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## **Legitimate Exercise of the Right to Freedom of Expression or Unacceptable War Propaganda? The Prosecution of Verbal Crimes Related to the Russia's War of Aggression against Ukraine<sup>1</sup>**

The Russia's war of aggression against Ukraine has triggered a massive wave of criminal prosecutions for war-related offences. Most of these prosecutions pertain to war crimes, crimes against humanity, or ordinary crimes committed in the battlefield or in the territories occupied by the Russian Federation or (in the past) by one of their proxies. Yet, individuals can be criminally prosecuted in relation to the Russia's war of aggression against Ukraine without having ever put their foot on the Ukrainian soil. This is so in case of those who have unsuccessfully travelled to the region to engage in the fight without the required authorisation (foreign fighters<sup>2</sup>) and those who have made statements that might amount to the denial or justification of certain crimes committed during the conflict (conflict-related crimes). This paper discusses the latter category of prosecutions, and it does so from the perspective of international law, especially international human rights law and international criminal law. More specifically, the paper examines whether there is an obligation under current international law for states to criminalize and prosecute verbal acts linked to conflict-related crimes and what legal limits this law imposes on states in this area.

The paper consists of three sections. The first section introduces the concepts of conflict-related crimes and of verbal acts linked to such crimes, and it illustrates how such verbal acts could be criminally prosecuted using the example of the Czech Republic. The second section shows that current international law requires states to criminalize and prosecute a very limited range of verbal acts linked to conflict-related crimes, but that this range is further expanded under EU law. Finally, the third section identifies the legal standards that states have to respect when they criminalize and prosecute verbal acts linked to conflict-related crimes and, using again the example of

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<sup>2</sup> See K. Rękawek, *Foreign Fighters in Ukraine: The Brown-Red Cocktail*, London 2023; *Not Only Syria? The Phenomenon of Foreign Fighters in a Comparative Perspective*, ed. K. Rękawek, Amsterdam 2017.

the Czech Republic, it shows how states may proceed and what challenges they face when seeking to abide by these standards.

## 1. The Denial or Justification of Conflict-Related Crimes

The term conflict-related crimes is not a legal term of art. It is used in this paper to describe various crimes committed during or, rather, in connection with an armed conflict, in this particular context the armed conflict between the Russian Federation and Ukraine. It largely overlaps with the category of crimes under international law, which, on the contrary, is a legal term of art. Crimes under international law include four internationally recognized crimes: the crime of aggression, the crime of genocide, war crimes, and crimes against humanity. The definitions of these crimes, agreed upon by the international community, are currently enshrined in the Rome Statute of the International Criminal Court (ICC).<sup>3</sup> Conflict-related crimes include all crimes committed in the context of an armed conflict. While it might be expected that crimes under international law would constitute their core, the category is broader, because national legal orders may, and do, criminalize the denial or justification of other crimes as well.

The denial or justification of conflict-related crimes belong into a broader category of verbal crimes, i.e., crimes committed by words rather than deeds.<sup>4</sup> In many instances, moreover, these acts fall under the category of hate crimes or bias crimes.<sup>5</sup> Such crimes are characterised by a specific motive involving an element of hatred and/or bias directed against a particular group of persons. States have different approaches to the prosecution of both verbal crimes and hate/bias crimes. With regard to the former category, while there is probably no legal order in which “mere words” of some kind could not be prosecuted, the extent and nature the “words” that are criminalized vary from country to country. With regard to the latter category, legal orders use different legal techniques to take into account the hate/bias motive of the offence. Some treat such a motive as a qualified fact, others as a general aggravating circumstance or a circumstance that allows for an extraordinary increase in the legal sanction, and still others as one of the elements of the offence.

This paper focuses on those legal orders in which the denial or justification of conflict-related crimes constitutes a specific, separate criminal offence. One such country is the Czech Republic. The Criminal Code of the Czech Republic (CCCR)<sup>6</sup> contains three offences that can be used in this context. One is the general offence of approving of a crime (para 365), applicable to anyone who “publicly approves of a committed crime committed or [...] publicly praises the perpetrator of a crime” (para 365(1)). Crimes

<sup>3</sup> See Articles 6–8bis of the Rome Statute of the ICC.

