Losing the Freedom to Be Human*, 52 COLUM. H.R.L. REV. 306, 323-326 (2020). See also Susie Alegre, *Rethinking Freedom of Thought for the 21st Century*, 3 EUR. H.R.L. REV. 221, 225 (2017).

them for having certain opinions. Finally, and most importantly for our purposes, it can *coerce* or *manipulate* them into forming and holding certain opinions.<sup>111</sup> This tripartite understanding of the negative duty to respect this freedom has been adopted by the U.N. Special Rapporteurs on the promotion and protection of the freedom of opinion and expression<sup>112</sup> and on freedom of religion or belief.<sup>113</sup>

The first two types of interferences with opinion – compulsion to disclose and punishment – can be done by means of state lies, as in the scenario immediately above. But it is the third type of violation, the *direct* interference with a person’s mental processes, which is truly distinctive. Can that type of violation be committed through lies?

It seems reasonably clear that some state actions that directly affect an individual’s mental processes would be regarded as (*ipso facto* impermissible) interferences with freedoms of thought and opinion.<sup>114</sup> Consider, for instance, methods employed by totalitarian regimes – an evocative example would be the torture that the protagonist of Orwell’s *1984* is subjected to by the regime’s Thought Police to force him to align his beliefs with those of the Party. Indoctrination in a re-education camp, “brainwashing” techniques, or the use of certain psychotropic substances would similarly qualify.<sup>115</sup>

The core idea here is that the state (or some other actor) deprives an individual of their control over their own mind.<sup>116</sup> The normative question – one to which there is no clear answer as things stand, bearing in mind the lack of textual guidance in the treaties and the

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<sup>111</sup> See also General Comment No. 34, paras. 9-10; Jones, *supra* note 31, at 34.

<sup>112</sup> See Khan, *supra* note 32, paras. 33-36.

<sup>113</sup> See Shaheed, *supra* note 103, paras. 25-39.

<sup>114</sup> Cf. Kang v. Korea, U.N. Doc. CCPR/C/78/D/878/1999 (2003), para. 7.2 (solitary confinement for 13 years designed to compel ideological conversion a violation of freedoms of thought and opinion). See also Jones, *supra* note 31, at 33.

General Comment No. 34, para. 10 (“Any form of effort to coerce the holding or not holding of any opinion is prohibited.”) See also Jones, *supra* note 31, at 34.

<sup>115</sup> See Nowak, *supra* note 78, at 441-2 (1993); Khan, *supra* note 32, para. 36.

<sup>116</sup> For a human rights analysis of other, technological means of interference with a person’s mental integrity, see Sjors Ligthart, *Towards a Human Right to Psychological Continuity? Reflections on the Rights to Personal Identity, Self-Determination, and Personal Integrity*, 5 EUR. CONV. HUM. R. L. REV. 199 (2024).

inexistent jurisprudence on the matter – is how high or low this deprivation threshold should be. That is, what *degree* of deprivation of control over one’s mental processes should count as an interference with freedom of opinion (and thought). Several plausible conceptions of the threshold exist on a spectrum.

A conservative approach would require a high threshold, equivalent to the brainwashing and indoctrination examples above. By contrast, at the lowest end of the spectrum, a mere lie or any other form of deception would count as an interference with freedom of opinion. A step above that, but still at the lower end, would be to say that any form of *manipulation* counts as an interference, as argued by Evelyn Aswad.<sup>117</sup> The UN Special Rapporteur on freedoms of opinion and expression has also endorsed such an approach, finding that “the critical issue is the knowledge and consent of the rights holder”<sup>118</sup> and that “content curation through powerful platform recommendations or microtargeting [...] play a significant role in spreading disinformation and, as involuntary or non-consensual manipulation of thinking processes, contravene the right to freedom of opinion.”<sup>119</sup> The Special Rapporteur on freedom of religion and belief has noted that manipulation could infringe upon freedom of thought, but has done so with some degree of caution.<sup>120</sup>

The difficulty here is that “manipulation” is not a term that can easily be defined, especially in this particular context. There is a copious philosophical literature on both the notion of manipulation and its ethics, but no account of either that appears dominant. For example, while some accounts of manipulation claim that it is a type of influence that bypasses reason, others conceive of it as a form of trickery or deception, and yet others distinguish between overt and covert forms of influence.<sup>121</sup> Many attempts at defining

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<sup>117</sup> See Aswad, *supra* note 110, at 358, 361-362.

<sup>118</sup> Khan, *supra* note 32, para. 34.

<sup>119</sup> *Id.*, para. 36.

<sup>120</sup> See Shaheed, *supra* note 103, paras. 3537.

<sup>121</sup> See generally Noggle, *supra* note 35.

manipulation are overinclusive or underinclusive when judged against ordinary usage and moral intuitions – consider, for example, whether advertising that appeals to emotions or psychological “nudges” should be regarded as a form of manipulation.<sup>122</sup> Are these forms of influence really so pernicious that they should fall within the scope of an *absolute* ban on any interference with the freedoms of opinion and thought?

Similarly, it has reasonably been argued that some unique features of algorithmic content curation on digital platforms, which can enable the spreading and assimilation of disinformation, could qualify as violations of freedom of opinion.<sup>123</sup> It is clear that some of these techniques are manipulative (judged against several plausible definitions of the term), and that users of these platforms are influenced by them to at least some degree. Manipulative behaviour on digital platforms, and other similar methods, clearly can legitimately be *regulated* by states – that is, states can legitimately restrict freedom of expression, to the extent the regulation concerned curtails that right, for the purpose of protecting the users of those platforms.<sup>124</sup>

Accepting this does not entail, however, that the use of such techniques by the state (or other actors) necessarily *violates* freedom of opinion or thought, i.e. that it crosses the required threshold of interference. In particular, I find it difficult to accept that billions of human beings who use various digital platforms – almost all of which use some manipulative techniques to foster user “engagement” – are thereby *ipso facto* victims of categorically impermissible interferences with their freedom of opinion. In particular, on the evidence we

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<sup>122</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009).

<sup>123</sup> See Jones, *supra* note 31, at 33-37; Aswad, *supra* note 110, at 359-371; Khan, *supra* note 32, para. 36. See also Shaheed, *supra* note 103, paras. 73-75.

<sup>124</sup> See Jones, *supra* note 31, at 53.



have available, there is substantial uncertainty as to whether algorithmic manipulation on digital platforms radically affects their users' beliefs and preferences.<sup>125</sup>

In my view, the key consideration here is the substantiality or significance of the impact of the method (or a combination of methods) used against particular individuals, with regard to the extent of the individuals' loss of control over the formation of their own opinions, preferences and decisions. This would inevitably be a contextual and empirical assessment, taking into account the characteristics of the specific audience being targeted – for example, whether children, the elderly, or the digitally illiterate are particularly vulnerable to manipulative online or offline techniques attempting to shape their opinions.<sup>126</sup>

In sum, a more conservative approach to the interference threshold could be normatively justified both by the nature of the protected interest, the *forum internum*, and by the absolute character of the right. As a legal matter, techniques such as brainwashing and indoctrination clearly qualify as interferences with the freedoms of opinion and thought. It is unclear, as things stand, whether other measures would cross the interference threshold. A reasonable – but hardly obvious – argument can be made that other forms of coercion, compulsion and manipulation can also cross it, especially in the digital context.

Lies will, in practice, almost inevitably be part of a package of measures designed to coerce or manipulate opinion. But, conceptually, it is not the lie as such, but depriving a person of (some degree of) control over their mind that violates the freedoms of thought and opinion. For example, *truthful* indoctrination and compulsion would still violate these freedoms – were a state to brainwash intransigent anti-vaxxers, flat-Earthers or climate

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<sup>125</sup> See Ceren Budak et al., *Misunderstanding the Harms of Online Misinformation*, 630 NATURE 45 (2024); Sacha Altay, Manon Berriche & Alberto Acerbi, *Misinformation on Misinformation: Conceptual and Methodological Challenges*, 9 SOCIAL MEDIA + SOCIETY (2023), <https://doi.org/10.1177/20563051221150412>; Jennifer Allen et al., *Evaluating the Fake News Problem at the Scale of the Information Ecosystem*, 6 SCIENCE ADVANCES (2020), <https://doi.org/10.1126/sciadv.aay3539>. But see RENÉE DI RESTA, *INVISIBLE RULERS: THE PEOPLE WHO TURN LIES INTO REALITY* (2024).

<sup>126</sup> See also Shaheed, *supra* note 103, paras. 36-37.

change deniers to compel them to change their objectively factually wrong and socially harmful beliefs, we would *still* consider such measures to be (categorically impermissible) interferences with freedom of opinion.

Lying alone, even if done on a vast scale, is in my view unlikely to reach the required threshold of invasion of the mind. Consider, for example, the position of millions of ordinary Russian citizens, who are incessantly bombarded with state propaganda on all sorts of matters, much of which would qualify as state lies. The fact that all broadcast media are targeting the Russian population with a variety of untruthful messages does not entail that the average Russian citizen has been deprived of control over their mind to such an extent that there is a violation of their freedom of opinion. The same would apply for lies delivered via social media and the like; it is difficult to see that manipulation by algorithm is somehow categorically different from the propagandistic power of state television. These individuals' thought processes are still their own.

To be clear, I am not saying that this kind of state lying on a vast scale has no effect in shaping public opinion – far from it. But I do think that it is inaccurate to regard all individuals subjected to such propaganda as victims of a state intrusion into their *forum internum*. Labelling them as such would deprive these millions of ordinary Russians of agency and moral responsibility. Such a scenario is, I would submit, better assessed from a freedom of expression standpoint.

There is a substantial difference between an environment permeated by state lies of the kind we can observe in Putin's Russia and many other autocracies, and the totalitarian exercise of state control over thought that is the hallmark of, say, North Korea. Everyone's development is of course shaped by their society. But, in a manner that is exceptional when compared to other societies, a person born in North Korea genuinely has little freedom to develop their own inner world of thought and opinion. That kind of regime should not be

conflated with run-of-the-mill autocracies, in which the scale of state coercion and propaganda is orders of magnitude lower.<sup>127</sup> We should confine violations of freedom of opinion to such situations, of which North Korea is hardly the only example. Thus, in occupied areas of Ukraine, Russia is conducting concerted efforts of indoctrination, especially targeting children in educational settings, which do resemble North Korean-style attempts at thought control.<sup>128</sup> What Russia does there appears to be an invasion of the mind that, broadly speaking, substantially exceeds those measures that it applies to its own population.

To conclude, state lies will rarely violate freedom of opinion. This could be the case, however, if they are part of a more comprehensive package of coercion, propaganda and manipulation – and they will generally be *necessary* for that package to be effective. Isolated, standalone lies would, in my view, violate freedom of opinion only exceptionally, if they are used against a person who is for some reason especially vulnerable. This could, for instance, be a situation in which a person suffers from mental illness or disability, is in distress, or is a child, or is an elderly person experiencing cognitive decline. The less control that one has over their mental processes, the more likely it is that a standalone lie would be a *sufficient* condition for a violation,

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<sup>127</sup> See Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014), paras. 163 ff (detailing the Commission's finding regarding violations of freedom of thought in North Korea), esp. para. 165 ("The population of the DPRK is indoctrinated from a young age in accordance with the single state ideology and the Ten Principles as sustained by the Supreme Leader and the Workers' Party of Korea to such a degree that it not only infringes on the freedom to seek and receive information as article 19 of the ICCPR and article 17 of the CRC envisage, but it also suppresses the emergence and development of free thought and conscience, which is protected by article 18 of the ICCPR and article 14 of the CRC" and para. 194 ("Propaganda permeates every aspect of the lives of citizens of the DPRK. Apart from the state-controlled media, they are also exposed to inescapable propaganda broadcasts in their homes and in public spaces. .... In addition to the controlled television and radio broadcasting (see below), DPRK nationals receive information from the state through "fixed line" broadcasting. The fixed line system operates through the use of speakers in every DPRK household."

<sup>128</sup> See more Peter Pomerantsev, *Is Putin's brainwashing of Ukrainians into Russians even a crime?*, The Economist (Feb. 21, 2025), <https://www.economist.com/1843/2025/02/21/is-putins-brainwashing-of-ukrainians-into-russians-even-a-crime>.

To return to Grotius for one moment, it is interesting to note that he denied even the possibility that one could lie, in the proper sense of the term, to a mentally ill person or to a child, “because Children and Madmen not having a freedom of Judgment, they cannot be injured in that Liberty which they have not.”<sup>129</sup> But this view is based on a grossly oversimplified, binary conception of mental competence, and it hardly needs to be said that it is at odds with modern international law.<sup>130</sup> While it is true that lying to a child (and adults) may in some situations be morally justified, it is also true that lying to a child, or another vulnerable person, may, if done by the state, more easily reach the threshold of violation of freedom of opinion than when the same lies are directed against individuals who are not especially vulnerable.<sup>131</sup> Indoctrination in an educational context would likely be the best example here.<sup>132</sup>

### C. Seeking and Receiving *Accurate* Information in the *Forum Externum*

While there is, in my view, a relatively high threshold that state lies have to cross, often combined with other conduct, to constitute an interference with freedom of opinion, lies can more easily interfere with freedom of expression.<sup>133</sup> The latter right has several dimensions.

