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**LEFTER V. UKRAINE AND RUSSIA AND 4 OTHER APPLICATIONS
APPLICATION NO. 30863/14**

**WRITTEN COMMENTS BY
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS¹**

1. Introduction. Scope of the intervention

Pursuant to the letter by the Section Registrar from 10 April 2018, we would like to present a third-party intervention of the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland (HFHR) on the case *Lefter and Others v. Ukraine and Russia* before the Court.

The case of Sergiy Oleksandrovych Lefter and four other Applicants concerns their detention by the separatist militants of the so-called ‘Donetsk People’s Republic’ (DPR) in the eastern Ukraine. The case in question is very complex as it raises both the issue of interference with a number of human rights (Articles 3, 4, 5, 8, 10, 13 and 14), as well as the question of “jurisdiction” of the respondent States within the meaning of Article 1 of the Convention. In our third-party intervention we would like to focus on one particular aspect of the given case. Since two of the Applicants (namely: Sergiy Oleksandrovych Lefter and Irma Mykolayivna Krat) are journalists, we would like to address specifically the issue of interference with freedom of expression, raised in the ninth question asked by the Court in the communication of the case. In our view it is crucial to realise that journalists covering armed conflicts are often attacked as part of a systematic and deliberate practice. By filing these written comments with the Court we would like to contribute to development of enhanced protection standards, corresponding to the particular dangers media professionals face in situations of armed conflicts.

First, we would like to discuss the journalists’ specific ‘watchdog’ role in covering armed conflicts. Second, we would like to present the broader factual context of journalists working in conflict-affected areas, describing in particular situation in eastern Ukraine and its meaning for the work of media in the region, as – to our knowledge – what happened to the Applicants should not be seen as an isolated case. Third, we would like to draw the Court’s attention to the significance of protection of safety of journalists in armed conflicts in the light of a) international humanitarian law and b) international freedom of expression standards. Finally, we would like to address the question of protection of journalistic sources of information in armed conflicts.

2. Role of journalists in armed conflicts

The pre-eminent role of the media in ensuring proper functioning of a democratic society is one of the fundamental principles of the Court’s jurisprudence². As the Parliamentary Assembly of Council of Europe (CoE) observed, “situations of war or conflict do not make the adequate provision of information through the media any less important; on the contrary, they enhance its relevance”³. This enhanced relevance stems from two basic circumstances

¹ The intervention was prepared by Konrad Siemaszko and Dorota Głowacka, lawyers of the Helsinki Foundation of Human Rights.

² E.g. The ECtHR judgment from 26 November 1991 *Observer and Guardian v. the United Kingdom*, Application no 13585/88, par. 59; the ECtHR judgment [GC] from 22 October 2007 *Lindon, Otchakovsky-Laurens and July v. France*, Application nos. 21279/02 and 36448/02, par. 62.

³ Parliamentary Assembly of Council of Europe, Resolution 1438 (2005), Freedom of the press and the working conditions of journalists in conflict zones, 28 April 2005, par. 1.

of armed conflicts. First, as noted by the International Criminal Tribunal for the former Yugoslavia (ICTY), “wars necessarily involve death, destruction, and suffering on a large scale and, too frequently, atrocities of many kinds”⁴. Second, at the same time conflict zones are often devoid of regular mechanism of independent, external scrutiny of belligerents’ actions⁵. Therefore “journalists are extremely useful as part of the machinery which ensures the implementation of the rules of war when most other means of enforcement are lacking”⁶. This function of the media has been noted by the United Nations (UN) Security Council, which emphasised journalists’ important role in protection of civilians, as they can be “acting as an early warning mechanism in identifying and reporting potential situations that could result in genocide, war crimes, ethnic cleansing and crimes against humanity”⁷. Similarly the CoE Committee of Ministers indicated that journalists, by informing the public about the unlawful conduct in conflict situations, “can help to prevent further violations and suffering”⁸.

