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FREEDOM OF EXPRESSION IN TIME OF WAR: EXPANDED, RESTRICTED, MODIFIED?

Key words: freedom of expression, hate crime, war propaganda, derogation clause, European Convention on Human Rights, European Court of Human Rights.

Summary

The current article offers the analysis of the permitted extent of the freedom of expression in time of war and concerning war-related issues. The research addresses the freedom of expression in the framework of the derogation clause and jurisdiction under the European Convention on Human Rights, reveals the assessment of public comments on military operations, international crimes, terrorism and other forms of violence, as well as hate speech by the European Court of Human Rights, and emphasizes a crucial role of the mass media in times of conflict. The author concludes that the freedom of expression should be neither a weapon, nor a casualty of war and, in certain sense, it could become both, – expanded and restricted in time of war, however, hardly modified, as the task remains the same: balancing freedom and order.

Introduction

Despite the international community's efforts to ensure international peace and security entrusted mainly to the United Nations, the end of 2023 witnesses already two deadly international armed conflicts in Europe: Russia's aggression in Ukraine started on 24 February 2022 and Israeli's attacks on the Gaza Strip, responding to Hamas terrorist attacks on Israel on 7 October¹. The last few years have not only caused immense casualties and demanded huge human losses, but have also placed the foundations of the world order at stake and threatened every percept of humanity. Nations, people and a human as an individual play a crucial role in war: in terms of resistance or surrender, resilience or adaptation, following war propaganda or fighting for truth.

¹ The latter may be prone to a wider academic discussion as regards the reference to an "international armed conflict", however, irrelevant for and thus not elaborated on in this article.

As noticed by researchers decades ago, including T. I. Emerson, “war and preparation for war create serious strains on a system of freedom of expression. Emotions run high lowering the degree of rationality which is required to make such a system viable”.² Z. Chafee cited a familiar remark of E. Ludendorff: “wars are no longer won by armies in the field, but by the morale of the whole people”.³

The freedom of expression is a complex and unique phenomenon as it deals with an interplay of human feelings and emotions which, affected by many circumstances, result in various forms and, once publicly expressed, may face a legitimate need of a state to limit this human right once it oversteps a red line of, for example, public incitement to hostility or hatred. Moreover, the analysis of the required balance is even more complicated in a wider scope, including the situation of a war and the jurisdiction of a state, to which people are subject.

This research aims at the analysis of the allowed extent of the freedom of expression in time of war (and other emergencies) and on war related issues. It addresses the following main aspects: general insights on the freedom of expression and war; restrictions under Article 10 of the European Convention on Human Rights (ECHR) and derogation clause under Article 15, including the issue of jurisdiction under Article 1; standards set by the European Court of Human Rights (the ECtHR or Court) on the allowed extent of the freedom of expression on war, international crimes, terrorism and related forms of violence and hate crime; as well as the right to receive and impart information as an integral part of this freedom and a crucial role of mass media in times of conflict.

1. General insights on the freedom of expression on and during war

The freedom of expression and war encompass different aspects, context and actors (individual, societies, states, mass media).

The freedom of expression is a fundamental human right, a condition for development of every man, an essential instrument for a democratic society, moreover, playing a crucial role in time of war, when even a human safety much depends on an impartial, correct and timely information on an ongoing military conflict. Naturally negative attitude towards the aggressor state usually tends to grow, turning into hatred, at times possibly expanding onward to the aggressor’s nation (in separate cases it could even evolve encompassing the rejection of its language and culture); a state involved in the international military conflict may attempt to limit calls for criticism of its policy and there are many more scenarios.

A doctrinal insight that hate crime rate is affected by certain crises has recently been confirmed by the public reactions to the war in Ukraine and the situation in

² Emerson T. I. Freedom of Expression in Wartime. *University of Pennsylvania Law Review*, 1968, Vol. 116, No. 6, p. 975.