<sup>4</sup> G.S. Gordin, *Atrocity Speech Law: Foundation, Fragmentation, Fruition*, Oxford 2017.

<sup>5</sup> See, for instance, OSCE, Decision No. 9/09 Combating Hate Crimes, MC.DEC/9/09, 2 December 2009.

<sup>6</sup> Criminal Code of the Czech Republic, Law No. 40/2009 Coll.

are offences punishable by imprisonment for a term of not less than five years. Two other provisions focus on specific forms of the denial or justification of conflict-related crimes. One is the support or promotion of terrorism (para 312e), which consists of the public incitement to commit a terrorist offence, public approval of such an offence, or public praising of the perpetrators of such an offence. The second is the denial, questioning, approval, or justification of genocide (para 405),<sup>7</sup> which, despite its narrow title, applies to anyone who publicly denies, questions, approves of, or justifies “Nazi, communist or other genocide [...], crimes against humanity or war crimes or crimes against peace.”

In the past, these provisions were used relatively infrequently, and when they were used, it was either for crimes committed outside armed conflicts, mainly serious crimes of violence, or for crimes committed during WWII. For instance, in 2011, the Czechoslovak immigrant to Canada Vladimír Stwora was found guilty under (what is now) para 405 of the CCCR for publishing, on his *Zvědavec* webzine, the Czech translation of an article by D. Cassidy entitled *Holocaust and its 4-Million Option*, contesting the Holocaust. Stwora himself prefaced the translation with a short text describing the Holocaust as a historical fraud.<sup>8</sup> The situation began to change in the early 2020s, with the first prosecutions related to current armed conflicts being conducted by Czech courts. One of these cases concerned the killing of Czech soldiers by the Taliban in Afghanistan in 2018. Commenting on the event on social media, 70-year-old Antonín Dobner described the soldiers as terrorists and war criminals who had participated in aggression against the Afghan people. Initially accused of supporting and encouraging terrorism, he was convicted of condoning murder and given a three-month suspended sentence.<sup>9</sup>

The outbreak of the full-scale Russia’s war of aggression against Ukraine in 2022 marked a milestone in the active prosecution of verbal acts linked to conflict-related crimes. On 26 February 2022, the Czech Republic’s Prosecutor General, Igor Stříž, issued a public statement, in which he recalled that freedom of expression is not absolute and warned that “if someone publicly (including [...] on the internet or social networks) expresses agreement with the attacks of the Russian Federation on Ukraine (accepts or supports them) or expresses support for or praises the leaders of the Russian Federation in this context, they could [...] face criminal liability [...] under paras 365 or [...] 405 of the CCCR.”<sup>10</sup> Several days later, the Prosecutor General’s Office issued a comprehensive analysis, which noted that “the military operations of the Russian

<sup>7</sup> See also V. Bílková, *The Punishment of Negationism – the Czech Experience* [in:] *Responsibility for negation of international crimes. Memory Law – International Crimes – Denial*, ed. P. Grzebyk, Warsaw 2020.

<sup>8</sup> Stwora benefited from the presidential amnesty declared in 2013 and the webzine *Zvědavec* remains operational. For more details on Czech cases, see *ibid.*

<sup>9</sup> *Za schvalování smrti českých vojáků v Afghánistánu dostal senior tříměsíční podmínku*, ČTK, 26.01.2021. The verdict was upheld by the High Court in Prague in 2021 and the Supreme Court in 2022.

<sup>10</sup> *Informace k možným trestněprávním limitům svobody projevu ve vztahu k situaci na Ukrajině*, Nejvyšší státní zastupitelství, 26.02.2022.