What is more, the presence of journalists in war zones and their ability to provide “first-hand and direct knowledge based on their personal experience of the events unfolding”⁹ allows to accurately inform the public opinion, including the international community, about the real character of a conflict. As Ms. Kyung-wha Kang, the then Deputy High Commissioner for Human Rights put it: “amidst the so-called ‘fog of war’, they play a vital role in keeping the world informed and ensuring that our responses are based on the facts and truths unfolding on the ground”¹⁰. The ‘fog of war’ creates a space for disinformation and propaganda – phenomena, that have always accompanied wars, but of which in the past few years we have witnessed a growing prevalence in general in communication¹¹ – what makes the media presence on the spot even more significant. Journalists’ access to the conflict areas is not only beneficial to facts-based legal or political responses of the international community, but equally to the humanitarian aid. As researches indicate, “lack of information, as well as poor or non-existent communication with beneficiaries and between aid agencies, has resulted in poor or inappropriate delivery of aid that has harmed local people and systems”¹². The media, that can communicate to and with victims of conflicts and beneficiaries of aid on the spot, may significantly improve these deficiencies of humanitarian aid¹³.

Furthermore, the work of journalists during armed conflicts may also play a vital role after the end of a war. Their position allows them to document international law violations in ways that others cannot and therefore they may contribute to bringing the perpetrators to justice¹⁴. This post-conflict aspect of their role has been already proved in practice on numerous occasions – the ICTY explicitly acknowledged that “it was the brave efforts and reporting of journalists in the former Yugoslavia that, in part, contributed to the establishment of the [ICTY]”¹⁵.

Finally, journalists reporting on conflict areas may contribute to fulfilling the belief expressed in the Preamble of Convention, namely that fundamental freedoms – including freedom of expression – are foundation of peace in the world¹⁶. Regarding the direct belligerents of a conflict, UN Assistant Secretary-General for Human Rights observed that media “often support transitional justice processes, including individual accountability for violations as a way

⁴ ICTY, *Prosecutor v. Radoslav Brđjanin & Momir Talić* (Decision on Interlocutory Appeal), case no. IT-99-36, 11 December 2001, par. 36.

⁵ B. Saul, *The International Protection of Journalists in Armed Conflict and Other Violent Situations*, “Australian Journal of Human Rights” Vol. 14, No. 1, October 8, 2009, pp. 99-100.

⁶ I. Detter, *The Law of War*, Cambridge 2000, p. 323.

⁷ United Nations Security Council, Resolution S/RES/2222 on the protection of civilians in armed conflict, 27 May 2015.

⁸ Council of Europe Committee of Ministers Recommendation no. R (96) 4 on the protection of journalists in situations of conflict and tension, 3 May 1996.

⁹ The ECtHR judgment from 9 February 2017, *Selmani and Others v. “The Former Yugoslav Republic Of Macedonia”*, Application no. 67259/14, par. 84.

¹⁰ K. Kang, ‘Opening Remarks by Ms. Kyung-wha Kang Deputy High Commissioner for Human Rights at the panel discussion on the protection of journalists in armed conflict’ (14th session of the Human Rights Council, Geneva) (OHCHR, 4 June 2010), available at: <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10108&LangID=E>, (accessed 1 May 2018).

¹¹ Joint Declaration on Fake News and Propaganda by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017.

¹² T. Hannides, *Humanitarian Broadcasting in Emergencies: A Synthesis of Evaluation Findings*, BBC Media Action, London 2015, p. 9

¹³ M. Buromensky, S. Shturkhetzky, E. Beals, Z. Kazanji, M. Betz, C. Schuepp, *Conflict sensitive journalism: best practices and recommendations*, Kyiv 2016.

¹⁴ I. Šimonović, Assistant Secretary-General for Human Rights, Statement at the Conference on Journalists’ Safety, Media Freedom and Pluralism in Times of Conflict, Vienna, 15 June 2015, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16078&LangID=E>, (accessed 1 May 2018).

¹⁵ ICTY, *Prosecutor v. Brđanin & Talić*, (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence), case no. IT-99-36-T, 7 June 2002, par. 25.

¹⁶ Convention, preamble, recital 4.

towards attaining reconciliation and sustainable peace”¹⁷. More broadly, the ICTY recognised that journalists “play a vital role in bringing to the attention of the international community the horrors and realities of the conflict”¹⁸, what may counteract propaganda for war and hatred¹⁹.