³ Chafee Z. Freedom of Speech in War Time. *Harvard Law Review*, 1919, Vol. 8, No. 32, p. 937.

the Gaza Strip. Israeli attacks on the Gaza Strip has given a rise to anti-Muslim and anti-Jewish hate reflected in demonstrations, Internet comments, slogans and public insults worldwide⁴, cases of anti-Palestinian sentiments have also been announced. Even more forms of expression of feelings and emotions have been stipulated by Russia's full-scale aggression against Ukraine, which is already in the second year. The exercise of freedom is completely different in Russia (also Belarus), and Ukraine, as well as well as the states which support it. In Russia, for example, even children's drawings depicting war victims or calling for peace were subject to restrictions, separate silent voices against aggression were immediately suppressed by a governmental propaganda machine, mass media were ordered to call the aggression a special operation and each attempt to say the truth publicly has been immediately prevented⁵, while in Ukraine and its supporting states different cases reflecting the growing anti-Russian hatred have been reported⁶. In response to Russia's campaign of disinformation and information manipulation, the European Union suspended the broadcasting activities of certain channels (Sputnik and RT/Russia Today)⁷. There were also the states staying in between: abstaining or undetermined. But above all, there have been fighters for truth – journalists, nongovernmental organisations, public figures and famous people, academics, lawyers, human rights activists speaking for truth to be heard worldwide and to be globally supported.

Even if the freedom of expression allows an option not to express any opinion, being undecided concerning an issue, or ignorant regarding an issue of public concern, especially implying only one clear answer, may be unpopular. For example, in Lithuania, the question about the attribution of Crimea became a test for public figures in public electoral debates, position on the war in Ukraine has been listed in the questionnaires for applicants by migration authorities, well-known actors, sportsmen and other public figures were urged to publicly announce their position on war; moreover, much debate was inspired after in some cases certain rights and benefits such as citizenship granted by way of exception were made subject to

⁴ Mass media has been reporting remarkably increased number of cases, e.g. Antisemitic hate crimes in London up 1.350%, Met police say. Available: <https://www.theguardian.com/news/2023/oct/20/antisemitic-hate-crimes-in-london-rise-1350-since-israel-hamas-war-met-says> [viewed 22.11.2023.].

⁵ Russian man detained over daughter's pro-Ukraine drawings. Available: <https://www.theguardian.com/world/2023/mar/01/russian-detained-over-anti-war-statements-and-daughter-taken-into-care> [viewed 27.11.2023.].

⁶ Russians Around the World Are Facing Abuse and Harassment Amid the Ukraine Conflict. Available: <https://time.com/6156582/ukraine-anti-russian-hate/> [viewed 22.11.2023.].

⁷ EU imposes sanctions on state-owned outlets RT/Russia Today and Sputnik's broadcasting in the EU. Available: <https://www.consilium.europa.eu/en/press/press-releases/2022/03/02/eu-imposes-sanctions-on-state-owned-outlets-rt-russia-today-and-sputnik-s-broadcasting-in-the-eu/> [viewed 20.11.2023.].

the public declaration of one's position on war⁸. The state suspended transmission of a few Russian TV/Radio channels and Internet platforms owned, controlled, financed by Russia (or Belarus)⁹.

The above are merely a few cases, – there are examples reflecting many other complex situations which encompass different circumstances; however, the freedom of expression shall be subject to the international (European) standards analysed below.

2. Freedom of expression and war: The ECtHR jurisprudence

The ECtHR jurisprudence encompasses the following main aspects of interplay between the freedom of expression and war: establishing jurisdiction, derogations, restrictions and context. The right is subject to restrictions established in Article 10 of the ECHR¹⁰ and a standard “three-stage” test applied by the ECtHR in each case: whether the restrictions are prescribed by law, necessary in a democratic society for a legitimate aim and proportional. Moreover, the freedom may be derogated from at time of war under Article 15 of the ECHR. The applicant cannot benefit from the protection of the freedom of expression on the basis of Article 17 (prohibition of abuse of rights).