Federation on the territory of Ukraine can meet the characteristics of crimes under international law and, possibly, crimes under the CCCR<sup>11</sup> and confirmed the relevance of the CCCR in this context. By November 2023, the Czech police had initiated criminal prosecutions – under paras 365, 405 and, exceptionally, 312e of the CCCR – in almost 400 cases and more than 20 people had been convicted (most were given suspended sentences of several months). Since October 2023, criminal prosecutions related to the conflict in Gaza have also been initiated in some cases.<sup>12</sup>

The figures show that while the number of prosecutions has soared, the number of convictions has so far been modest. Some of the cases that have not resulted in convictions, include the molecular geneticist Sonia Peková, who in a radio interview invited listeners to pray for the Russian president Putin,<sup>13</sup> the far-right SPD politician Lubomír Volný who in his posts on social media thanked the Russian army for its “peaceful approach” and called the Ukrainian president Volodymyr Zelensky a “mass murderer,”<sup>14</sup> or a primary school teacher who told her class that “nothing was happening in Kyev.”<sup>15</sup> Conversely, those who have been found guilty are, for instance, another far-right politician Daniel Makay, who used Facebook to praise Putin for “his excellent strategy (that) will work and liberate Ukraine from the fascist ruling juntas”<sup>16</sup> and suggested that hydrogen bombs should be used by Russia; a young man who issued several videos calling upon people to “pray for Russia, help the Russian army against the Americans, hope that Russia will soon defeat Ukraine;”<sup>17</sup> or a woman who described Russia’s aggression in her social media posts as an act of self-defence against a Nazi government in Ukraine.<sup>18</sup>

The decisions related to these cases reveal a genuine effort by the national authorities to draw a line between verbal acts that should be prosecuted and those that should remain lawful, even if they may be uncomfortable or even shocking for some listeners. The right to freedom of expression is conventionally invoked, as is the need to identify the limits of the legitimate exercise of this right. In some cases, the obligations of states under international law in relation to international crimes are also mentioned, although usually in a vague way. All this raises the question of the limits that international law imposes on states in prosecuting the denial or justification of conflict-related crimes. Are states legally required to prosecute such verbal acts? If this is so, which verbal acts does this requirement apply to? And if, or to the extent that,

<sup>11</sup> Stanovisko Nejvyššího státního zastupitelství k vybraným trestněprávním aspektům schvalování ozbrojených akcí v souvislosti s válečným konfliktem na Ukrajině, Nejvyšší státní zastupitelství, 1 SL 117/2022, 2.03.2022.

<sup>12</sup> *Už téměř stovka. Policie stále řeší případy schvalování války na Ukrajině, zajímá se i o případy okolo Gazy*, iRozhlas, 11.11.2023.

<sup>13</sup> *Policie řeší 65 případů schvalování války. Část oznámení ale končí bez postihu*, iDnes, 3.07.2022.

<sup>14</sup> Š. Rogner, *Policisté na výrocích exposlance Volného k válce na Ukrajině nenašli nic trestného, případ odložili*, ČTK, 17.06.2022.

<sup>15</sup> *Nešlo o trestný čin. Soud opět osvobodil učitelku, která popírala válečné zločiny*, iDnes, 25.01.2024.

<sup>16</sup> Cit. in Supreme Court, 8 Tdo 418/2023, Decision, 16.08.2023.

<sup>17</sup> V. Blažek, *Soudy řekly, jaké nadávky Ukrajincům i Rusům jsou už trestné*, Seznam Zprávy, 5.05.2023.

<sup>18</sup> *Ibid.*

this is not so, are states free to engage in such prosecutions or do they have to respect certain legal limits in this area? These questions will be discussed in the remainder of this paper.

## **2. Obligation of States to Prosecute Verbal Acts Linked to Conflict-Related Crimes**

The two branches of international law relevant to the subject of this paper are international human rights law (IHRL) and international criminal law (ICL). For the majority of European states, the most important IHRL instruments are the 1950 European Convention on Human Rights (ECHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR). Both instruments enshrine the right to freedom of expression (Article 10 of the ECHR and Article 19 of the ICCPR). The provisions are drafted in a similar manner, and they concur in that this right includes the right to hold opinions and the right to seek, receive, and impart information and ideas in any form (oral, written, etc.) without interference by a public authority. They also concur in that the right to freedom of expression is a non-absolute right that can be limited or derogated from.