3. General facts on attacks on journalists and an overview of the situation in Ukraine

Attacks on journalists reporting on armed conflicts have been described on many occasions as a widespread problem²⁰. According to UNESCO, in the years 2012-2016, 530 journalists were killed, of which 56% were killed in countries with armed conflict²¹. Many of the killed or otherwise attacked journalists were assaulted not only despite the important role they fulfil when reporting on wars and not only in a crossfire, but too frequently deliberately and for very reason of their work. According to the Committee to Protect Journalists – which during the same period of the years 2012-2016 recorded 328 killings of journalists confirmed to be related to the person’s work – 50% of the killed journalists were deliberately murdered, compared to 36% caught in the crossfire and 14 % killed while on dangerous assignment (such as covering a protest that turns violent)²². Available statistics suggest also that in many conflicts, journalists can be at greater risk of death or injury even than soldiers²³. The number of deliberate targeting of journalists, including targeting during armed conflicts, reached such a scale that CoE Parliamentary Assembly referred to it as a “widespread and systematic” practice²⁴ and certain scholars recognised it as an established “tactic” of some military forces²⁵.

Unfortunately this negative phenomena could be observed in Ukraine in the recent years. As noted by the OSCE Representative on the Freedom of Media (OSCE RFM), who has been monitoring and denouncing media freedom violations in Ukraine, there has been a significant deterioration of the situation of journalists since 2010²⁶. In 2013 violent attacks on media freedom were triggered by protests in Kyiv and other cities throughout Ukraine. These attacks significantly intensified in March 2014 in the south and east of the country affected by the armed conflict²⁷. The journalists covering events in the conflict zones have become a principal target²⁸ of systematic harassment and physical violence which – according to the OSCE RFM – constituted a major threat to media freedom and free expression not only in Ukraine²⁹ but also across the entire OSCE region³⁰. The OSCE RFM stated in this context that “while attacks on members of the media have been observed in several OSCE participating States, in no country has the physical safety of journalists become more critical in recent years than in Ukraine”³¹. The case in question, concerning *inter alia* journalists covering the military operations in Slovyansk in April 2014, cannot be therefore analysed in isolation from the broader context of hostile media freedom environment and recurring attacks on journalists which took their toll in particular between 2014 and 2015 in the Ukraine’s conflict-affected parts of the country.

As reported by the OSCE RFM, between the end of November 2013 and May 2014, there have been nearly 300 attacks targeting media, affecting both domestic and international correspondents covering events in Ukraine³².

¹⁷ I. Šimonović, op. Cit.

¹⁸ ICTY, *Prosecutor v. Brđanin & Talić*, (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence), case no. IT-99-36-T, 7 June 2002, par. 25.

¹⁹ D. Matheson, S. Allan, *Digital War Reporting*, Cambridge 2009 pp.166-188.

²⁰ Parliamentary Assembly of Council of Europe, Resolution 1438 (2005), op. Cit., par. 2.

²¹ UNESCO, *World Trends in Freedom of Expression and Media Development Global Report 2017/2018*, Paris 2018, p. 140.

²² Committee to Protect Journalists, *Journalists Killed in the years 2012-2016, 2017*, available at <https://www.cpj.org/killed> (accessed 1 May 2018).

²³ B. Katovsky, T. Carlson, *Embedded: The Media at War in Iraq*, Guildford 2003, p. xi.

²⁴ Parliamentary Assembly of Council of Europe, Resolution 1438 (2005), op. Cit., par. 2.

²⁵ B. Saul, op. Cit., p. 101.

²⁶ OSCE RFM, *Report - Media freedom under siege in Ukraine*, 23 May 2014, <https://www.osce.org/fom/118990>, p. 2.

²⁷ *Ibidem*, p. 3.

²⁸ OSCE RFM, *Siege of free media in Ukraine continues, journalists remain principal target, says OSCE representative*, 3 June 2014, <https://www.osce.org/fom/119425>.

²⁹ OSCE RFM, *Journalists’ safety remains biggest media freedom challenge in Ukraine, says OSCE representative*, 20 August 2014, <https://www.osce.org/fom/122779>.

³⁰ RFM, *Events in Ukraine a great threat to media freedom across the OSCE region, media freedom representative tells participating States*, 19 June 2014, <https://www.osce.org/fom/119962>.

³¹ OSCE RFM, *OSCE Representative calls for increased measures enhancing safety of journalists in conflict affected area in Ukraine*, 3 February 2017, <https://www.osce.org/fom/297526>.