2.1. Jurisdiction and derogation clause

A war itself does not provide valid grounds for limiting the freedom of expression excessively, however, the change of a state exercising authority and control over the territory and its people may at times affect the right even substantially. If a state attacks the territorial and political integrity of another state, the complaints

⁸ For example, in September 2023 the President of Lithuania signed a decree on withdrawing Lithuanian citizenship from a famous world and European figure skater Russian-born M. Drobiazko, – the citizenship was granted by way of exception as she maintained close professional and personal ties with the wife of the press secretary of Russian President and with her husband P. Vanagas participated in shows organised in Sochi after Russia's full-scale invasion of Ukraine, although the figure skater in a public letter claimed being uninvolved in Russian propaganda. President strips Russian ice dancer Drobiazko of Lithuanian citizenship. Available: <https://www.lrt.lt/en/news-in-english/19/2078254/president-strips-russian-ice-dancer-drobiazko-of-lithuanian-citizenship> [viewed 22.11.2023.].

⁹ Lithuania blocks online access of sanctioned Russian media. Available: <https://www.lrt.lt/en/news-in-english/19/1939384/lithuania-blocks-online-access-of-sanctioned-russian-media> [viewed 22.11.2023.].

¹⁰ Article 10 establishes the right to freedom of expression (Paragraph 1) and lists grounds for possible restriction on the exercise of this freedom: interests of national security, territorial integrity or public safety, prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary (Paragraph 2).

may be directed against such “active” state, however, where a state is unable to exercise its authority in a part of its territory, that presumption may be limited¹¹.

In the ECtHR judgment of 10 May 2001 in *Case Cyprus v. Turkey* (application No. 25781/94) the Court established Turkey’s jurisdiction, as well as violation of Article 10 among others. Living conditions of Greek Cypriots in Karpas region of northern Cyprus (following the military operations conducted by Turkey, the Turkish Republic of Northern Cyprus was proclaimed unlawfully) amounted to the violation of the freedom of expression, insofar as the textbooks intended for use in the primary school (history, geography, etc.) were subject to excessive measures of censorship (vetting procedure in the context of confidence-building measures).

Freedom of expression is also among the claims of Ukraine and individuals in cases pending before the ECtHR against Russia mostly concerning the events in the Eastern Ukraine and Crimea. In the decision of 16 December 2020 in *Case Ukraine v. Russia (re Crimea)* (No. 20958/14 and 38334/18), the Court declared Ukraine’s claims on the alleged existence of an administrative practice of suppression of non-Russian media beginning in February 2014 on the basis of the effective control that it exercised partly admissible: there was sufficient *prima facie* evidence regarding the practice of suppressing non-Russian media under Article 10 of the ECHR (including the closure of Ukrainian and Tatar television stations and the apprehension, intimidation and seizure of material from international journalists). Ukraine’s allegations concerning Russia’s attacks on journalists and the blocking of Ukrainian broadcasters, as well as a prohibition on teaching in the Ukrainian language is among the claims declared partly admissible in *Case Ukraine v. Russia (re Eastern Ukraine)* (application No. 8019/16)¹². Similar discriminatory practice against Crimean Tatar and ethnic Ukrainians is confirmed by other international courts: International Court of Justice (ICJ) adopted provisional measures ordering Russia to refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis, and ensure the availability of education in the Ukrainian language¹³.

A war situation is a clear ground for a derogation clause under Article 15 of the ECHR, which can also be invoked in other public emergencies, if threatening the life of the nation and only to the extent strictly required by the exigencies of the situation. For example, in the judgment of 21 September 2021 in *Case Dareskizb Ltd v. Armenia* (application No. 61737/08), Armenia failed to justify the need of

¹¹ Guide on Article 1 of the ECHR: Obligation to respect human rights – Concepts of “jurisdiction” and imputability. Available: https://www.echr.coe.int/documents/d/echr/guide_art_1_eng [viewed 20.11.2023].

¹² On 27 November 2020 joined the *Case Ukraine and the Netherlands v. Russia* (applications No. 8019/16, 43800/14 and 28525/20).

¹³ ICJ Order of 19 April 2017 in *Case Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*.

derogation from the freedom of expression, constituted by banning a publication in a newspaper in context of the opposition protests after the Presidential election, as they did not reach the required threshold, however, security situation (terrorism) in Northern Ireland met it in a number of cases, including the decision of 10 July 2001 in *Case of G. Marshall v. United Kingdom* (application No. 41571/98).