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<sup>129</sup> Grotius, *supra* note 41, at 16.

<sup>130</sup> See Art. 12(1) CRC (“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”). See also Arts. 13 and 14 CRC (protecting the child’s freedoms of expression and thought).

<sup>131</sup> See Shaheed, *supra* note 103, paras. 37-38.

<sup>132</sup> See, e.g., Report of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, *supra* note 127, paras. 166-171, as well as para. 176 (“Children in the DPRK are introduced at an early age to “confession and criticism” sessions. Children gather in groups weekly and take turns standing up and describing their activities for the previous week, as far as possible showing how they were living in accordance with the teachings of the Kim philosophy and the Ten Principles. The Principles are recited during the confession. Children must berate themselves if they have failed in some way during the preceding week; such as being absent from class or not having made a contribution as expected. They must then make a commitment to become better. They are also expected to describe the failings of at least one of their peers in the same group. Until they identify someone for criticism, they are not allowed to stand down.”)

<sup>133</sup> This is again a different question from whether states can justifiably restrict freedom of expression in order to combat social harms caused by lies or disinformation – see more Khan, *supra* note 32, paras. 37-45; Milanovic & Webb, *supra* note 39.

The notion of expression is understood broadly.<sup>134</sup> It is not simply about *imparting* information, but also about *seeking* and *receiving* “information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.”<sup>135</sup>

Most commonly, states interfere with this freedom by punishing individuals for engaging in protected expression or by censoring, penalizing or shutting down media outlets. We have already seen this above in the incitement and harassment by means of lies scenarios. The violation of freedom of expression in these scenarios arises because the state uses lies to penalize those who wish to express themselves freely, in order to unjustifiably limit that expression.

But, state lies – themselves a form of speech by state agents – can also constitute an interference with protected expression even if they are not deployed to punish specific individuals for speaking.<sup>136</sup> While there is no litigated case affirming this position, it is analytically straightforward. While some individuals may want to seek and receive information *regardless of its accuracy*, for example because they take pleasure from such content, most of us want information that is factually accurate, to the extent it concerns matters that can objectively be true or false.<sup>137</sup> It is *accurate* information – or at least *truthful* information – that serves broader social ends that freedom of expression is meant to facilitate, such as debating public policy in a democracy, criticising the government, or advancing

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<sup>134</sup> See General Comment No. 34, paras. 11-12.

<sup>135</sup> Art. 19(2) ICCPR.

<sup>136</sup> See Joint Declaration on Fake News (preamble) (“*Expressing concern* that disinformation and propaganda are often designed and implemented so as to mislead a population, as well as to interfere with the public’s right to know and the right of individuals to seek and receive, as well as to impart, information and ideas of all kinds, regardless of frontiers, protected under international legal guarantees of the rights to freedom of expression and to hold opinions”); OSCE Non-Paper, at 59-60, 66.

<sup>137</sup> See Schauer, *supra* note 17, at 6-7 (explaining how individuals can have diverging preferences for truthful and untruthful information, and that “evidence and truth are not the only values there are”).

scientific progress.<sup>138</sup> Indeed, the regulation of broadcast and print media, whether by the state or by the industry itself, often takes ensuring accuracy as a legitimate public interest.

A state can lie systematically and at scale so that it pollutes the information space to such an extent that it will become difficult for an ordinary individual to seek and receive *accurate* information. In doing so, the state will be interfering with the freedom of expression of the affected individuals.<sup>139</sup> This is especially the case if the state's pervasive lying is complemented by other measures, such as punishing dissent, shutting down independent media outlets, or restricting access to websites or apps that the state deems undesirable.<sup>140</sup> In such an information environment, separating fact from fiction becomes very burdensome, cognitively and otherwise, for the ordinary individual. It can also be dangerous. That is the whole point of the state's actions. The average person, who at least in principle wants to seek and receive accurate information, finds themselves unable to do so without an exceptional investment of time, resources and exposure to risk of other harm. Hence, the state has interfered with their freedom of expression.<sup>141</sup> Notably, this approach has been endorsed by the UN Special Rapporteur on freedom of expression: "[w]here States systematically and simultaneously suppress other sources while promoting their own false narratives, they are denying individuals the right to seek and receive information."<sup>142</sup>

In this framing, every ordinary Russian bombarded by state lies on say the war in Ukraine is, in fact, a victim of a violation of their freedom of expression – at least to the extent that they have any interest in seeking, receiving or imparting *accurate* information.<sup>143</sup>

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<sup>138</sup> See also General Comment No. 34, para. 3 ("Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.")

<sup>139</sup> See also Pentney, *supra* note 39, at 25-6 (agreeing with this position, but also arguing for a lower threshold for interference when a lie relates to any information on a matter of public interest).

<sup>140</sup> See OSCE Non-Paper, at 18-19.

<sup>141</sup> See Marko Milanovic & Michael N. Schmitt, *Cyber Attacks and Cyber (Mis)information Operations during a Pandemic*, 11 Journal of National Security Law & Policy 247, 268 (2020).

<sup>142</sup> Khan, *supra* note 32, para. 47.

<sup>143</sup> Again, I accept that there will be individuals – even large segments of the population, especially in polarized societies – who have no such interest.

Their interactions with others in the *forum externum* have been substantially restricted by the state, even if they remain free, within their *forum internum*, to form their own opinions (which, again, will inevitably be influenced by the environment in which they do so).

Although this will always be a contextual assessment, it is unlikely that state lies can interfere with freedom of expression in this particular manner if they are not systematic and/or done at scale. That said, this type of violation could also be committed if it was a smaller subgroup, rather the whole population, that was targeted with a campaign of lies and deprived of its ability to seek and receive accurate information.

However, my view is that not every standalone lie by a state official can adversely affect the ability of the public to seek and receive information. If, for instance, Donald Trump lies about his net worth or his golfing prowess, this does not mean that somehow every American citizen's right to freedom of expression was violated through that lie.

I acknowledge that an alternative position is possible: that all lies by state officials, on any issue, would be inconsistent with an overarching positive duty to promote an enabling environment for freedom of expression.<sup>144</sup> Lying by state officials is not exactly enabling free expression – that much is clear. But, again, I find it hard to accept that every single individual who hears a lie propagated by a state official has somehow become a victim, in the sense that their specific rights have been interfered with, which is the focus of my inquiry. If, however, such lies are part of a package of other speech-restrictive measures, such as shutting down alternative sources of information or otherwise suppressing dissent, an interference with freedom of expression would be more straightforward to establish. Either way, I fail to see how a pervasive campaign of state lies, which deprives affected individuals of their ability to

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<sup>144</sup> See Joint Declaration on Fake News, para. 3(a) (discussing an obligation to “promote a free, independent and diverse communications environment, including media diversity, which is a key means of addressing disinformation and propaganda.”) See also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/HRC/38/35 (2018), para. 6.

seek and receive information, could pass the justification test under international human rights law.

#### **D. State Lies and the Right to Access Information in the Public Interest**

Freedom of expressions is today generally understood as including a qualified right of individuals to access information held by public bodies.<sup>145</sup> This right essentially compels the state to speak through its agents and imposes a duty on them to disclose certain information in their possession. There are several scenarios in which state lies – even isolated, standalone lies – can be a sufficient condition for a violation of this specific right. First, an individual (or a media outlet or some other organization) may request access to a certain record or item of information, and the state authority competent to receive such requests may lie about the *existence* of such a record or item of information.<sup>146</sup> That is, the request may be rejected on the basis that the record does not exist or could not be found, with the relevant state organ engaging in intentional deception. Second, a request may be rejected on some other untruthful grounds, for example because disclosing the record would supposedly compromise national security, even though in fact it would not do so. Here the state lie is in the false reason given for the lack of disclosure. Third, the competent state authority may accept the

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<sup>145</sup> See General Comment No. 34, para. 18 (“Article 19, paragraph 2 [ICCPR] embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.”) For an example of the Committee’s approach to this right in the context of its monitoring function, see, e.g., Concluding Observations on the Czech Republic, U.N. Doc. CCPR/C/CZE/CO/4 (2019), paras. 40-41. See also Countering Disinformation, *supra* note 32, para. 14; Taylor, *supra* note 78, at 545-9. The recognition of this right as part of freedom of expression involved a gradual process, especially in the ECHR context – see more Katie Pentney, *The Right of Access to ‘Reliable’ Information Under Article 10 ECHR: From Meagre Beginnings to New Frontiers*, 5 EUROPEAN CONVENTION ON HUMAN RIGHTS LAW REVIEW 230, 233-242 (2024).

<sup>146</sup> A failure to even respond to a request, i.e. one of omission by state authorities, would not qualify as a lie as defined for the purposes of this article, even if the omission was deliberate. Such an omission would nonetheless violate the right of access to information.



request, but then falsify the information that is being disclosed. In this scenario, the state lie is in the *content* of the disclosed information.

In all of these scenarios, the state lie would directly interfere with the right of access to information, as protected by the right to seek and receive information aspect of freedom of expression. That right is only meaningful if the state is compelled to provide reliable, truthful information.<sup>147</sup> Thus, in a case against France, the European Court rejected the respondent state's argument that freedom of expression only required disclosure of information in the public interest, regardless of the quality of that information.<sup>148</sup> Rather, the Court held that:

[T]he right of access to information would be deprived of its substance if the information provided by the competent authorities was insincere, inaccurate or even insufficient. Indeed, respect for the right of access to information necessarily implies that the information provided must be reliable, in particular where this right results from a legal obligation imposed on the State. The effectiveness of this right therefore requires that, in the event of a dispute in this respect, the interested parties have a remedy enabling them to check the content and quality of the information provided, within the framework of an adversarial proceeding. On this point, the Court reiterates that the object and purpose of the Convention, an instrument for the protection of human rights, calls for its provisions to be understood and applied in a way that makes their requirements practical and effective, not theoretical and illusory.<sup>149</sup>

In this context, and in contrast to the preceding case study, there is no need here for the lie to be systematic or be done at scale or at the highest levels of government. If, say, a municipal authority of a small town responded to a request by a member of the public for information about the operation of the local sewage plant, and did so in manner that contained lies, such a response would *ipso facto* violate the right of access to information. In other words, the lie is a sufficient condition for an interference and a violation.

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<sup>147</sup> See generally Pentney, *supra* note 145. See also Deluggi & Ashraf, *supra* note 31, at 377-9.

<sup>148</sup> See Association BURESTOP 55 et autres c. France, no. 56176/18 (July 1, 2021), paras. 80-85 (available in French only).

<sup>149</sup> *Ibid.*, para. 108. Translation by Pentney, *supra* note 145, at 247, and verified by the author. This case has subsequently been approvingly cited by the Grand Chamber of the Court, but not on the point discussed here. See Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC], no. 53600/20 (Apr. 9, 2024), paras. 294, 591, 595, 596.

As a general matter, while this is a qualified right that can justifiably be restricted if the legality, legitimacy, necessity and proportionality requirements are met,<sup>150</sup> state authorities cannot respond to requests for access to information by lying – a duty of candour is simply inherent in this right. It can be justified, for instance on grounds of national security, for state authorities to refuse to answer a request, or to refuse to confirm or deny that they have a certain item of information in their possession, or to release a redacted version of a document. But, when these options are all available, it is difficult to see how deliberate state lies in this context could ever be necessary, and thus justified. Such cases might exist, but no examples readily come to mind. Similarly, while inadvertent errors in the information state authorities disclose could be reasonably expected, and justified so long as a process existed whereby they could be corrected, it is difficult to see how intentional deception could be justified.

## **VII. STATE LIES AND INVESTIGATIONS, CRIMINAL AND OTHERWISE**

Let us now turn to other case studies, which go beyond the freedoms of opinion and expression. Of particular interest are scenarios in which state agents can, by lying, violate human rights in the context of criminal and other investigations. There are two basic scenarios of this kind. In the first scenario, state agents – most often police officers or officers in the security services, prosecutors, and even judges – fabricate a case against an individual, who may then be convicted of a criminal offence which they most likely did not commit. Put differently, in this scenario state agents have framed the defendant. In the second scenario, during an investigation of a deprivation of life or some other human rights violation, which the state must effectively investigate to comply with its procedural positive obligations under

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<sup>150</sup> See Section XI below.

human rights law, state agents lie in order to frustrate the investigation. In this second scenario, which could, for example, be driven by the state agents' desire to cover-up their own wrongdoing, the victim of the underlying human rights violation, or the victim's family, are denied their right to find out the truth about what had really happened.

The two scenarios can overlap. That is, a single situation can involve both framing an innocent individual and denying the victim of the underlying violation the possibility to establish the truth of what had happened. But, at least conceptually, the scenarios are distinct and involve different classes of victims.

In the first, frame-up, scenario, the lie is a necessary condition for a violation, but it will most often not be a sufficient one. The defendant can be harmed at different stages through the lies of state agents, which may also be combined with other types of deceptive conduct. Thus, for example, an innocent individual may be falsely accused by state authorities of having committed a crime, e.g. through the filing of a knowingly false criminal complaint or the fabrication of charges. State agents, such as police officers, can provide false testimony, or plant false physical evidence. Prosecutors and judges may similarly act maliciously to falsely implicate or convict the defendant.<sup>151</sup> State agents may act out of different motives. For example, they may genuinely believe that the defendant is guilty, so they fabricate additional evidence to secure conviction. Or, they may use the defendant as a scapegoat in order to exonerate another. The case may even be political and the defendant is being investigated, prosecuted or convicted as part of a campaign of political persecution.<sup>152</sup>

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<sup>151</sup> See *Nasheed v. Maldives*, CCPR/C/122/D/2851/2016 (2018) (former leader of the Maldives prosecuted and convicted on political grounds, in order to disqualify him from running for office again). See also Taylor, *supra* note 78, at 714-715.