In addition to recognizing the right to freedom of expression, IHRL instruments also identify specific forms of expression that states have the obligation to prohibit. Prohibition does not automatically mean criminalization,<sup>19</sup> though scholars argue that in some instances, only criminal sanctions would be truly effective.<sup>20</sup> The ICCPR, in its Article 20, obliges states to prohibit “any propaganda for war” (para 1) and “an advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (para 2). A similar provision features in another IHRL instrument, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which in its Article 4 indicates that States “shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.” There is no such provision in the ECHR. However, under Article 17 of the ECHR, some forms of expression may be excluded altogether from the protection afforded by the ECHR if they are found to constitute an abuse of rights.<sup>21</sup>

<sup>19</sup> The UN Human Rights Committee stated that “for article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation.” General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para 2. There is however uncertainty, also due to a large number of reservations made by States with respect to Article 20, what the appropriate sanction could be.

<sup>20</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: ICCPR Commentary*, Kehl am Rhein 2005, p. 474.

<sup>21</sup> The provision stipulates that “nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction

None of the instruments expressly mentions the denial or justification of conflict-related crimes. Article 20 of the ICCPR comes closest to it, in the section on the prohibition of any war propaganda. The General Comment on the provision, issued by the UN Human Rights Committee back in 1983, specifies that the prohibition “extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the UN Charter” and, conversely, it does not cover “advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the UN Charter.”<sup>22</sup> Yet, as rightly noted in scholarly literature, the meaning of the crucial words “propaganda” and “war” remains uncertain.<sup>23</sup> There are also diverging views on whether the prohibition applies only before a war or, also, during a war<sup>24</sup> and on whether it requires any specific type of sanctions (criminal, civil, etc.).

In one of the most recent articles published on this topic, Aswad concludes that Article 20(1) of the ICCPR “applies to the intentional spreading of information in favor of war that is likely to result in near-term [...] war. The term ‘war’ should generally be understood to mean an act of aggression by a state against another state [...] Article 20’s prohibition requires civil rather than criminal sanctions, [...] and applies to speech before a war is launched.”<sup>25</sup> If these conclusions are correct, then Article 20(1) of the ICCPR has a rather limited relevance for the criminal prosecution of the denial or justification of conflict-related crimes. As long as these acts do not consist of incitement to commit a (new) act of aggression, they would remain outside its scope. Moreover, even if they did constitute such incitement, states would not be obliged to respond to them by criminal means.

The latter comment also applies to verbal acts falling under Article 20(2) of the ICCPR, which obliges States to prohibit hate speech. This concept is clearly not identical with the denial or justification of conflict-related crimes, although there could certainly be an overlap between the two categories. In the 2013 Rabat Plan of Action related to Article 20(2), the UN High Commissioner for Human Rights suggested that certain forms of hate speech should be criminalized, and proposed a six-part test to identify such forms (context, speaker, intent, content and form, extent of the speech act, and likelihood, including imminence).<sup>26</sup> The test is similar to that identified by

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of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

<sup>22</sup> General Comment No. 11..., para 2.

<sup>23</sup> See, for instance, M. Kearney, *The Prohibition of Propaganda for War in the International Covenant on Civil and Political Rights*, “Netherlands Quarterly of Human Rights” 2005, vol. 23, no. 4, pp. 551–570; E. Aswad, *Propaganda for War & International Human Rights Standards*, “Chicago Journal of International Law” 2023, vol. 24, no. 1, pp. 1–30.

<sup>24</sup> See UN Doc. A/77/288, Disinformation and freedom of opinion and expression during armed conflicts, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 12 August 2022, para 39.

<sup>25</sup> E. Aswad, *Propaganda for War...*, p. 29.

<sup>26</sup> UN Doc. A/HRC/22/17/Add., Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, 11 January 2013, para 29.

the ICERD Committee, also in 2013, in relation to Article 4 of the ICERD, which also explicitly provides for the criminalisation of certain verbal acts.<sup>27</sup> Such acts, however, must contain elements of racial discrimination and, as such, do not – again – include all instances of the denial or justification of conflict-related crimes. That suggests that both the ICERD and, arguably, the ICCPR require states to criminalize and prosecute individuals who engage in certain forms of hate speech and that these forms overlap to some extent, but are certainly not identical to, the denial or justification of conflict-related crimes, for which there is no such general obligation to criminalise and prosecute them under IHRL.