2.2. Assessment of restrictions in different contexts

The freedom of expression and war is often analysed focusing on a war propaganda, which generally means “a form of incitement to violence based on advocacy of national, racial or religious hatred”¹⁴ (e.g. active call for hostility, support for aggression, etc.). The context is rather broad and it is further analysed in the ECtHR jurisprudence, assessing the allowed extent of the freedom of expression and its limitations in cases of commenting military operations, war, terrorism, international crimes, groups targeted by hatred, and related forms of incitement to hostility and public violence.

The ECtHR repeatedly confirms that under Paragraph 2 of Article 10 there is a little scope for restrictions of debate on questions of a public interest; however, all circumstances are to be taken into account in each case: content, form, tone, words, context, addressee, etc. Public assessment of military action was considered in the ECtHR judgment of 8 July 1999 in *Case Surek and Ozdemir v. Turkey* (applications No. 23927/94 and 24277/94). Weekly review published an interview with a leader of the Kurdistan Workers’ Party (recognised as illegal organisation) and a declaration made by four socialist organisations, whereby the state’s policies and military actions were condemned as being directed at driving the Kurds out of their territory, breaking their resistance and struggle for independence. The conviction for disseminating propaganda against the indivisibility of the state and provoking enmity and hatred among the people, taking into account a sensitive situation in south-east Turkey and a possible need to protect national security and territorial integrity, as well as the prevention of disorder in such time, was not upheld by the ECtHR. It stated that “domestic authorities [...] failed to have sufficient regard to the public’s right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them” and that “the views expressed in the interviews could not be read as an incitement to violence”. Article 10 had been breached, as sentencing was disproportionate and was not necessary in a democratic society. In another judgment of 16 March 2000 in *Case Ozgur Gundem v. Turkey* (application No. 23144/93), the Court agreed that articles containing passages which advocated intensifying the armed struggle, glorified war and espoused the intention to fight to the last drop of blood, in the context of the conflict, could

¹⁴ Propaganda and Freedom of the Media. Non-paper of the OSCE Office of the Representative on Freedom of the Media. Vienna, 2015. Available: <https://www.osce.org/files/f/documents/b/3/203926.pdf> [viewed 23.11.2023.], p. 14.

reasonably be regarded as encouraging the use of violence and thus the measures disputed in the complaint were proportionate to the legitimate aims of preventing crime and disorder, and could be justified as necessary in a democratic society (although excessive measures have been applied on the newspaper).

In other cases, the ECtHR assessed support for terrorism which is among the threats to international peace and security. For example, in the decision of 17 April 2018 in *Case Roj TV A/S v. Denmark* (application No. 24683/14), incitement to violence and support for terrorist activity were recognized as the abuse of rights (Article 17 of the ECHR), restrictions of the freedom of expression of a Danish company and a TV channel were held to be necessary. The programmes included incitement to violence and support for terrorist activity, the views expressed therein were disseminated to wide audience through television broadcasting and they directly concerned an issue which is paramount in modern European society – the prevention of terrorism and terrorist-related expressions advocating the use of violence for promotion of terror operation (by an organisation listed as terrorist).

Depiction of war and torture shall not necessarily be prohibited in all cases, as the freedom of expression also permits the forms of expression which may shock, disturb or offend. In judgment of 15 January 2009 in *Case Orban and Others v. France* (application No. 20985/05), where an author of the book, a member of the French armed forces, described the use of torture during the Algerian War, the Court regarded the book as a witness account by a former special services officer who had been directly involved in practices such as torture and summary execution in the course of his military service, and thus contributed to a debate on an issue of a public concern. The ECtHR did not uphold the national courts' remark on the lack of a critical stance with regard to these horrifying practices or the need to express regret. Accordingly, restriction of the publishers' freedom of expression (criticism for not distancing themselves from the general's account) had not been justified.