<sup>152</sup> Consider, among a legion of other examples, the case of the U.S. journalist Evan Gershkovich, who was falsely accused and convicted in Russia of being a spy – see, e.g., *Judge who sentenced Evan Gershkovich says trial did not look at evidence*, THE GUARDIAN (Sept. 27, 2024), <https://www.theguardian.com/world/2024/sep/27/judge-who-sentenced-evan-gershkovich-says-trial-did-not-look-at-evidence>.

These scenarios are factually complex – it can be difficult to reliably establish that state agents have engaged in this type of lying and falsification of evidence, for whatever reason. They occur with some frequency even in democratic societies, let alone in autocracies. But, while they may be factually complex, these scenarios are legally straightforward. Depending on the extent of the consequences of an investigation, prosecution and conviction on the basis of lies by state agents, a number of human rights can be violated: the right to liberty of person due to an unjustified arrest, detention on remand or custodial punishment; the right to a fair trial; the right to private and family life, due to any restrictions on the defendant's ability to enjoy the benefits of these rights; the prohibition of inhuman or degrading punishment, due to any suffering caused by a wrongful prosecution or conviction, e.g. as a consequence of confinement; and even a violation of the right to life, for persons sentenced to death in countries that still practice the death penalty.<sup>153</sup> Consider, for example, the case of Iwao Hakamada, who was wrongfully convicted of murder in Japan on the basis of evidence fabricated by the police and then spent 46 years on death row, mostly in solitary confinement, before he was acquitted, aged 88.<sup>154</sup> Lies by state agents thus precipitated a chain of events that resulted in a series of human rights violations.

The second scenario does not require such causation of harm to any specific defendant. Rather, the state fails to comply with its procedural obligations to effectively investigate certain situations, because its agents lie in the course of that investigation. Such lies are a sufficient condition for a violation, if they are not remedied through the conduct of other state agents.

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<sup>153</sup> In the ECHR context, a further issue is whether convictions based on lies can violate Art. 18 ECHR (prohibiting using exceptions to rights for abusive purposes). The Court's jurisprudence on the matter has vacillated, but has now settled on an affirmative answer. See more Philip Leach, *Political prosecutions and unfair trials – Strasbourg scrutiny enhanced*, Strasbourg Observers (Feb. 18, 2025), <https://strasbourgobservers.com/2025/02/18/political-prosecutions-and-unfair-trials-strasbourg-scrutiny-enhanced/>.

<sup>154</sup> See Gavin Butler and Shaimaa Khalil, *World's longest-serving death row inmate acquitted in Japan*, BBC News (Sept. 26, 2024), <https://www.bbc.com/news/articles/c5y9x6zrkrrr>.

The procedural obligations to investigate is not expressly set out in the text of most human rights treaties. It was first laid down by the European Court of Human Rights in the *McCann* case, as part of the overarching state obligation to protect life, with the Court holding that the investigative obligation applies to takings of life at the hands of both state agents and private individuals.<sup>155</sup> (For our purposes, state agents will most often lie in an investigation to cover up their own wrongdoing, but the state's procedural duty covers violations by non-state actors as well). The Court has substantially developed its jurisprudence on the requirements for an effective investigation, and has expanded this approach to cover certain other ECHR rights, such as the prohibition of ill-treatment.<sup>156</sup> Its approach has subsequently been emulated by other human rights bodies.<sup>157</sup> Thus, for example, for the UN Human Rights Committee, “[i]nvestigations into allegations of violations of [the right to life] must always be independent, impartial, prompt, thorough, effective, credible and transparent [...] States parties need to take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life.”<sup>158</sup>

State agents lying, or otherwise fabricating evidence in the course of an investigation, would be acting in way that is manifestly inconsistent with these requirements, and would constitute a violation of the state's procedural obligation to investigate. Consider the example of a police officer falsely testifying that he (or a colleague) used lethal force against an individual because they thought that the individual had a gun, even though this was not in fact the case. Now, it is entirely possible that the state will be able to *remedy* this violation

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<sup>155</sup> *McCann & Others v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A, 1995), para. 161.

<sup>156</sup> See, e.g., *Kurt v. Turkey*, App. No. 24276/94 (May 25, 1998); *Tas v. Turkey*, App. No. 24396/94 (Nov. 14, 2000). For recent articulations of the relevant principles, see *Daugaard Sorensen v. Denmark*, App. No. 25650/22 (Oct. 15, 2024) (failure to effectively prosecute an alleged rape violated Arts. 3 and 8 ECHR); *T.V. v. Spain*, App. No. 22512/21 (Oct. 10, 2024) (the Court holding that there had been a violation of the prohibition of slavery and forced labour in Art. 4 ECHR because of an inadequate investigation into allegations of human trafficking and sexual exploitation).

<sup>157</sup> See, e.g., General Comment No. 36, paras. 19, 21, 27-29; Taylor, *supra* note 78, at 145-147.

<sup>158</sup> General Comment No. 36, para. 28.

because *other* state agents engaging in an investigation uncover the truth of what had happened.<sup>159</sup> This is as it should be, but every state official nonetheless has a duty to refrain from lying during an investigation.

Similarly, that, at some point, the strength of the evidence on a certain issue becomes so overwhelming that a state has no choice but to stop lying about a particular event does not diminish the state's responsibility for lying in the first place – consider, for example, the initial Saudi denials about the involvement of Saudi state agents in the murder of the journalist Jamal Khashoggi,<sup>160</sup> or the initial Iranian denials, subsequently abandoned, that Iranian air defences shot down a Ukrainian civilian airliner in 2020.<sup>161</sup> State lying in such cases compounded the original violation of the right to life.

We have so far focused mainly on *criminal* investigations. But, it is entirely possible for a state to attempt to discharge its procedural obligations under the relevant human rights through other types of investigations, such as coroners' inquests, commission of inquiry, or some types of administrative proceedings. The basic principle set out above – that any lying by state agents in the course of such investigations is incompatible with the state's duty to effectively investigate – remains regardless of the precise type of investigation.

There are at least two other close cognates of the procedural duty to effectively investigate, which are often lumped together under the umbrella terms “right to truth” or the “right to know the truth.”<sup>162</sup> The first variant of this right is firmly grounded in international

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<sup>159</sup> See, e.g., *3 Former Officers Acquitted of Most Serious Charge in Tyre Nichols's Death*, THE NEW YORK TIMES (Oct. 3, 2024), <https://www.nytimes.com/2024/10/03/us/tyre-nichols-verdict.html> (detailing the conviction of several police officers who unlawfully killed an individual, and then attempted to cover up their crime, by lying on “internal police forms, as well as [in] informal testimony they gave to law enforcement officials, [which] helped cement their efforts to cover up the violence.”)

<sup>160</sup> See more Marko Milanovic, *The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life*, 20 Hum. Rts. L. Rev. 1 (2020).

<sup>161</sup> See Anton Troianovski, Andrew E. Kramer and Farnaz Fassihi, *Furor in Iran and Abroad After Tehran Admits Downing Ukrainian Jetliner*, THE NEW YORK TIMES (Jan. 11, 2020), <https://www.nytimes.com/2020/01/11/world/middleeast/furor-in-iran-and-abroad-after-tehran-admits-downing-ukrainian-jetliner.html>.

<sup>162</sup> See more Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?* 88 INTERNATIONAL REVIEW OF THE RED CROSS 245 (2006); Alice M. Panepinto, *The Right to the Truth in International Law: The*

law and applies to a specific type of human rights violation – enforced disappearances. The essence of this violation is depriving a person of liberty, by state agents or with their approval, coupled with “a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”<sup>163</sup>

Enforced disappearances *ipso facto* violate several distinct rights of the person subjected to such disappearances, especially the right to liberty of person (which the person is deprived of arbitrarily), the right to be free from inhuman or degrading treatment (due to being held incommunicado), and the right to life (if the disappeared person is killed). Crucially, enforced disappearances *also* violate the rights of the disappeared person’s close family, due to the anguish and suffering they are subjected to because of not knowing about their loved one’s fate. This position was recognized as early as in a 1983 decision of the Human Rights Committee:

The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has *the right to know* what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter.<sup>164</sup>

This position was affirmed in the subsequent jurisprudence of various human rights bodies, with the jurisprudence of Inter-American institutions being especially notable in that regard.<sup>165</sup> Moreover, Article 24(1) of the 2010 International Convention for the Protection of

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*Significance of Strasbourg’s Contributions*, 37 LEGAL STUDIES 739 (2017); James A. Sweeney, *The Elusive Right to Truth in Transitional Human Rights Jurisprudence*, 67 ICLQ 353 (2018).

<sup>163</sup> Art. 2, International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>164</sup> Almeida de Quinteros v. Uruguay, CCPR/C/19/D/107/1981 (July 21, 1983), para. 14 (emphasis added).

<sup>165</sup> See, e.g., in Association ‘21 December 1989’ v. Romania, App. Nos. 33810/07 and 18817/08 (May 24, 2011); Inter-American Court of Human Rights Judgment of 29 July 1988, Velasquez Rodriguez case, in Series C: Decisions and Judgments, No. 4, para. 181, p. 75; Inter-American Court of Human Rights, Judgment of 20 January 1989, Godinez Cruz case, in Series C: Decisions and Judgments, No. 5; Judgment of 3 November 1997, Castillo Paez case; Judgment of 24 January 1998, Blake case; and Judgment of 25 November 2000, Bamaca case. See also Marloes van Noorloos, *A Critical Reflection on the Right to the Truth about Gross Human Rights Violations*, 21 HUM. RTS. L. REV. 874, 875-880 (2021); Eduardo Ferrer MacGregor, *The Right to the Truth As an Autonomous Right Under the Interamerican Human Rights System*, 9 MEXICAN L. REV. 121 (2016).

All Persons from Enforced Disappearance defines a “victim” of an enforced person as “the disappeared person,” but also as “any individual who has suffered harm as the direct result of an enforced disappearance,” such as members of their family. Article 24(2) thereof further provides that “[e]ach victim has *the right to know the truth* regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard” (emphasis added).

Thus, if, in the context of an enforced disappearance, state agents lie about the fate of the disappeared person, that lie is doubly internationally wrongful. First, the lying may amount to a “concealment of the fate or whereabouts of the disappeared person,” a constitutive element of an enforced disappearance. Second, the lying can violate the disappeared person’s, or their family members’, right to know the truth about what had happened. In either case, lies are a necessary condition for a violation – there can be no enforced disappearances without lying.

The second relevant variant of a “right to truth” is substantially different in some important respects. It was developed, mainly through soft law instruments, in the context of *gross* human rights violations, those that are particularly serious, and/or happen at scale and systematically, drawing also on the rules of international humanitarian law regarding missing persons during armed conflict.<sup>166</sup> In such a context, the right to truth is regarded not just as an individual right, but also as a *collective* right, pertaining to the affected society, or certain especially affected groups, as such.<sup>167</sup> That conception of the right to truth may be realized

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<sup>166</sup> See, e.g., Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006); U.N. General Assembly Resolution 68/165: Right to the Truth, U.N. Doc. A/RES/68/165 (Jan. 21, 2014); U.N. Human Rights Council Resolution 21/7: Right to the Truth, U.N. Doc. A/HRC/RES/21/7 (Oct. 10, 2012); van Noorloos, *supra* note 165, at 875-880.

<sup>167</sup> See Study on the Right to the Truth, *supra* note 166, para. 36;



through various efforts, including transitional justice mechanisms such as truth commissions.<sup>168</sup>

This second notion of the “right to truth” is therefore not particularized to a specific victim or their family. It is thus conceptually more removed than the first, enforced disappearances variant, from the procedural duty to investigate that applies even to individual cases that have nothing to do with gross human rights violations. Indeed, this is at least partly why this collective understanding of the right to truth has provoked some controversy in international jurisprudence.<sup>169</sup> As things stand, it remains unsettled to what extent this collective or societal dimension of the right to truth is protected under existing international law, and it may well be the case that the level of protection granted will vary between regional systems, and indeed under different constitutional systems.<sup>170</sup> But, again, for our purposes of assessing the legality of lying by state agents the core idea is the same – lies by state agents during some kind of truth-seeking process would clearly violate this collective understanding of the right to truth, to the extent that it is protected under existing international law or under domestic law. They are both a necessary and a sufficient condition

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<sup>168</sup> See more MELANIE KLINKNER AND HOWARD DAVIS, *THE RIGHT TO THE TRUTH IN INTERNATIONAL LAW: VICTIMS’ RIGHTS IN HUMAN RIGHTS AND INTERNATIONAL CRIMINAL LAW* (2020); NATASHA STAMENKOVIKJ, *THE RIGHT TO KNOW THE TRUTH IN TRANSITIONAL JUSTICE PROCESSES* (2021); Sam Szoke-Burke, *Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies*, 33 Berkeley J. of Int’l L. 526 (2015).