The same situation exists under ICL. Neither the Rome Statute of the ICC, nor specific instruments dealing with individual crimes under international law impose an obligation on states to criminalize and prosecute the denial or justification of such crimes. One exception to this rule is the direct and public incitement to commit genocide, which constitutes a mode of committing the crime of genocide<sup>28</sup> and must be criminalized and prosecuted as such.<sup>29</sup> No similar regulation is foreseen for the other crimes under international law.

The situation is however different for Member States of the European Union (EU). In 2008, the EU Council adopted Framework Decision 2008/913/JHA, which requests Member States to make it a criminal offence to publicly condone, deny, or grossly trivialise crimes falling within the jurisdiction of the Nuremberg Tribunal and the ICC that are “directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.”<sup>30</sup> Although primarily targeting the denial of the Holocaust,<sup>31</sup> the provision is framed in general terms and the criminal offences introduced or amended in response to it – such as para 405 of the CCCR – may cover a broad range of verbal acts, depending on the way in which the Framework Decision has been transposed in EU countries.<sup>32</sup> Despite the diversity of these ways, the EU law

<sup>27</sup> UN Doc. CERD/C/GC/35, General recommendation No. 35: Combating racist hate speech, 26 September 2013, para 15.

<sup>28</sup> Article III(c) of the Convention on the Prevention and Punishment of the Crime of Genocide and Article 25(3)(e) of the Rome Statute of the ICC.

<sup>29</sup> See S. Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, “Virginia Journal of International Law” 2008, vol. 48, no. 3, pp. 485–528.

<sup>30</sup> EU Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, Article 1(1)(c)–(d).

<sup>31</sup> See L. Cajani, *Legislating History: The European Union and Denial of International Crimes* [in:] *Law and Memory. Towards Legal Governance of History*, eds. U. Belavusau, A. Gliszczyńska-Grabias, Cambridge 2018, pp. 129–147.

<sup>32</sup> See COM(2014) 27 final, Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, Brussels, 27.01.2014, pp. 4–6; L. Gačanić, C. Finkeldey, *Calling War Atrocities By Their Right Name. Regulating a Ban on Denial, Trivialisation, Justification or Condonation of Genocide, the Holocaust, Crimes against Humanity or War Crimes*, forumZFD – TRIAL International, Sarajevo 2019, pp. 15–17.

is clearly more demanding of States than IHRL and ICL. When applied together, as is the case of the Czech Republic, international law and the EU law limit the discretion of States by requiring them to criminalize and prosecute incitement to genocide, certain forms of verbal hate crimes and condoning, denying or grossly trivialising crimes under international law.

### 3. Legal Limits Imposed on States in the Prosecution of Verbal Acts Linked to Conflict-Related Crimes

The previous section has established that states, in particular EU Member States, have an obligation under international and EU law, to criminalize and prosecute certain verbal acts linked to conflict-related crimes. This obligation leaves room for states in several areas: first, they may decide to criminalize and prosecute other verbal crimes; second, they have some latitude in defining the basic concepts ("incitement," "condoning," "hate crime," etc.); and third, they must consider which individual verbal acts are serious enough to warrant criminal prosecution. Even in these areas, however, the room for manoeuvre is not unlimited. Verbal acts of any kind are *prima facie* covered by the right to freedom of expression. Any interference with them must therefore satisfy the three-part test of lawful restrictions of this right set out in IHRL instruments. Alternatively, it must be shown that certain verbal acts do not enjoy the protection of IHRL at all.

The latter alternative has its legal basis in Article 17 of the ECHR. This provision excludes from the scope of the ECHR "any activity or [...] any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." The European Court of Human Rights (ECtHR) has used this provision in cases concerning the right to freedom of expression – to find that certain verbal acts do not merit the protection of the ECHR and to declare the complaint in question incompatible *ratione materiae* with the provisions of the ECHR. Article 17 has been applied in cases related to Holocaust denial,<sup>33</sup> justification of war crimes,<sup>34</sup> or incitement to violence<sup>35</sup> or hatred.<sup>36</sup> The denial or justification of conflict-related crimes could also be subsumed under it. Yet, as the ECtHR has stated, Article 17 is "only applicable on an exceptional basis and in extreme cases,"<sup>37</sup> Its applicability must be assessed on a case-by-case basis and it is hardly conceivable that a whole category of cases, defined by one single parameter (e.g., the

<sup>33</sup> ECtHR, *Garaudy v. France*, Application No. 65831/01, Decision, 24 June 2003, HUDOC.