Applications which are inspired by totalitarian doctrine or express ideas that represent a threat to the democratic order and are liable to lead to the restoration of a totalitarian regime are not in line with the values of the ECHR. As regards search for historical truth, seeking it is an integral part of the freedom of expression. Debate on the causes of acts which might amount to war crimes or crimes against humanity should be able to take place freely as stated in judgment 3 October 2017 in *Case Dmitriyevskiy v. Russia* (application No. 42168/06). To the contrary, questioning the reality, extent and seriousness of these historical events that are not the subject of debate between historians, but are clearly established, is not a historical research. Disputing the existence of crimes against humanity was one of the most severe forms of racial defamation and incitement to hatred of Jews as stated in the decision of 24 June 2003 in *Case Garaudy v. France* (application No. 65831/01).

A relevant part of the ECtHR jurisprudence is that on hate speech in context related with war and other situations of conflict. Attacks on ethnic or other

groups is against the values of the ECHR, such as tolerance, social peace and non-discrimination. Therefore, “it may be considered necessary in certain situations to sanction or even prevent forms of expression which spread, incite, promote or justify hatred based on intolerance, provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued”¹⁵.

The judgment of 16 January 2018 in Case Smajic v. Bosnia and Herzegovina (application No. 48657/16) was adopted in a case where the applicant claimed to have expressed his opinion on a matter of public concern, however, was convicted, as the state deemed it necessary, for incitement to national, racial and religious hatred, discord or intolerance following a number of Internet posts describing military action which could be undertaken against certain Serb villages in the event of another war. The Court declared the applicant’s complaint under Article 10 inadmissible as manifestly ill-founded, and upheld the need of limiting his freedom of expression: the aim of protecting the reputation and rights of others was legitimate. Even if the statements were of a hypothetical nature, the ECtHR considered them as too sensitive in the context of inter-ethnic relationship of the post-conflict Bosnian society. The examination of the applicant’s case by domestic courts was considered as careful, providing sufficient justification for his conviction, namely, his use of highly insulting expressions towards Serbs, and penalties imposed (a suspended sentence and seizing of the computer and laptop) had not been excessive.

3. Right to receive and impart information: The role of mass media

As regards the freedom of expression, mass media plays a special role, which becomes crucial at the time of war: fundamental human needs, including safety and well-being, even public stance concerning particular target groups depend on impartial and accurate information on war and other emergencies provided by mass media and its adherence to professional standards.

*The independent and impartial media constitutes one of the essential foundations of a democratic society, and thereby can contribute to the protection of civilians and conflict prevention, as well as bring to the attention of the international community the horrors and reality of conflict*¹⁶.

¹⁵ ECtHR Factsheet Hate Speech. Available: https://www.echr.coe.int/documents/d/echr/fs_hate_speech_eng [viewed 27.11.2023.], p. 1.

¹⁶ Council of Europe. Journalism in situations of conflict and aggression. Principles extracted from the relevant Council of Europe and other international standards. Available: <https://rm.coe.int/compilation-of-coe-standards-relating-to-journalism-in-situations-of-c/1680a5b775> [viewed 27.11.2023.].

The analysis of the freedom in question in the ECtHR jurisprudence also contains an emphasis on the fundamental role of the press in proper functioning of political democracy and its unique role in times of emergencies: “the “duties and responsibilities” which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension”¹⁷.

The main principles pertaining to the right to information and mass media have been derived by the Council of Europe from the ECHR, as well as the conventions and declarations of the United Nations. The restrictions of public’s access to information are subject to and must not go beyond the limitations allowed by Article 10 of the ECHR; the states should use concrete and clearly defined terms when imposing restrictions on the freedom of expression and information in conflict situations, notably, regarding incitement to violence and public disorder; states should not misuse libel and defamation legislation to limit the freedom of expression and should refrain from intimidating journalists by lawsuits or disproportionate sanctions¹⁸. In addition, journalists (as civilians) shall be protected by the rules of International Humanitarian Law (shall not be subject to reprisals, etc.).