<sup>169</sup> Cf. *El-Masri v. the former Yugoslav Republic of Macedonia*, App. No. 39630/09 (Dec. 13, 2012), Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller (arguing, in the context of a case concerning the extraordinary rendition from Macedonia of an individual by U.S. agents, that the Court should recognize the right to the truth as part of the right to an effective remedy protected by Article 13 ECHR); *ibid.*, Joint Concurring Opinion of Judges Casadevall and López Guerra (arguing that such a right was not necessary due to the positive procedural obligations that were already firmly entrenched in ECHR jurisprudence). See also *Al Nashiri v. Poland*, App. No. 28761/11 (July 24, 2014), para. 495 (Chamber holding in passing that “where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened”); *Abu Zubaydah v. Lithuania*, App. No. 46454/11 (May 31, 2018), para. 610 (same); *Al-Hawsawi v. Lithuania*, App. No. 6383/17 (Jan. 16, 2024), para. 186 (same). See more van Noorloos, *supra* note 165, at 881-884.

<sup>170</sup> See more van Noorloos, *supra* note 165, at 887-898.

for a violation, although that violation may be remedied through the conduct of other state agents who do manage to establish the truth.

## VIII. STATE DENIALS OF HISTORICAL CRIMES AND GROSS HUMAN RIGHTS VIOLATIONS

This brings us to a scenario closely related to the societal dimension of the right to truth: consider a situation in which a state agent, outside the context of any kind of investigation, lies by denying the existence of (clearly and undeniably established) historical crimes or gross human rights violations – here paradigmatically the Holocaust, but this kind of scenario is obviously not confined to this example – thereby causing emotional or psychological harm, or an injury to their dignity, to the members of a community particularly affected by such crimes. Can it be said that such lies violate the right to private life, or some other right such as the prohibition of discrimination, of the members of the affected community, *even if* the denial, in its context, does *not* constitute incitement to hatred, violence or discrimination?

There is substantial human rights jurisprudence on this scenario in reverse – the question in such cases is whether the state can, usually by means of criminal law, punish individuals who deny the Holocaust or other similar crimes, that is, whether restricting their freedom of expression is justified.<sup>171</sup> There has been some inconsistency in the approach taken by various bodies – in particular, the European Court has treated Holocaust denial as a special case, essentially as *ipso facto* constituting the incitement of hatred. In principle, the mere denial of historical crimes – or any particular set of historical events – cannot justify speech restriction, certainly not by means of criminal punishment, unless it can be proven that

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<sup>171</sup> See generally Amal Clooney & Alice Gardoll, *Hate Speech*, in Clooney & Neuberger, *supra* note 39, at 153; LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY (Uladzislau Belavusau & Aleksandra Gliszczyńska-Grabias eds., 2017).

such denial is a coded or implied form of incitement to hatred. In the words of the U.N.

Human Rights Committee:

Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20.<sup>172</sup>

This position has been endorsed by the U.N. Secretary-General<sup>173</sup> and now also (outside the context of Holocaust denial) by the European Court as well.<sup>174</sup>

But, the scenario of state lies that concerns us here is different. Our scenario is one where a *state agent* engages in untruthful denials of historical crimes, thereby causing harm to the dignity or emotional or psychological wellbeing of others. The question here is not whether it is justifiable for a state to limit an individual's freedom of speech, but whether the state, through its agents, who are knowingly falsely speaking on the state's behalf, violates the human rights of particularly affected individuals or groups. If, for example, an official of the state of Serbia, acting in his official capacity, lies and denies the truth of the genocide that took place in the Bosnian town of Srebrenica in July 1995, the question is *not* whether that state official can justifiably be prosecuted for that denialist speech, but whether the *state* is responsible, through lying, for violating some human rights of Bosniaks (Bosnian Muslims), the victim group of that crime.<sup>175</sup>

To my mind, a reasonable argument can be made that such state lies can violate the right to private life, a broadly framed right that captures considerations of identity, group

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<sup>172</sup> See General Comment No. 34, para. 49

<sup>173</sup> Countering Disinformation, *supra* note 32, para. 13.

<sup>174</sup> See *Perinçek v. Switzerland* [GC], App. No. 27510/08 (Oct. 15, 2015), paras. 231, 239, 252-253, 280.

<sup>175</sup> See *Vucic's Srebrenica genocide denial stirs tensions in Bosnia*, N1 Sarajevo (Nov. 25, 2024), <https://n1info.ba/english/news/vucics-srebrenica-genocide-denial-stirs-tensions-in-bosnia/>; Maja Nikolic, *Srebrenica Genocide Denials Rise Amid Lack of Prosecutions: Report*, Balkan Insight (Sept. 20, 2024), <https://balkaninsight.com/2024/09/20/srebrenica-genocide-denials-rise-amid-lack-of-prosecutions-report/>.

identity and moral integrity. This would be the case if the facts of the historical crime have been clearly and objectively established, so that no reasonable controversy exists about them, if the state agent knowingly lies about these facts, and if, in its social context, the denialist speech is capable of affecting the moral integrity of the victims. As in the investigation scenarios above, it would, in principle, be possible for other state agents to remedy the injury caused through the denialist speech, for example, if they repudiated it and offered an apology to the victims. But that does not alter the basic point that the original state lie, the denialist speech, could amount to a human rights violation.

The European Court adopted an analogue of this approach in a recent judgment against Romania.<sup>176</sup> The applicants were two Jewish survivors of the Holocaust in Romania. After the war, the courts of Communist Romania convicted (among others) two individuals for crimes committed during the war, including those specifically affecting the two applicants. After the fall of Communism, these offenders had their previous convictions quashed in an extraordinary procedure initiated by the Romanian authorities, without informing the general public or the applicants.

In assessing this case, the Court first noted its previous jurisprudence holding that “a public speech by a politician denying a historically established mass killing of members of an ethnic group affected the right to respect for private life of the members of the group in question.”<sup>177</sup> While, on the facts of this case, there was no such public speech by state officials,

The proceedings in the present case (which led to the acquittal of high-ranking military officials convicted for crimes connected with the Holocaust) and the authorities’ behaviour in respect of these proceedings (the failure to inform the public about the initiation of the extraordinary appeals, the retention of the case files by the secret services and the initial refusal to allow the applicants access to those files) have been perceived by the applicants, once they learned about them, as constituting a denial of the occurrence of the Holocaust in Romania and of the historical truth about

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<sup>176</sup> *Zăicescu and Fălticaneanu v. Romania*, App. No. 42917/16 (Apr. 23, 2024).

<sup>177</sup> *Id.*, para. 117.

it and revived in them the trauma of the Holocaust, of which they were direct victims. In respect of this point, the Court further notes that the acquittals occurred at a time that was marked by the questioning of the Romanian authorities' role in the Holocaust in Romania and by the honouring of war criminals by some members of the political class ... the Court accepts that the result of the proceedings of 1998 and 1999, which examined the role of high-ranking military officials in events of an extremely sensitive nature such as the Holocaust, and the context surrounding these proceedings was capable of having a sufficient impact on the applicants' sense of identity and self-worth as Jews and survivors of the Holocaust in Romania as to have produced in them emotional suffering that reached the "certain level" or the "threshold of severity" required.<sup>178</sup>

The Court therefore found that the right to private life, as protected by Article 8 ECHR, applied to this situation, and then held the same with regard to the prohibition of discrimination in Article 14 ECHR, on account of the specific Jewish identity of the applicants and the facts of the historical crimes.<sup>179</sup>

The Court then determined that the judgments of the Romanian court after the fall of Communism, which acquitted the two offenders, "may objectively be seen as excuses or efforts to blur responsibility and put blame on another nation for the Holocaust contrary to well established historical facts – all elements of Holocaust denial and distortion."<sup>180</sup> Essentially, the Romanian judges falsely portrayed the Holocaust in Romania as being entirely perpetrated by German forces, while minimizing the involvement of the then Romanian authorities. Taking note of its jurisprudence on Holocaust denial in the context of justified restrictions on freedom of expression, the European Court concluded that such denialist speech injured the dignity of Jews to such an extent that it warranted the restriction of the freedom of speech of *private* individuals who denied the Holocaust, and that, *a fortiori*, "those principles are also applicable in the present case, where the alleged discriminatory acts were performed by State authorities."<sup>181</sup>

Therefore, the Court concluded that the conduct of Romanian authorities

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<sup>178</sup> Id., paras. 118-119.

<sup>179</sup> Id., para. 120.

<sup>180</sup> Id., para. 150.

<sup>181</sup> Id., para. 151.

could have legitimately provoked in the applicants feelings of humiliation and vulnerability and caused them psychological trauma. ... The foregoing considerations are sufficient to enable the Court to conclude that, in the light of the case as a whole, the domestic authorities failed to adduce relevant and sufficient reasons for their actions that led to the revision of historical convictions for crimes connected with the Holocaust in the absence of new evidence and by reinterpreting historically established facts and denying the responsibility of State officials for the Holocaust (in contradiction with principles of international law). Therefore, the authorities' actions were excessive and cannot be justified as "necessary in a democratic society".<sup>182</sup>

For these reasons, the Court found a violation of Articles 8 and 14 ECHR.<sup>183</sup>

While the Court did not use the conceptual framework of state lies that I have developed in this article, its approach is consistent with that framework. Simply put, in acquitting the two offenders, the Romanian courts lied about the Holocaust in Romania, deliberately seeking to minimize the involvement of the Romanian state in those crimes, and thereby injuring the dignity and moral integrity of the survivors. That is the essence of this case. That the state lie was a judicial one does not really alter the analysis. While the European Court does not expressly make a finding of bad faith on the part of the relevant Romanian authorities, this is the only plausible explanation for what had happened, especially when these decisions are seen (as the Court saw them) in their social context. Moreover, some of the language that the Court uses is clearly indicative of an implicit finding of bad faith (an effort to blur responsibility, blame another nation, denial, distortion).

Clearly, there are many situations of historical crimes that are substantially more contested than the Holocaust. The core point, however, is that deliberate, knowing lies by state officials about historical crimes can violate the rights of the victims (or victim groups) – even if some of these cases may be less straightforward than Holocaust denial. The application of this approach will clearly be most appropriate when the facts regarding specific historical crimes have been conclusively established by international or domestic courts, and

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<sup>182</sup> Id., paras. 154-155.

<sup>183</sup> Id., para. 156.

when there is a consensus among historians and other experts studying those crimes about what had transpired. Inferring knowing or intentional deception in such cases would generally not be a difficult task. Finally, in the absence of any remedial action by other state officials such lies would be a sufficient condition for the existence of a violation, and there is simply no plausible scenario in which they could be justified within the human rights framework.

## IX. STATE LIES AND PUBLIC HEALTH

Lies by state agents can also violate various human rights in the context of public health. The most directly affected human rights here is of course the right to health, but the same lie may also simultaneously violate other human rights, such as the right to life,<sup>184</sup> the right to be free from ill-treatment, or the right to freedom of expression. This may depend on the harmful consequences of a lie, the ability to prove a causal relationship between the lie and the harms, the nature of these harms, and any remedial action that other state officials may have taken to mitigate these harms.

Some 25 years ago, the UN Committee on Economic, Social and Cultural Rights observed that, to respect the right to health, states have to refrain “from censoring, withholding or *intentionally misrepresenting* health-related information,” “take measures to prevent, treat and control epidemic and endemic diseases,” and “provide education and access to information concerning the main health problems in the community.”<sup>185</sup> The Committee has also noted that the “*deliberate* withholding or *misrepresentation* of information vital to

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<sup>184</sup> See, e.g., HRC General Comment No. 36, para. 26 (holding that the right to life extends to “general conditions in society that may give rise to direct threats to life ... [including] the prevalence of life threatening diseases.”)

<sup>185</sup> Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14, U.N. Doc. E/C.12/2000/4 (2000), paras. 34, 44 (emphasis added).

health protection or treatment” violates a state’s duty to respect the right to health.<sup>186</sup> This position was subsequently endorsed by the UN Committee on the Rights of the Child, which emphasized that “effective HIV/AIDS prevention requires States to refrain from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information.”<sup>187</sup>

Thus, a state lie alone is sufficient violate this negative dimension of the right to health, which requires the state to refrain from certain types of conduct, including lies and other forms of deception that can harm human health. It is not necessary to prove actual causation of harm for the violation of the negative duty to respect the right to health to arise – it is only necessary to show that state actions “are likely to result in bodily harm, unnecessary morbidity and preventable mortality.”<sup>188</sup> That is, the *risk* (to the level of likelihood) of harm to public health from state lies and other deception suffices for a violation of the right to health, although more demanding forms of causation may be required for violations of other rights, such as the right to life.

The Covid-19 pandemic has unfortunately provided us with a list of examples of state lies violating the right to health:

- (1) Lying about the very existence of the virus, its virulence or other attributes, or its spread (or lack thereof) in a particular community;<sup>189</sup>

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<sup>186</sup> Id., para. 50 (emphasis added).

<sup>187</sup> Comm. on Rights of the Child, General Comment No. 3, U.N. Doc. CRC/GC/2003/3 (2003), para. 16.

<sup>188</sup> CESCR General Comment No. 14, para. 50.