<sup>34</sup> ECtHR, *ROJ TV A/S v. Denmark*, Application No. 24683/14, Decision, 17 April 2018, HUDOC.

<sup>35</sup> ECtHR, *Hizb Ut-Tahrir and Others v. Germany*, Application No. 31098/08, Decision, 12 June 2012, HUDOC.

<sup>36</sup> ECtHR, *Glimmerveen and Hagenbeek v. The Netherlands*, Applications Nos 8348/78 and 8406/78, Decision, 11 October 1979, HUDOC.

<sup>37</sup> ECtHR, *Perinçek v. Switzerland*, Application No. 27510/08, Judgment (GCH), 15 October 2015, HUDOC, para 114 (hereafter: *Perinçek v. Switzerland*).

denied crimes), could fall under it. Furthermore, Article 17 is a unique provision. It has no counterpart in UN instruments or at the national level. Here, therefore, interference with the right to freedom of expression must be justified under the classic text of lawful restrictions.

The test combines three requirements – legality (the restriction is prescribed by law), legitimacy (the restriction pursues a legitimate aim), and necessity (the restriction is necessary and proportionate to the aim). Any restriction has to be narrowly construed and “may not put in jeopardy the right itself.”<sup>38</sup> Moreover, there is “little scope [...] for restrictions on political speech or on debate on questions of public interest.”<sup>39</sup> States must act within this framework both when implementing international obligations to criminalize and prosecute certain verbal acts and when acting in the absence of such obligations.

In most cases, it should not be difficult to establish that the condition of legitimacy is met. Prohibiting the denial or justification of conflict-related crimes would most likely fall within one of the legitimate aims provided for in IHRL instruments, such as the protection of national security, the protection of public order, the prevention of disorder or crime, or the protection of the rights or reputation of others. At the same time, it is important to ensure that the invocation of such legitimate aims is not a mere pretext and that the restrictions do not have an ulterior purpose, for instance that of stifling free and open discussion in a democratic society.<sup>40</sup> Whether this is the case can be inferred to some extent from the scope of the criminal provisions and the degree of precision with which they are drafted. These factors are also crucial in assessing the condition of legality.

Under this condition, any restriction to the right to freedom of expression need not only to be expressly prescribed in the legal order but also be specific enough to serve as a guide to behaviour (foreseeability). Individuals need to understand which crimes are considered so well established and, at the same time, so important to society that statements denying or trivializing them cannot be tolerated in the public sphere. It is clear that the number of such crimes will always be quite limited and that the list may differ from one state to another. This is so, because, as the ECtHR explained in the *Perinçek* case, the criminalization of the denial or justification of certain crimes is not only and not so much concerned with the preservation of historical truth, but rather with the protection of society from certain current threats.<sup>41</sup> Only such statements that are not merely controversial or blatantly false, but also have the potential to cause serious social harm in a given state, should be criminalized. This also satisfies the third condition for lawful restrictions, that of necessity and proportionality.

<sup>38</sup> UN Doc. CCRP/C/GC/34, General comment No. 34 Article 19: Freedoms of opinion and expression, 12 September 2011, para 21.

<sup>39</sup> ECtHR, *Feldek v. Slovakia*, Application No. 29032/95, Judgment, 12 July 2001, HUDOC, para 74.

<sup>40</sup> Article 18 of the ECHR explicitly stipulates that “the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

<sup>41</sup> *Perinçek v. Switzerland*, para 243.