The effective implementation of the abovementioned principles is at stake in the light of the contemporary conflicts, often of hybrid nature, moreover, in a digital age. I. Khan, the Special Rapporteur on promotion and protection of freedom of opinion and expression, pointed to “the scale, spread and speed of disinformation, propaganda and hate speech, targeting civilians, particularly vulnerable and marginalised groups” as new and deeply worrying aspects in today’s conflicts, where people are “being hit with manipulated information, Internet shutdowns or slowdowns, information blackouts and other restrictions on information”¹⁹.

Russia’s aggression in Ukraine particularly shows how journalists risk their lives as they report from the conflict zones. Experts appointed by the United Nations cited numerous cases when journalists have been “targeted, tortured, kidnapped, attacked and killed, or refused safe passage from cities and regions under siege”²⁰. Human Rights Committee indicated thousands of cases of harassment and persecution of journalists, dozens of murders and attempted murders, abduction and torture, detention of hundreds of Russian journalists for reporting on the war in Ukraine or protests about the war, constituting a violation of the freedom of

¹⁷ ECtHR judgment of 8 July 1999 in Case *Surek and Ozdemir v. Turkey*. Paragraph 63.

¹⁸ Council of Europe. Journalism in situations of conflict and aggression.

¹⁹ Protect freedom of expression as a vital ‘survival right’ of civilians in armed conflict: UN expert, 17 October 2022. Available: <https://www.ohchr.org/en/press-releases/2022/10/protect-freedom-expression-vital-survival-right-civilians-armed-conflict-un> [viewed 27.11.2023.].

²⁰ Ukraine: Journalists targeted and in danger, warn top rights experts. Available: <https://news.un.org/en/story/2022/05/1117462> [viewed 27.11.2023.].

speech²¹. In response to such Russia's monopoly on information, the organisations of journalists and civil society (partner organisations of the Council of Europe's Platform to Promote the Protection of Journalism and Safety of Journalists) condemned the threats to the lives and safety of journalists resulting from Russia's invasion of Ukraine and called for the protection of Ukrainian and international reporters covering the war²².

Conclusions

1. The freedom of expression should be neither a weapon, nor a casualty of war. In certain sense, it may become both at the time of war, – expanded and restricted. Expanded, as human safety much depends on the true and exhaustive information on war which, in its turn, naturally causes intense human emotions, public expression whereof, even if in a form of anger, hatred and frustration is not necessarily punishable. Restricted, as the state still holds a responsibility to protect its vital interests: the safety of its people, state's sovereignty and security, public order, including the need to prevent hate speech. The right is, however, hardly much modified: challenges posed by digital age and information wars demand new arsenal of instruments to address new types of threats in the ever-changing international landscape, the rationale remains the same although – balancing freedom and order.
2. A (temporal) change of effective jurisdiction arising from cases of violation of other state's territorial integrity may negatively impact the freedom of expression of residents and mass media in the respective territory. International military conflicts usually amount to a required threshold under the derogation clause established in Article 15 of the ECHR; limitations are also possible under Article 10. Many different scenarios of commenting war, international crimes, terrorism and attack on target groups are to be assessed taking into account all circumstances of a particular case, including the form of expression, words, context, addressee, region, etc. Public incitement to hatred and hostility, support for totalitarian regimes, call for terrorism or aggression and similar forms of promoting violence are not in line with the values of the ECHR.
3. The right to receive and impart information is inseparable from effective functioning and professional performance of mass media: accurate, impartial and timely coverage of conflict is essential for human safety and well-being,

²¹ Human Rights Committee Considers Report of the Russian Federation in the Absence of a Delegation, Experts Raise Issues on the Persecution of Journalists and the Arrests of Protesters. Available: <https://www.ohchr.org/en/news/2022/10/human-rights-committee-considers-report-russian-federation-absence-delegation-experts> [viewed 27.11.2023.].

²² Ukraine: Journalists targeted and in danger, warn top rights experts. Available: <https://news.un.org/en/story/2022/05/1117462> [viewed 27.11.2023.].

journalism may also impact social stance and public attitude regarding issues of public concern. The freedom of the media, the same as the freedom of expression, shall not become a vehicle for spreading war propaganda, incitement to violence, hatred or hostility.

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