<sup>189</sup> See, e.g., Katy Watson, *Coronavirus: Brazil's Bolsonaro in denial and out on a limb*, BBC News (Mar. 29, 2020), <https://www.bbc.com/news/world-latin-america-52080830>; *Coronavirus: nearly 200 North Korea soldiers 'die from outbreak government refuses to acknowledge'*, South China Morning Post (Mar. 10, 2020), <https://www.scmp.com/news/asia/east-asia/article/3074377/coronavirus-nearly-200-north-korea-soldiers-die-outbreak>; *Coronavirus in Tanzania: The country that's rejecting the vaccine*, BBC News (Feb. 6, 2021), <https://www.bbc.com/news/world-africa-55900680>; Lauren Egan and Mansee Khurana, *Trump has many hunches about the coronavirus. Here's what the experts say*, NBC News (Mar. 6, 2020), <https://www.nbcnews.com/politics/donald-trump/just-my-hunch-trump-contradicts-health-experts-coronavirus-n1151006>.



- (2) Lying about the preparedness of state institutions to combat the epidemic, for instance about the available number of ventilators, doctors, hospital beds, or personal protective equipment;<sup>190</sup>
- (3) Lying about the number of individuals infected or hospitalized with Covid, or those who died from the disease;<sup>191</sup>
- (4) Lying about the safety or effectiveness of therapeutics or vaccines, for instance by promoting false remedies, such as hydroxychloroquine or ivermectin, or denigrating ones that actually work.<sup>192</sup>

In many documented situations of state officials spreading false information about Covid, we were dealing with lies as defined above. That is, the relevant officials were most likely engaged in intentional deception, usually doing so for some form of political gain – for example, to persuade the population that the disease burden was lower than it actually was, or persuade them that the poor results of the state’s epidemic management were not the result of the incompetence or ill-preparedness of state officials, or to generate economic activity.<sup>193</sup>

However, in some situations state officials did not lie, even though they disseminated information that was objectively false. This is because they spoke *truthfully* – they genuinely

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<sup>190</sup> See, e.g., *Union says Vucic falsely describing situation in healthcare system*, N1 (July 5, 2020), <https://n1info.rs/english/news/a616756-union-says-vucic-falsely-describing-situation-in-healthcare-system/>; Tom Krishner & Hope Yen, *Trump hype on auto industry and ventilators*, Associated Press (Mar. 23, 2020), <https://apnews.com/article/17868870ddfc526c6c7f454d651b6d7f>.

<sup>191</sup> See, e.g., Natalija Jovanovic, *Serbia Under-Reported COVID-19 Deaths and Infections, Data Shows*, Balkan Insight (June 22, 2020), <https://balkaninsight.com/2020/06/22/serbia-under-reported-covid-19-deaths-and-infections-data-shows/>; *Coronavirus: John Magufuli declares Tanzania free of Covid-19*, BBC News (June 8, 2020), <https://www.bbc.com/news/world-africa-52966016>.

<sup>192</sup> See, e.g., Giulia Afiune et al., *Brazil: politicians distribute fake Covid-19 cures*, Agência Pública (Nov. 11, 2020), <https://apublica.org/2020/11/brazil-politicians-distribute-fake-covid-19-cures/>; Raïssa Ioussouf, *Madagascar president's herbal tonic fails to halt Covid-19 spike*, BBC News (Aug. 14, 2020), <https://www.bbc.com/news/world-africa-53756752>; Sammy Awami, *Tanzania president raises doubts over COVID vaccines*, Al Jazeera (Jan. 27, 2021), <https://www.aljazeera.com/news/2021/1/27/tanzania-president-denounces-covid-vaccines>; William Echols, *With Scant Evidence, Maduro Touts "100 Percent" COVID-19 Cure*, Voice of America (Jan. 29, 2021), <https://www.voanews.com/a/fact-check-maduro-covid-miracle-cure/6742780.html>.

<sup>193</sup> See, e.g., Alex Ward, *World leaders who denied the coronavirus's danger made us all less safe*, Vox (Mar. 30, 2020), <https://www.vox.com/2020/3/30/21195469/coronavirus-usa-china-brazil-mexico-spain-italy-iran>.

believed the information to be true. For example, in the early stages of the pandemic public health officials in many countries, as well as experts from the World Health Organization, claimed that the coronavirus was not airborne, but could only be spread by larger droplets. Therefore, there was no need for masking or other interventions appropriate for airborne infections, such as improving ventilation in enclosed spaces.<sup>194</sup> This information turned out to be wrong – Covid could spread through aerosol particles of various sizes, and masking, ventilation and the like were important for limiting the spread of the virus. Eventually, more rigorous research overturned conventional wisdom, and public health officials (belatedly) corrected their messaging when better evidence became available.<sup>195</sup>

This scenario raises an important conceptual point – while the statements of the two Committees above focused on *intentional* or *deliberate misrepresentation*, i.e. lying, as violations of the negative state obligation to respect the right to health, it could be that insisting on deceptive intent would impose an underinclusive standard of fault for violations of this duty. While states should be responsible *for every lie* capable of harming public health,<sup>196</sup> they should not be responsible *for every false piece of information* communicated to the public. Strict liability for false statements, without any fault, would be overinclusive. This is because it could lead to excessive caution in how state officials communicate with the public in situations of genuine uncertainty, which may harm rather than advance the protection of public health. That said, it could be that forms of fault lower than intent, such as recklessness or even negligence, could strike the right balance here. While a state should

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<sup>194</sup> See Natalie Grover, *Two years of COVID: The battle to accept airborne transmission*, Al Jazeera (Mar. 11, 2022), <https://www.aljazeera.com/features/2022/3/11/two-years-of-covid-the-battle-to-accept-airborne-transmission>.

<sup>195</sup> See more Jose L. Jimenez et al., *What were the historical reasons for the resistance to recognizing airborne transmission during the COVID-19 pandemic?* *Indoor Air* (2022) 32:e13070. doi: 10.1111/ina.13070; Amy Maxmen, *The WHO overturned dogma on how airborne diseases spread. Will the CDC act on it?*, NBC News (Apr. 30, 2024), <https://www.nbcnews.com/health/health-news/who-airborne-disease-cdc-updated-guidelines-rca149843>; Katie L. Burke, *Changing Policies on COVID-19 Transmission*, 111 *American Scientist* 266 (2023).

<sup>196</sup> See Milanovic & Schmitt, *supra* note 141, at 268.

always bear responsibility for every lie by one of its officials capable of harming health, it should also bear responsibility for false statements that were truthful but were nonetheless not appropriately verified or not based on sufficiently rigorous medical and other research, or where the uncertainty in current scientific knowledge was not properly communicated.<sup>197</sup>

Thus, if a state official – say a health minister – genuinely believed vaccines to cause autism (even though they do not),<sup>198</sup> that official would not be a *liar* if he or she communicated this false information to the public. But that official would be wilfully blind or reckless as to the truth of the information being transmitted, because he or she consciously chose to disregard scientific consensus on the safety of vaccines, and risked the safety of others in doing so. The state would therefore be liable for such false statements, even though they would not be lies as defined above.

Here we have a pre-Covid example that is as instructive as it was atrocious – South Africa’s response to the AIDS epidemic under President Thabo Mbeki, who was in office from 1999 to 2008.<sup>199</sup> For much of his administration, Mbeki and his health minister made numerous false statements harmful to public health, such as denying that HIV caused AIDS, rejecting the effectiveness of antiretroviral drugs (and refusing to provide them to the public until compelled to do so by campaigners and litigation before the Constitutional Court),<sup>200</sup> and promoting the use of ineffective remedies, including herbs, garlic and beetroot, to treat AIDS.<sup>201</sup> It is estimated that the HIV/AIDS policies of the Mbeki administration caused more

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<sup>197</sup> It is at least arguable that the resistance to promptly correcting mistaken advice on the airborne transmission of Covid, e.g. among WHO experts, was negligent, even if all of the individuals concerned acted in good faith. See, e.g., Megan Molteni, *The 60-Year-Old Scientific Screwup That Helped Covid Kill*, Wired (May 13, 2021), <https://www.wired.com/story/the-teeny-tiny-scientific-screwup-that-helped-covid-kill/>.

<sup>198</sup> See Institute of Medicine, *supra* note 15.

<sup>199</sup> See generally PIETER FOURIE, *THE POLITICAL MANAGEMENT OF HIV AND AIDS IN SOUTH AFRICA* (2006); NICOLI NATTRASS, *MORTAL COMBAT: AIDS DENIALISM AND THE STRUGGLE FOR ANTIRETROVIRALS IN SOUTH AFRICA* (2007);

<sup>200</sup> See *Minister of Health and Others v. Treatment Action Campaign and Others (No 2)* (CCT8/02) [2002] ZACC 15. See also Sharifah Sekalala and Kene Esom, *Law, Human Rights, and Pandemic Response: Reflecting on the South African HIV Response 25 Years Later*, 26 *Health and Human Rights Journal* 21 (2024).

<sup>201</sup> See, e.g., Chris McGreal, *CIA and drug firms out to get me, Mbeki says*, *The Guardian* (Oct. 6, 2000), <https://www.theguardian.com/world/2000/oct/06/chrismcgreal>; Chris McGreal, *How Mbeki stoked South*

than 300,000 preventable deaths in South Africa, while 35,000 babies were born with HIV because of a failure to promptly implement a mother-to-child transmission prophylaxis program.<sup>202</sup>

While the falsity and harms of Mbeki's statements can be easily proven,<sup>203</sup> it is more difficult to establish his state of mind and that of his officials – did they *genuinely believe* in the false statements they were making, or were they lying? This is at least partly because no accountability mechanism, such as a formal inquiry or a truth commission, was ever tasked with assessing Mbeki's policies on HIV/AIDS. That said, it is entirely possible, maybe even probable, that Mbeki and his officials were sincere, truthful HIV denialists. It has been argued, for example, that Mbeki's attitude to HIV/AIDS was deeply rooted in his personal ideology, as shaped by his struggle against apartheid, his general contrarianism, his distrust of the West and the pharmaceutical industry, his desire for African solutions for African problems, and his belief that racism and poverty were the root causes of all social problems in South Africa.<sup>204</sup> Some of these beliefs are valid – for instance, there are good reasons to be suspicious of “Big Pharma”, while racism, poverty and malnutrition certainly do contribute to

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*Africa's Aids catastrophe*, The Guardian (June 12, 2001), <https://www.theguardian.com/world/2001/jun/12/aids.chrismcgreal>; Gwen Thompkins, *AIDS Crisis Politicized in South Africa as Graves Fill*, NPR (Sept. 19, 2007), <https://www.npr.org/2007/09/19/14370270/aids-crisis-politicized-in-south-africa-as-graves-fill>;

Mbeki has persisted in his AIDS denialism even after leaving office, although he has commented on these issues only infrequently. See The Academy of Science of South Africa, Statement on Comments by former President Thabo Mbeki on HIV and AIDS Delivered at UNISA on Wednesday, September 21, 2022, at <https://www.samrc.ac.za/sites/default/files/attachments/2023-02/ASSAfStatement.pdf>.

<sup>202</sup> See Pride Chigwedere et al., *Estimating the Lost Benefits of Antiretroviral Drug Use in South Africa*, 49(4) Journal of Acquired Immune Deficiency Syndromes 410 (2008).

<sup>203</sup> See also *The Durban Declaration*, 406 Nature 15-16 (2000) (5000 scientists affirming that HIV is the cause of AIDS, while noting that as “with any other chronic infection, various factors have a role in determining the risk of disease. People who are malnourished, who already suffer other infections or who are older, tend to be more susceptible to the rapid development of AIDS following HIV infection. However, none of these factors weakens the scientific evidence that HIV is the sole cause of the AIDS epidemic.”); Martin Delaney, *Why are AIDS dissidents still making 15-year-old, long-refuted claims?*, 408 Nature 287 (2000).

<sup>204</sup> See, e.g., Helen Schneider & Didier Fassin, *Denial and defiance: a socio-political analysis of AIDS in South Africa*, 16 AIDS 45 (2002); Chris McGreal, *Mbeki admits he is still Aids dissident six years on*, The Guardian (Nov. 6, 2007), <https://www.theguardian.com/world/2007/nov/06/southafrica.aids>; Nicoli Nattrass, *AIDS Denialism vs. Science*, 31 Skeptical Inquirer 31 (2007);

public health crises – but in combination they led Mbeki to disregard science and endanger the welfare of his own citizens.