The Czech practice, described in section 1, reflects an effort to abide by these standards. As we saw, the relevant provisions of the CCCR (Articles 365, 405 and 312e) were rarely used until the 2020s and practically only in relation to crimes committed during WWII. The situation has changed in the last years, in response to new conflicts. The Prosecutor General's statement warning the public of the risk of prosecution for those who condone serious crimes committed in Ukraine has been widely disseminated in the media. The analysis of the Office, made available on 2 March 2022, confirmed that "the approval of armed actions in connection with the Russian Federation's attack on Ukraine can be prosecuted as a crime."<sup>42</sup> The analysis recalled the definitions of the crimes under international law and it suggested four criteria that need to be met cumulatively for statements to trigger criminal prosecution. Such statements must entail positive evaluation of specific acts fulfilling the characteristics of one of the crimes under international law, must be unambiguous and dangerous ("far beyond what is permissible in a civilized society"<sup>43</sup>), and must incite to hatred or violence.

The case-law shows how Czech courts have applied these general standards in specific cases. This can be illustrated by two cases mentioned above, which have already been considered by several courts – one resulting in repeated convictions, the other in repeated acquittals. The first case concerns the far-right politician Daniel Makay, who – on 25 February 2022 – placed three posts on Facebook expressing support for Putin in his fight against "Ukro-Fascists" and suggesting that hydrogen bombs should be used by Russia. He was found guilty under paras 365 and 405 of the CCCR by the District Court and a fine of 450,000 CZK (circa 17.750 Euros) was imposed on him. The verdict was upheld by the Regional Court and also, in substance, by the Supreme Court.<sup>44</sup> As one of the defendant's arguments was the alleged violation of his right to freedom of expression, all the courts discussed this aspect. They stressed that this right was very important but had its limits, and they explained the factors that made them conclude that the defendant had exceeded the limits. The factors included the unambiguous nature of his statements, their repetition, and the fact that they both condoned crimes already committed and incited to new ones. The courts also noted that the illegality of the Russian invasion of Ukraine was well known and that the defendant, as a former soldier, must also have been aware that the use of certain weapons would constitute a war crime.

The second case, which has not yet been fully closed, is that of the primary school teacher Martina Bednářová. In April 2022, Bednářová told her class that nothing was happening in Kyiv and that the invasion of Ukraine was a reaction to the atrocities

<sup>42</sup> Stanovisko Nejvyššího státního zastupitelství..., p. 1.

<sup>43</sup> *Ibid.*, p. 7.

<sup>44</sup> Supreme Court, 8Tdo 418/2023, Decision, 16.08.2023. The Supreme Court annulled the decisions of the lower courts but it did so due to the inappropriate legal qualification consisting in the cumulation of paras 365 and 405 of the CCCR. The District Court then, in November 2023, found Makay guilty solely under para 405 of the CCCR and imposed on him the same penalty (fine of 450,00 CZK). See also *Soud znovu potrestal bývalého zastupitele Bruntálu za schvalování ruské invaze*, Region Ostrava, 16.11.2023.

committed by Ukrainian Nazi groups in Donbas. Some of her pupils recorded her statements, and she was subsequently dismissed from her job and accused under para 405 of the CCCR. In June 2023, a District Court acquitted her. It found that although she had used inappropriate methods to influence her pupils, the statements did not include explicit denial or justification of serious crimes and, as such, remained protected by the right to freedom of expression.<sup>45</sup> The Regional Court, ruling on the appeal, did not share this conclusion. Noting that “teachers can be viewed through a stricter lens in terms of freedom of expression and its limitations”<sup>46</sup> and that the whole context, including the impact on pupils, had to be considered, it annulled the decision. Yet, in January 2024, the District Court once again acquitted Bednářová.<sup>47</sup> The Regional Court upheld the decision in May 2024 but the chief prosecutor filed an appeal to the Supreme Court and the final outcome of the case is hence still uncertain.

The case-law shows that even with the analysis issued by the General Prosecutor’s Office, Czech courts do not always find it easy to determine which verbal acts related to the conflict are crimes and should be prosecuted. The factors they take into account are largely those indicated in the analysis, although they tend not to refer to it explicitly. These factors include the unambiguous/ambiguous nature of the statements, whether they are made once or repeatedly, the channels through which they are made, how the public reacts to them, the profile (including education, profession, and social position) of the author, and whether there is an element of hate or violence. Each statement must be assessed individually in the light of all these different factors. The case law also shows that Czech courts take a restrained approach, applying criminal sanctions only in serious and clear-cut cases that leave little doubt as to the knowledge and intent of the defendants and the nature and effect of their statements. This approach is in line with IHRL instruments and the tests proposed at the international level (e.g. in the 2013 Rabat Plan of Action) and it helps to reduce the risk of individuals being prosecuted for verbal acts which, although controversial or outrageous to some, do not exceed the limits of the right to freedom of expression.