That Mbeki and his officials might not have intentionally, deliberately or knowingly misrepresented health-related information – that they did not lie – does not, however, entail that South Africa bore no state responsibility for the harms to public health caused by their objectively false statements. The conscious disregard of the scientific consensus on HIV/AIDS was at least objectively unreasonable, i.e. negligent, and could most likely be characterized as reckless, a form of morally culpable risk-taking.<sup>205</sup> And these lower forms of fault should suffice for the responsibility of the state for violating the negative duty to respect the right to health, by contrast to the incorrect advice on masking and airborne transmission of Covid scenario examined above.<sup>206</sup>

In sum, state lies, as well as false statements made negligently or recklessly, can violate the right to health, if they are likely to result in bodily harm, unnecessary morbidity and preventable mortality.<sup>207</sup> Such statements are a sufficient condition for the violation, at least if they are not promptly corrected through remedial efforts by other state officials. False statements made entirely innocently, without fault, would not violate the duty to respect the right to health even if they actually caused harmful consequences. In some situations, proving the existence of an intent to deceive may be straightforward; in others, it may be easier to prove negligence or recklessness. But a lie harmful to public health should be exposed and

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<sup>205</sup> See also Peter Singer, Mbeki ignored the science on HIV, *The Guardian* (Dec. 17, 2008), <https://www.theguardian.com/commentisfree/2008/dec/17/mbeki-south-africa-aids> (“The culpable failure, especially when lives are at stake, is not to disagree with scientists, but to reject science as a method of inquiry. Mbeki must have known that, if his unorthodox views about the cause of Aids and the efficacy of anti-retrovirals were wrong, his policy would lead to a large number of unnecessary deaths. That knowledge put him under the strongest obligation to allow all the evidence to be fairly presented and examined without fear or favour. Because he did not do this, Mbeki cannot escape responsibility for hundreds of thousands of deaths.”)

<sup>206</sup> I will leave aside here the issue of whether risk-based forms of fault would be appropriate in contexts other than the right to health.

<sup>207</sup> CESCR General Comment No. 14, para. 50.

stigmatized as such, because of its higher degree of blameworthiness and because lying is frequently used to cover up other types of wrongdoing by state officials.

On the facts of the cases examined above, no justification appears possible for any of the lies harmful to public health that were told by state officials. This is because in most cases state officials lied to disguise their own incompetence or for other political or ideological ends – aims not regarded as legitimate for the purpose of justifiably restricting the rights of others. It is possible, however, that in some rare instances lies in this context could be justified. The core scenario would be one in which a state official lies, for example about the extent of imminent danger from an infectious disease, in order to avert a possible panic that could lead to even greater loss of life or other harms. Short of a very limited lie of this kind, which is later corrected and remedied to the extent possible, state lies harmful to public health cannot be regarded as legitimate, necessary or proportionate.

## **X. STATE LIES AND PARTICIPATION IN PUBLIC AFFAIRS**

Moving on to our next case study, we should note that Article 25 ICCPR protects the right of every citizen to participate in public affairs.<sup>208</sup> That right has three dimensions:<sup>209</sup> (1) the participation in public affairs as such, directly or indirectly (through one's chosen representatives); (2) the right to vote and the right to stand as a candidate in elections; and (3) the right to have access to public service, i.e. the opportunity to be a civil servant in the state's bureaucracy. All three dimensions of the right are guaranteed "without unreasonable

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<sup>208</sup> The text of Article 25 ICCPR is somewhat more robust than the text of Article 21 UDHR on which it was based; provisions on the right to vote and the right to stand for elections can also be found in regional human rights treaties, but I will not discuss them here. See Art. 3, Protocol 1 ECHR, Art. 23 ACHR.

<sup>209</sup> The right to participate in public affairs can be both an umbrella concept referring to all three dimensions of the right, or refer solely to this first dimension of the right. See OHCHR, Guidelines for States on the effective implementation of the right to participate in public affairs (2018), [https://www.ohchr.org/sites/default/files/2021-12/GuidelinesRightParticipatePublicAffairs\\_web.pdf](https://www.ohchr.org/sites/default/files/2021-12/GuidelinesRightParticipatePublicAffairs_web.pdf), para. 5. See also Taylor, *supra* note 78, at 693-7.

restrictions.” This is primarily a negative duty of restraint – if the state, through an action of one of its organs or agents, *restricts* a dimension of this right, and that restriction is *unreasonable*, the right has been violated.

The Human Rights Committee has elaborated both on the protective scope of the three dimensions of the right, and on the types of unreasonable restrictions on the exercise of the right.<sup>210</sup> The Office of the High Commissioner for Human Rights has also published an important set of guidelines on this right.<sup>211</sup>

According to the Committee, participation in public affairs “is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.”<sup>212</sup> Citizens can directly participate in public affairs by exercising power as members of legislative or executive bodies, by voting in plebiscites or referenda, by participating in formal consultative bodies, or by engaging in public debate and dialogue.<sup>213</sup> When it comes to the rights to vote and be elected, Article 25(b) ICCPR expressly requires elections to be “genuine,” so that they can “guarant[ee] the free expression of the will of the electors.” Finally, the third dimension of the right – the opportunity of citizens to have equal access to public service positions – entails, *inter alia*, that “persons holding public service positions are free from political interference or pressures.”<sup>214</sup>

There are substantial synergies between the different dimensions of the right to participate in public affairs and other human rights.<sup>215</sup> On the one hand, the overarching purpose of this right – essentially to secure democratic governance – is also reflected in the

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<sup>210</sup> Hum. Rts. Comm., General Comment No. 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

<sup>211</sup> See OHCHR Guidelines, *supra* note 209.

<sup>212</sup> HRC General Comment No. 25, para. 5.

<sup>213</sup> HRC General Comment No. 25, paras. 6-8.

<sup>214</sup> HRC General Comment No. 25, para. 23.

<sup>215</sup> See OHCHR Guidelines, paras. 14-17.

right of all peoples to self-determination. The right to self-determination is a *collective* right, pertaining to the people as a whole, whereas the right to participate in public affairs is an *individual* right.<sup>216</sup> I will not be discussing self-determination here any further, except to note that many of the arguments, set out below, on how state lies can violate individual rights in this context can also be made with regard to this collective right.<sup>217</sup> Participation in public affairs also clearly overlaps with various activities protected by the freedoms of expression, assembly and association, all of which can be forms of direct participation in such affairs and are essential for the effective exercise of electoral rights.<sup>218</sup>

For our purposes, the question is whether lies by state agents can amount to restrictions on the right to participate in public affairs; if they do, and they are unreasonable (which they almost invariably will be), then state lies will violate this right. While no such cases have been litigated, to my mind the answer to this question is clear – state lies can violate all three dimensions of the right to participate in public affairs.<sup>219</sup> Let us consider some scenarios.

First, there is a variation on the incitement, punishment, harassment or intimidation scenarios addressed above.<sup>220</sup> Here, state officials would target opposition members of parliament, or career civil servants, or sitting judges or prosecutors because of their work, and would do so by launching a campaign of lies against them. The purpose of this smear campaign could be to deter the individual concerned from continuing their work, that is, to

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<sup>216</sup> HRC General Comment No. 25, para. 2.

<sup>217</sup> See JENS DAVID OHLIN, ELECTION INTERFERENCE: INTERNATIONAL LAW AND THE FUTURE OF DEMOCRACY (2020); İrem Işık, Ömer Bildik & Tayancı Molla, *Securing Elections Through International Law: A Tool for Combatting Disinformation Operations?*, 15 Journal of Strategic Security 106 (2022).

<sup>218</sup> HRC General Comment No. 25, paras. 8, 12, 25-26.

<sup>219</sup> Cf. OHCHR Guidelines, para. 10 (recognizing that information and communication technologies “could negatively affect participation [in public affairs], for example when disinformation and propaganda are spread through ICTs to mislead a population or to interfere with the right to seek and receive, and to impart, information and ideas of all kinds, regardless of frontiers.”) See also Jones, *supra* note 31, at 49-50.

<sup>220</sup> See Sections III and IV above.



compel them to align themselves with those in the state apparatus targeting them, or to compel them to resign from office, or to obtain some other political advantage.<sup>221</sup>

Second, in the context of the right to stand for elections, state officials may similarly target candidates for public office with a smear campaign, again either to compel them to desist from their candidacy or to lower their standing with the electorate.<sup>222</sup> Such state lies are contrary to the right of every individual candidate to put themselves forward for election, and thus participate in public affairs. In the words of the Human Rights Committee, “[n]o person should suffer discrimination or disadvantage of any kind because of that person's candidacy.”<sup>223</sup>

Third, state officials may use lies to target voters, normally *en masse*. The purpose of such a campaign could be to suppress part of the vote, or to manipulate the electors to vote, or not vote, for particular candidates. This type of state lies does not violate only the rights of individuals candidates running for office, but those of voters who are unable to express their genuine, free will. Thus, in the view of Committee, “abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced.”<sup>224</sup> A smear campaign designed to suppress the vote, or interfere with the balloting, would clearly qualify as an *abusive* interference. Similarly, according to the Committee:

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<sup>221</sup> See, e.g., Jelena Kleut, *Mapping disinformation in Serbian media*, CRTA Research Report (2022), <https://cрта.rs/en/mapping-disinformation-in-serbian-media-2020/> (documenting state-sponsored attacks against the leaders of opposition political parties in parliament); Anne Applebaum, *The Disturbing Campaign Against Poland's Judges*, *The Atlantic* (Jan. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/> (documenting a smear campaign, organized by officials within the Polish Ministry of Justice, against independent judges in Poland); Konrad Bleyer-Simon, *Smear campaigns are constant components of Fidesz's recipe to stay in power*, HBS (Jan. 5, 2022), <https://cz.boell.org/en/2022/01/05/smear-campaigns-are-constant-components-fideszs-recipe-stay-power> (reporting on state-sponsored smear campaigns against an opposition legislator and a mayor in Hungary).

<sup>222</sup> See, e.g., Kemal Kirişçi and Ömer Taşpınar, *Erdoğan's tactical gamble in Istanbul proves a strategic mistake*, *The Brookings Institution* (June 27, 2019), <https://www.brookings.edu/articles/erdogans-tactical-gamble-in-istanbul-proves-a-strategic-mistake/> (reporting on a government-orchestrated smear campaign against the opposition candidate for mayor of Istanbul in Turkey).

<sup>223</sup> HRC General Comment No. 25, para. 15.

<sup>224</sup> HRC General Comment No. 25, para. 11.

Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, *without undue influence or coercion of any kind* which may *distort or inhibit* the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or *manipulative interference* of any kind.<sup>225</sup>

Again, it seems quite straightforward to argue that a campaign of lies by state officials can qualify as “undue influence” or a form of “manipulative interference” with the will of the electors.<sup>226</sup> This raises the question of whether there should be some kind of threshold, *de minimis* or otherwise, that state lies must cross in their capacity to influence voters in order to qualify as restrictions on the right to participate in public affairs. I have explored the analogous threshold issues with regard to the freedoms of opinion and expression above.<sup>227</sup> As things stand, this is a question of some indeterminacy, on which various reasonable positions could be taken. My own view – albeit a provisional one – is that proof of intent by state officials to deceive or manipulate voters in the context of an election suffices to obviate any concerns that the rule prohibiting lies in such a context would be overinclusive. The question will always be whether, on some specific facts, the free expression of the electors’ will was being distorted.

Finally, and perhaps most blatantly, state officials can use lies to violate the right to participate in public affairs in the most comprehensive way imaginable – by falsifying the results of an election, thereby violating both the rights of the candidates and the rights of the electorate. Needless to say, “[t]he results of genuine elections should be respected and implemented.”<sup>228</sup> An attempt to overturn the results of a genuine election will normally require a web of lies from a host of state officials – from the highest-ranking members of the executive, through supposedly independent members of election commissions or judges

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<sup>225</sup> HRC General Comment No. 25, para. 19 (emphasis added).

<sup>226</sup> See also Nowak, *supra* note 78, at 583-4.

<sup>227</sup> See Section V.

<sup>228</sup> HRC General Comment No. 25, para. 19.

supervising the elections.<sup>229</sup> The attempt may or may not be successful in the end, but each and every one of these lies by a state officials would violate Article 25 ICCPR.

One example that will likely come to readers' mind is the unsuccessful attempt by the then-and-future President of the United States, Donald Trump, to overturn the results of the 2020 presidential elections. But there are many others, even more blatant. Consider, for instance, the presidential elections held in Belarus in August 2020, in which the incumbent President, Alexander Lukashenko, was allegedly re-elected with more than 80 percent of the vote. The elections themselves and their preparation clearly did not meet international standards,<sup>230</sup> but the final count of the votes was widely regarded as fraudulent.<sup>231</sup> That is, various state authorities, including the sitting president and the Central Election Commission, likely systematically lied to falsify the results of the vote, in an election that was already rigged in the incumbent's favour. Peaceful protests against the election fraud were then met with a wave of repression, including the violent dispersal of protests and the arbitrary detention of some 37,000 persons; according to the OHCHR, this response "had the primary aim to suppress criticism and dissent of governmental policies."<sup>232</sup>

Or, consider the July 2024 presidential elections in Venezuela, which were stolen by the incumbent autocrat, Nicolas Maduro, and were rejected as such, inter alia, by numerous governments.<sup>233</sup> Despite the fact that Venezuela has an advanced, fully transparent electronic

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<sup>229</sup> Cf. the European Court's reference to "procedural breaches that would be capable of thwarting the free expression of the opinion of the people, for instance through gross distortion of the voters' intent" in the analogous ECHR context, in *Davydov and Others v. Russia*, App. No. 75947/11 (2017), para. 287.

<sup>230</sup> See OSCE Rapporteur's Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus (Oct. 29, 2000), [https://www.osce.org/files/f/documents/2/b/469539\\_0.pdf](https://www.osce.org/files/f/documents/2/b/469539_0.pdf), at 10-21.

<sup>231</sup> See *id.*, at 55 ("there is overwhelming evidence that the presidential elections of 9 August 2020 have been falsified"). See also Alesia Rudnik, *Explainer: how do we know that Belarusian election was rigged and who won the race?*, Center for New Ideas (2020), <https://newbelarus.vision/explainer-elections/>.

<sup>232</sup> See Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/49/71 (2022), paras. 80-86. I need to disclose here that I was one of the three experts appointed by the High Commissioner to assist her in the preparation of this report.

<sup>233</sup> See Tom Phillips, *US and 10 Latin American states reject Nicolás Maduro's vote certification*, The Guardian (Aug. 23, 2023), <https://www.theguardian.com/world/article/2024/aug/23/latin-american-states-and-us-reject-maduro-vote-certification-election-venezuela-supreme-court>.

voting system, which makes it impossible to alter the election results by conventional methods of ballot box stuffing and the like, the theft nonetheless happened.<sup>234</sup> And it happened because all state officials who were in charge of the election process – from the members of National Electoral Council to the Supreme Court – simply lied and proclaimed Maduro the victor.<sup>235</sup>

In many of these examples state lies are part of a package of other human rights violations – Lukashenko and Maduro could not have held on to power, for example, were it not for the continued obedience of the state security services and their repression against the opposition and ordinary citizens. But, their lies were at the very core of the violation of the right to participate in public affairs, in all its dimensions – they were a necessary and sufficient condition for all of these violations. The role of the lies told by state officials, including going so far as to falsify an election, should not be overshadowed by the state's other wrongdoings. And needless to say, in all of these scenarios the officials concerned are acting with ulterior purposes, and their lies can categorically never be justified.

## **XI. STATE LIES AGAINST THE POPULATIONS OF OTHER STATES**

Now that we have looked at some of the rights that can be interfered with and violated by state lies, it is important to consider a structural issue: whether human rights law even applies when state do not direct their lies against their own populations, as in most of the examples discussed above, but against the populations of other states. This is, in other words,

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<sup>234</sup> See more Javier Corrales & Dorothy Kronick, *How Maduro Stole Venezuela's Vote*, 36 *Journal of Democracy* 36 (2005).

<sup>235</sup> See also Tom Phillips, *Pressure grows on Maduro after top court endorses Venezuela election win*, *The Guardian* (Aug. 22, 2024), <https://www.theguardian.com/world/article/2024/aug/22/maduro-accused-power-grab-top-court-endorses-venezuela-election-win>; OAS General Secretariat Rejects Ruling Issued by Venezuela's Supreme Court, Press Release (Aug. 23, 2024), [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-056/24](https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-056/24).

the question of the extraterritorial application of human rights law, which has been extensively discussed in the literature, albeit not in this particular context.<sup>236</sup> This issue has generated a substantial body of international jurisprudence, much of which is conceptually confused and internally inconsistent, on matters as diverse as the application of human rights law to overseas military operations, targeted killings, espionage, cyber operations and climate change.

The jurisprudence generally turns on the proper interpretation to be given to so-called jurisdiction clauses in human rights treaties, under which states have to ensure human rights to individuals within or subject to their jurisdiction.<sup>237</sup> The jurisprudence has coalesced around two complementary tests – the spatial model of state jurisdiction, under which individuals are within a state’s jurisdiction if they are located in a territory under the state’s control; and the personal model of jurisdiction, under which individuals are within a state’s jurisdiction if they are subject to the authority, power or control of a state agent. A recent addition to these tests is the functional model, under which jurisdiction exists if the state has the capacity to control the exercise of an individual’s rights – an approach endorsed by several UN treaty bodies,<sup>238</sup> but recently rejected by the European Court in the climate change context.<sup>239</sup>

In my own work, I have argued that the only coherent approach to the extraterritorial application of *negative* duties of restraint is to accept that they are territorially unbound. That is, whenever the state can, through the actions of its agents, interfere with the rights of an

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<sup>236</sup> See, e.g., MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2011); Taylor, *supra* note 78, at 64-6.

<sup>237</sup> It should be noted that there is textual variation among these clauses, and that not all treaties have them (the ICESCR is an important example).

<sup>238</sup> See General Comment No. 36, para. 66; *Sacchi v. Argentina*, U.N. Doc. CRC/C/88/D/104/2019 (2021), para. 10.5.

<sup>239</sup> See *Duarte Agostinho v. Portugal and 32 other states* [GC] (dec.), App. No. 39371/20 (2024), paras. 205-208. See also Marko Milanovic, *A Quick Take on the European Court’s Climate Change Judgments*, EJIL: Talk! (Apr. 9, 2024), <https://www.ejiltalk.org/a-quick-take-on-the-european-courts-climate-change-judgments/>.

individual, it should have the duty to respect the rights of that individual.<sup>240</sup> The personal model of jurisdiction essentially collapses to this proposition, because every state action capable of adversely affecting an individual's rights can be said to be a form of authority, power or control over that individual. The same goes for the functional model of jurisdiction. Positive duties of protections are, however, much more complicated.<sup>241</sup>

But this approach has not been adopted by human rights bodies or states – at least not yet. The European Court in particular has a restrictive jurisprudence, developed primarily in the armed conflict context, which the Court has used as a device for avoiding dealing with the merits of factually, legally and politically complex cases. Some states, especially those keen on overseas military adventures, have also adopted restrictive official positions on the extraterritorial scope of human rights law. Under some such approaches, even dropping a bomb on an individual would not suffice to create a jurisdictional link – and lesser forms of interference, such as spying or lying, would therefore also not suffice.<sup>242</sup>

Such restrictive positions are, in my view, normatively completely unsustainable. Let us focus only on extraterritorial state lies. Consider the scenario in which a state launches a smear campaign against a journalist, civil society activist or opposition politician, to incite violence against them, or to otherwise punish, intimidate or harass them.<sup>243</sup> There is no meaningful legal or moral difference, I would argue, in analysing this scenario, that could follow from the *location* of that individual.<sup>244</sup> Just like there is no difference in human rights

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<sup>240</sup> See Milanovic, *supra* note 236, at 209 *et seq.*

<sup>241</sup> See A.S. and others v. Malta, U.N. Doc. CCPR/C/128/D/3043/2017 (2021); A.S. and others v. Italy, U.N. Doc. CCPR/C/130/DR/3042/2017 (2021); Marko Milanovic, *Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations*, EJIL: Talk! (Mar. 16, 2021), <https://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/>.

<sup>242</sup> See Bankovic v. Belgium, 2001-XII Eur. Ct. H.R., paras. 74-82; Georgia v. Russia No. 2, App. No. 38263/08 (2021), paras. 126, 137-8.

<sup>243</sup> Sections III and IV above.

<sup>244</sup> On specific facts, especially in the context of incitement to violence, smear campaigns against journalists within a state's territory might be more effective than those outside a state's territory, simply because there is a larger audience susceptible to such messaging. But this is a factual question of the extent of harm being caused, rather than a question of broader legal or moral principle.

terms between, say, a repressive state assassinating dissidents on its own territory and doing so on the territory of other states,<sup>245</sup> so there is no difference between a situation in which a state uses lies to target a dissident on its own territory or outside it.<sup>246</sup> In fact, in many repressive societies, journalists, human rights defenders or political dissidents have little choice but to flee their own country and continue working from exile. Are we really going to say that such an individual is legally deserving of no protection from the state persecuting them, especially in a context in which state lies can easily be deployed online, in a manner that transcends boundaries?

Or, consider the example of state agents lying in the course of investigations, criminal or otherwise. Again, I fail to see how it could be justified to argue that state agents have a duty to refrain from lying in investigations regard human rights violations on their territory, but would not be prohibited from lying with regard to violations or investigations occurring elsewhere. For example, it has been established that Australian special forces operating in Afghanistan between 2005 and 2016 murdered at least 39 civilians or prisoners, and then lied and covered up these war crimes, including by planting weapons next to the persons killed and by falsifying other evidence to disguise their wrongdoing.<sup>247</sup> Amongst these liars was Australia's most decorated, now disgraced, soldier.<sup>248</sup>

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<sup>245</sup> See Milanovic, *supra* note 160 (discussing the murder of Jamal Khashoggi by Saudi agents in Istanbul).

<sup>246</sup> See also Article 19, *Clearing the Fog of War: Protecting Freedom of Expression in Armed Conflict* (2024), <https://www.article19.org/wp-content/uploads/2021/07/Clearing-the-Fog-of-War-3-December-2024.pdf>, at 15-17.

<sup>247</sup> See The Inspector-General of the Australian Defence Force Afghanistan Inquiry Report (the Brereton Report) (2000), at <https://www.defence.gov.au/sites/default/files/2021-10/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>. See also Christopher Knaus, *Australian special forces involved in murder of 39 Afghan civilians, war crimes report alleges*, The Guardian (Nov. 19, 2020), <https://www.theguardian.com/australia-news/2020/nov/19/australian-special-forces-involved-in-of-39-afghan-civilians-war-crimes-report-alleges>.

<sup>248</sup> The soldier, Ben Roberts-Smith, brought defamation proceedings against several newspapers that published allegations about his commission of war crimes. The Federal Court of Australia dismissed the defamation claim, finding that the allegations made were substantially true, and further ruled that the claimant brought his claim while knowing that the allegations against him were true, i.e. that he lied. See Ben Doherty, *Ben Roberts-Smith loses defamation case, with judge finding former SAS soldier committed war crimes*, The Guardian (June 1, 2023), <https://www.theguardian.com/australia-news/2023/jun/01/ben-roberts-smith-loses-defamation-case-with-judge-saying-newspapers-established-truth-of-some-murders>; *Roberts-Smith v Fairfax Media Publications Pty Limited* (No 41) [2023] FCA 555; *Roberts-Smith v Fairfax Media Publications Pty Limited* (No 45) [2023] FCA 1474 (ordering the applicant to pay the respondents' costs), paras. 21 (the applicant "knew from the

From the perspective of international human rights law, lies told by Australian soldiers to cover up their wrongdoing violated Australia's procedural obligation to effectively investigate the wrongful deaths of their Afghan victims, a violation that was partially remedied afterwards through further investigative steps that Australia took, many years later. But my main point is this: I see no way in which it could be reasonably argued that lies by Australian state agents within Australia would violate the rights of victims in Australia, but that human rights would not apply if these victims were Afghans in Afghanistan. (The same goes for the conduct of British special forces in Afghanistan, which is now being scrutinized by a formal inquiry and also involves cover-ups of war crimes).<sup>249</sup>

That is, if lies can violate various procedural obligations of the state under human rights law,<sup>250</sup> it should not matter whether the underlying conduct, or the lying, takes place within the state's territory or outside it. If, for instance, Russian state officials lie – and continue to do so – about Russia's involvement in the 2014 downing of the MH17 airliner over Ukraine, those lies violate Russia's procedural obligations under the right to life regardless of whether the plane was shot down over Ukraine or over Russia.<sup>251</sup>

Or, to turn to the example of state lies violating the right to health,<sup>252</sup> I can see no reason of principle that could justify a position under which lies would violate the rights of the victims if they were located within the territory of the state propagating the lies, but not if the victims were outside it. Just consider the instances of Covid-19 vaccine disinformation conducted by the United States and China discussed above, which largely targeted the

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commencement of the proceedings that the most serious imputations were substantially true") and 39 ("the applicant and [another person] had colluded to put forward a false story").

<sup>249</sup> See at <https://www.iaa.independent-inquiry.uk/>; Harrison Jones & Hannah O'Grady, *Afghanistan: UK special forces 'killed 9 people in their beds*, BBC News (Oct. 9, 2023), <https://www.bbc.com/news/uk-67054702>.

<sup>250</sup> See Section VII above.

<sup>251</sup> See Philip Pangalos, *Russia denies claims of involvement in Malaysia Airlines MH17 crash*, Euronews (June 19, 2016), at <https://www.euronews.com/2019/06/19/russia-denies-claims-of-involvement-in-malaysia-airlines-mh17-crash>; *Ukraine and the Netherlands v. Russia* [GC] (dec.), App. Nos. 8019/16, 43800/14 and 28525/20 (2022), paras. 899-942.

<sup>252</sup> Section IX above.



populations of other states, such as the Philippines.<sup>253</sup> Are we really going to say that a state has no obligation to refrain from using lies to harm the health of the peoples of other states even if it has such a duty towards its own population? That the lives and health of foreigners are somehow not deserving of protection, despite the universality principle underlying all human rights? Again, I fail to see how such a position could be justified in human rights terms.<sup>254</sup>

The same goes for state lies interfering with elections and other forms of participation in public affairs.<sup>255</sup> How could it be argued that states are not allowed to lie to their own people and smear candidates or manipulate voters, but are allowed to do so to the people of other states? Consider, for instance, the first round of presidential elections held in Romania in November 2024, in which the candidate who won the highest number of votes apparently benefited from numerous electoral irregularities and a disinformation campaign, especially on TikTok, allegedly run by the Russian Federation.<sup>256</sup> This led the Constitutional Court of Romania to annul the elections, ruling, *inter alia*, that

The freedom of voters to form an opinion includes the right to be correctly informed before making a decision. More specifically, the freedom of voters to form an opinion implies the right to obtain correct information about candidates and the electoral process from all sources, including online, as well as protection against undue influence, through unlawful and disproportionate acts/facts, on voting behaviour. [...] Consequently, interference by state or non-state entities in carrying out electoral propaganda or disinformation campaigns must be excluded.