## Conclusions

The Russia’s war of aggression against Ukraine has brought about a wave of criminal prosecutions, including prosecutions for the denial or justification of conflict-related crimes. Under current international law, states do not have an obligation to criminalize and prosecute such verbal acts, unless they involve incitement to racial discrimination

<sup>45</sup> The Court also noted that Bednářová was already adequately penalized by her dismissal from the school. K. Círoková, *Učitelka před dětmi popírala, že Kyjev hoří. Soud ji osvobodil*, Seznam Zprávy, 22.06.2023.

<sup>46</sup> *Odvolačí soud zrušil osvobození učitelky, která zpochybňovala ruské válečné zločiny*, Česká justice, 25.10.2023.

<sup>47</sup> *Nešlo o trestný čin. Soud opět osvobodil učitelku, která popírala válečné zločiny*, iDnes, 25.01.2024.

and, arguably, incitement to war or to violence based on national, racial, or religious hatred, although in the latter cases, using civil sanctions may be sufficient. EU law significantly expands the scope of the obligation by requiring states to criminalise and prosecute the public condoning, denial, or gross trivialisation of a wide range of crimes under international law. When implementing this obligation and, also, when deciding if certain other verbal acts linked to conflict-related crimes should be criminalized, states must respect the limits set by IHRL instruments. Most importantly, they must meet the three-part test of lawful restrictions on freedom of expression (legality, legitimacy, and necessity/proportionality). The example of the Czech Republic shows that, although it is not always easy to determine which individual statements do not exceed the limits of this right and which, on the contrary, can or should be criminalised, the availability of general guidelines and a restrained use of criminal sanctions can help mitigate many of the risks involved in this determination.

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## Summary

*Veronika Bílková*

### **Legitimate Exercise of the Right to Freedom of Expression or Unacceptable War Propaganda? The Prosecution of Verbal Crimes Related to the Russia's War of Aggression against Ukraine**

The Russia's war of aggression against Ukraine has triggered a massive wave of criminal prosecutions for war-related offences, including verbal offences consisting in the denial or justification of certain conflict-related crimes. This paper shows that current international law requires states to criminalize and prosecute a limited range of verbal acts linked to conflict-related crimes, though this range is further expanded under the EU law. The paper also identifies the legal standards that states have to respect when criminalizing and prosecuting verbal acts linked to conflict-related crimes and uses the example of the Czech Republic to show how Member States may proceed and what challenges they face when seeking to abide by these standards.

**Keywords:** armed conflicts, denial, justification, verbal offences, war-related crimes.

## Streszczenie

*Veronika Bílková*

### **Uprawnione korzystanie z prawa do wolności słowa czy niedopuszczalna propaganda wojenna? Ściganie przestępstw werbalnych w związku z agresją zbrojną Rosji przeciwko Ukrainie**

Agresja zbrojna Rosji przeciwko Ukrainie wywołała masową falę postępowań karnych za przestępstwa wojenne, w tym za przestępstwa werbalne polegające na zaprzeczaniu lub usprawiedliwianiu niektórych zbrodni związanych z konfliktem. W artykule pokazano, że współczesne prawo międzynarodowe wymaga od państw kryminalizacji i ścigania przestępstw werbalnych związanych z przestępstwami wojennymi, lecz zakres ten jest dodatkowo rozszerzany na mocy prawa UE. Omówiono również standardy prawne, których państwa muszą przestrzegać, kryminalizując i ścigając czyny werbalne powiązane z przestępstwami związanymi z konfliktami zbrojnymi. Dodatkowo na przykładzie Republiki Czeskiej omówiono, w jaki sposób państwa mogą postępować i jakie wyzwania stoją przed nimi, starając się przestrzegać tych standardów.

**Słowa kluczowe:** konflikty zbrojne, zaprzeczanie, usprawiedliwianie, przestępstwa werbalne, przestępstwa wojenne.