In the present case, the freely expressed nature of the vote was violated by the fact that voters were misinformed through an electoral campaign in which one of the candidates benefited from aggressive promotion, carried out in circumvention of national electoral legislation and through the abusive exploitation of the algorithms of social media platforms. The manipulation of the vote was all the more evident as the electoral materials promoting a candidate did not bear the specific signs of electoral advertising according to Law no. 370/2004. In addition, the candidate also benefited

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<sup>253</sup> See *supra* note 6 and accompanying text.

<sup>254</sup> See CESCR General Comment No. 14, para. 39 (“To comply with their international obligations in relation to article 12 [CESCR], States parties have to respect the enjoyment of the right to health in other countries”).

<sup>255</sup> Section X above.

<sup>256</sup> See Anda Iulia Solea, *Why Romania’s election was annulled – and what happens next?*, The Conversation (Dec. 16, 2024), <https://theconversation.com/why-romaniias-election-was-annulled-and-what-happens-next-245779>.

from preferential treatment on social media platforms, which had the effect of distorting the manifestation of the will of the voters.<sup>257</sup>

It could be that Russia was not, in fact, behind this election interference.<sup>258</sup> But if it was, how could it reasonably be denied that such an interference operation violated Article 25 ICCPR, in precisely the same way as if Russia lied and manipulated its own citizens? Such election interference operations can violate other rules of international law as well, especially the prohibition of intervention in a state's internal affairs,<sup>259</sup> but the core of the wrongdoing here is in the harm caused to the human rights of the voters. That should not be obscured through unprincipled restrictive interpretations of the extraterritorial scope of human rights law.

To conclude, scenarios in which state officials direct their lies against the populations of other states do pose a legal difficulty. The jurisprudence of human rights bodies on the issue of extraterritoriality is unsettled, and the same goes for the views of states.<sup>260</sup> But, as I explained, there is no normatively plausible way in which a rigid distinction can be maintained between lies directed at a state's own people and against individuals in other states. If the former can violate human rights, then so can the latter.

I would note in that regard that, in their analysis of restrictions on freedom of expression in the context of "fake news", UN and regional mandate-holders noted that human rights standards with which such restrictions have to comply "apply regardless of frontiers so as to limit restrictions not only within a jurisdiction but also those which affect media outlets and other communications systems operating from outside of the jurisdiction of a State as

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<sup>257</sup> Constitutional Court of Romania, Decision No. 32 (Dec. 6, 2024), available in Romanian [https://www.ccr.ro/wp-content/uploads/2024/12/Hotarare\\_32\\_2024.pdf](https://www.ccr.ro/wp-content/uploads/2024/12/Hotarare_32_2024.pdf), paras. 13-14 (Google translation into English).

<sup>258</sup> See Andrew Higgins, *A Canceled Vote in Romania Hands Russia a Propaganda Coup*, The New York Times (Dec. 23, 2024), at <https://www.nytimes.com/2024/12/23/world/europe/romania-election-russia.html>.

<sup>259</sup> See *supra* note 46.

<sup>260</sup> In the most acute context of armed conflict, see Marko Milanovic, *The Mariupol Test: Analysing the Briefs of Third States Intervening in Ukraine and the Netherlands v. Russia*, EJIL: Talk! (Jan. 9, 2024), <https://www.ejiltalk.org/the-mariupol-test-analysing-the-briefs-of-third-states-intervening-in-ukraine-and-the-netherlands-v-russia/>.

well as those reaching populations in States other than the State of origin.”<sup>261</sup> I would also note that the UN Human Rights Council rightly called upon “all States to refrain from conducting or sponsoring disinformation campaigns domestically or transnationally for political or other purposes.”<sup>262</sup> In the context of growing transnational repression, conducted by digital means or otherwise, it simply makes no sense to apply a restrictive approach to the extraterritorial application of human rights.<sup>263</sup>

## **XII. CONCLUSION**

We live in a time when even some of the world’s most established democracies have elected brazen, shameless liars as their leaders. Their lies, and those of other state officials and agents, are not only corrosive of democracy, good governance and morality. They can also be unlawful. I hope to have shown in this article how some state lies can violate international human rights law, in various scenarios, depending on the nature of the harm that they can cause.<sup>264</sup> I also hope to have shown that such lies can be justified only exceptionally within the human rights framework.

The article was not meant to provide a comprehensive overview of all possible rights that state lies can infringe, or all possible situations thereof. There will be others. For example, in many of the scenarios I examined above there may be an additional non-discrimination dimension, if, say, a particular group was victimized by state lies on the basis of some specific characteristic, or intersectionally on the basis of multiple characteristics –

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<sup>261</sup> Joint Declaration on Fake News, para. 1(c).

<sup>262</sup> Resolution 49/21, *supra* note 11, op. para. 5.

<sup>263</sup> See more Siena Anstis & Ron Deibert, *Silenced by Surveillance: The Impacts of Digital Transnational Repression on Journalists, Human Rights Defenders, and Dissidents in Exile*, Knight First Amendment Institute (Feb. 18, 2025), <https://knightcolumbia.org/content/silenced-by-surveillance-the-impacts-of-digital-transnational-repression>.

<sup>264</sup> See also Deluggi & Ashraf, *supra* note 31, at 381-2; Pentney, *supra* note 39, at 15.

consider, for instance, a state using lies to suppress the vote of women belonging to a minority ethnic group.

Similarly, I have not extensively examined socio-economic rights other than the right to health, and it may well be that state lies can violate many of these rights. For example, Article 15 ICESCR protects the right of everyone to enjoy the benefits of scientific progress and its application. In its General Comment on this right,<sup>265</sup> the Committee on Economic, Social and Cultural Rights has held that the negative duty to respect this right entails the “refraining from disinformation, disparagement or deliberate misinformation intended to erode citizen understanding of and respect for science and scientific research.”<sup>266</sup> From this starting point, a campaign of lies by state officials to, for example, denounce climate science and scientists, or researchers in vaccines and virology, would violate this particular right, in addition to other potential violations, such as that of freedom of expression.

Likewise, in a more procedural context, state lies can violate the reporting obligation under numerous human rights treaties, which surely requires that any information provided to treaty bodies be truthful. State lies could also possibly impede the exercise of the right to individual petition in judicial and quasi-judicial cases, as well as the duty of states to cooperate with human rights courts whose jurisdiction they have accepted.<sup>267</sup>

But, again, while one purpose of this article was to engage in mapping exercise, it was not meant to provide a complete human rights account of state lies. I also intended to show that lies can, even by themselves, violate certain human rights, and that they are frequently integral to many human rights violations as a part of broader package of deceptive or

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<sup>265</sup> U.N. Committee on Economic, Social and Cultural Rights, General comment No. 25 (2020) on science and economic, social and cultural rights, U.N. Doc. E/C.12/GC/25 (Apr. 30, 2020).

<sup>266</sup> *Id.*, para. 42.

<sup>267</sup> In that regard, lack of candour can enable courts and treaty bodies to draw adverse evidentiary inferences – see *Ukraine and the Netherlands v. Russia* [GC] (dec.), paras. 456, 457, 459 (European Court noting that that there was “a distinct lack of frankness and transparency in the written submissions provided by the respondent Government,” that its response to the Court’s requests for further information “were superficial and evasive” and that therefore it would liberally resort to the drawing of inferences.)

repressive conduct. In particular, lies are integral to some of the most corrosive activities of authoritarian or hybrid regimes. They can be used to punish journalists or dissidents, to pollute the information space, to steal elections, to make people question the very idea of truth. In that regard, we have seen above how some state lies infringe on the interests of specific individuals, whereas other can also interfere with the interests of the whole of society, as with lies systematically polluting the information space and impeding the ability of people to seek and receive accurate information, or with lies violating the right to participate in public affairs.

I have tried to distinguish between situations in which lying by state agents is *necessary* for a human rights violation, and those in which it is *sufficient* for a violation. An election cannot be stolen, for example, without lying. In those cases in which a lie is necessary, it might not be sufficient on its own to violate the rights of an individual, but may require other conduct and be subsumed into that conduct. In those situations in which state lies suffice for a violation – as in the context of procedural duties to investigate – their ability to interfere with right is inextricably linked to the harm that they cause, or could cause. This link between the lie and the harm avoids, in my view, an overbroad, maximalist position under which any state lie would be contrary to human rights law.

It is a reality – a part of human nature, even in democracies – that political leaders lie and manipulate. Most of the time, their lies should not be assessed from a legal standpoint, including one of international human rights law, but from the standpoint of politics and morality. It is when lies cause (or can cause) concrete harms to individual rights and interests, whether standing alone or as part of a compound series of acts, that lies should be seen as a human rights problem. Yet, that the harm (actual or possible) is indispensable for a violation should not lead us to disregard the lie as the violating conduct. This is why it is important to subject lies to a human rights analysis. This is why lying – with its focus on fault, an intention

to deceive – needs to be exposed as internationally wrongful, and why lying should not be overshadowed by other human rights violations. The state leader or other official who is a liar should be stigmatized as such.<sup>268</sup>

When doing so is wise or prudent is less a question of law and more a question of strategy – for human rights activists, litigators, courts, treaty bodies or special mandate-holders. In some situations, an inquiry into bad faith really might not be necessary or helpful. Thus, in the context of public health we looked at above, states will be responsible not just for lying, but also for disseminating falsehoods that are not intentionally deceptive, but are reckless or negligent.<sup>269</sup> In other situations, especially in the litigation context, a human rights court may be averse to accuse a state of lying, and may find a violation on some other basis – for example, it may find that an election was grossly irregular on various procedural grounds, rather than because state officials conspired to steal the election and lie about it (even if this is exactly what they did).<sup>270</sup> Findings of bad faith can be too provocative or politically explosive.

But, while caution about lying and bad faith is understandable, it is not without cost. The response of the European Court to cases litigated before it due to rising authoritarianism in Hungary, Russia or Turkey provides an instructive example in that regard. Many of the Court’s judgments in such cases – even those establishing grave violations – convey the impression of a state doing business as usual, a democracy making the occasional mistake. The overarching narrative that the Court produces over time will therefore not be one of a state conducting an all-out assault on democracy and the rule of law, much of it resting on a foundation of lies.<sup>271</sup> Thus, while there is something to be said for pragmatism and caution,

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<sup>268</sup> See also Pentney, *supra* note 39, at 28.

<sup>269</sup> Section IX.

<sup>270</sup> See Davydov and others v. Russia, paras. 335-38.

<sup>271</sup> See Novaya Gazeta v. Russia, App. No. 11884/22 (2025), Concurring Opinion of Judge Pavli, esp. paras. 11 & 15 (noting that the “Court’s case-law in respect of Russia reveals another, more disturbing pattern, if one tries not to miss the forest for the trees. The widespread restrictions on political freedoms over the past two decades have often been facilitated, and “justified”, by fairly elaborate legal frameworks that have tended to employ respectable human-rights language, such as the concepts of necessity and proportionality, in line with the country’s supposed level of democratic development” and asking “[i]n the case of the Russian Federation, with

there is also something lost in that strategy – the full truth about what the state concerned has been doing, as assessed from the standpoint of human rights law. Especially in the context of rising authoritarianism, if human rights bodies avoid making findings of state bad faith, including through lying, or make them only rarely, they risk being perceived as complicit in autocratic (self-)normalization.<sup>272</sup>

Therefore, making such findings or accusations should not just be avoided *in limine*. Activists, litigators and judges should carefully consider when framing what the state has done as lying would be appropriate. As this article explains, the existing legal framework does give them the tools to expose state lies if they wish to do so. True, there may be evidentiary difficulties in proving that a state official knowingly lied. But courts in criminal or civil settings establish knowledge, intent or other forms of fault routinely. Even in court, and certainly outside the courtroom, we do not need direct proof of bad faith, or proof to a very high standard such as beyond a reasonable doubt.<sup>273</sup> An intention to deceive or other forms of bad faith can often straightforwardly be inferred from the circumstances.<sup>274</sup> It might not be necessary always to do so. But sometimes it is both wise and necessary – for expressive purposes, to satisfy the interests of the victims, and simply to describe the truth as it is. Sometimes, in other words, state liars need to be called out, and their lies exposed as violations of human rights.

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the benefit of some hindsight and a large body of case-law behind us, can it be said that the Court sounded the alarm loudly enough, and early enough? And more importantly for the future, is it now prepared to do so in relation to other European political systems whose democratic protections might be eroding in ascertainable ways?”

<sup>272</sup> See Dilek Kurban, *Authoritarian Resistance and Judicial Complicity: Turkey and the European Court of Human Rights*, 35 EJIL 355 (2024).

<sup>273</sup> See generally Schauer, *supra* note 17 (arguing that the level of certainty required depends on a value or policy judgment about that specific context).

<sup>274</sup> See more Basak Çalı, *Proving Bad Faith in International Law* in Secondary Rules of Primary Importance in International Law 183 (Gabor Kajtár, Basak Çalı, and Marko Milanovic eds., 2022); *Navalnyy v. Russia* [GC], App. No. 29580/12 (2018), paras. 163-176; *Navalnyy v. Russia* (No. 2), App. No. 43734/14 (2019), paras. 92-99; *Selahattin Demirtaş v. Turkey* (No. 2) [GC], App. No. 14305/17 (2020), paras. 423-438.