³² OSCE RFM, *Report - Media freedom under siege in Ukraine*, op. cit.,

They involved *inter alia* killings (including five journalists killed in the eastern Ukraine³³), threats, kidnappings and detention of media professionals, forced switching off TV channels, denial of entry into Ukraine or refusal of access to particular events and information, as well as raids on media outlets resulting in damage or searches and confiscation of the journalistic equipment. Similar figures concerning attacks on media have been presented by the Institute of Mass Information (IMI), an Ukrainian organisation according to which between January and the end of June 2014³⁴ six journalists had been killed in connection with their work, 249 had been injured or attacked and at least 55 had been taken hostage or detained. According to another Ukrainian organization, the National Union of Journalists of Ukraine, there have been approximately 800 incidents of attacks and threats against journalists and media outlets in Ukraine between November 2013 and February 2017. During this period at least 10 media members have been killed, including those reporting from the conflict areas³⁵. Moreover numerous incidents threatening safety of journalists have been also reported by international journalistic organisations such as the Reporters Without Borders³⁶ or the Committee to Protect Journalists³⁷.

Among media violations which have been reported in different parts of Ukraine, both the human rights and journalistic organisations inform specifically about abductions and maltreatment of detained journalists on the territories controlled by the pro-Russian separatists of the self-proclaimed “Donetsk People’s Republic”, considering Slovyansk one of such territories in April 2014. In one of the reports released by the Office of the UN High Commissioner for Human Rights based on the findings of the UN Human Rights Monitoring Mission in Ukraine (HRMMU) covering the period of 2 April – 6 May 2014, Slovyansk is presented as a critical city where journalists had been facing increasing threats and acts of intimidation, including abduction and unlawful detention of at least 23 journalists, reporters and photographers by the armed groups controlling its territory (“Slovyansk self-defence unit”)³⁸. The systematic abductions of media personnel covering the situation in Slovyansk have been also noted by the Reporters Without Borders. The organisation condemned these attacks as part of an exacerbating “information war” between both parties to the armed conflict “designed to create a reserve of hostages and intimidate other journalists”. At the same time the organisation called Slovyansk an “increasingly unpredictable Bermuda Triangle where the safety of news providers is no longer guaranteed”³⁹. Unfortunately the situation of media representatives in the areas which remain under control of the pro-Russian separatists continues to be grave today. As reported in 2017 by the Office of the United Nations High Commissioner for Human Rights (OHCHR), “media representatives working in territory controlled by armed groups remained exposed to high levels of risk from indiscriminate fire during hostilities and some faced deliberate and targeted acts of violence perpetrated by the armed groups. They also continued to experience obstruction to their work, including denial of access to territory controlled by armed groups, censorship, unlawful detention and harassment”⁴⁰. According to the OHCHR, as of 15 February 2018, “at least two bloggers remained detained by armed groups in Donetsk people’s republic”⁴¹.

It should be emphasized that the violent attacks on media in Ukraine have been accompanied by other disturbing developments, such as negative trends in media legislation and institutional reforms undermining media

³³ OSCE, *OSCE representative warns about appalling journalists’ safety situation in eastern Ukraine after death of one more journalist, calls for thorough investigation*, 30 June 2014, <https://www.osce.org/tom/120566>.

³⁴ The Guardian, *Journalists covering the Ukraine crisis suffer intimidation*, 23 July 2013, <https://www.theguardian.com/media/greenslade/2014/jul/23/journalist-safety-ukraine>.

³⁵ European Federation of Journalists, *Ukrainian authorities must ensure the safety of journalists*, 3 February 2017, <https://europeanjournalists.org/blog/2017/02/03/13612/>.

³⁶ Reporters Without Borders, *Summary of attacks on media*, 31 August 2015, <https://rsf.org/en/news/summary-attacks-media>.

³⁷ For example: Committee to Protect Journalists, *Ukrainian journalists held by pro-Russian separatists*, 1 July 2014, <https://cpj.org/2014/07/ukrainian-journalists-held-by-pro-russian-separati.php>.

³⁸ Points 106-107, http://www.un.org.ua/images/stories/Report_15_May_2014_en.pdf.

³⁹ Reporters Without Border, *Reporters and media in a centre of a storm in eastern Ukraine*, 29 April 2014, updated 20 January 2016, <https://rsf.org/en/news/reporters-and-media-centre-storm-eastern-ukraine>.

⁴⁰ Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine 16 November 2016 to 15 February 2017*, available at http://www.un.org.ua/images/stories/17th_HRMMU_Report_ENG.pdf

⁴¹ Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine 16 November 2017 to 15 February 2018*, available at http://www.ohchr.org/Documents/Countries/UA/ReportUkraineNov2017-Feb2018_EN.pdf.

freedom⁴². Last but not least, media crisis has been increased by a dissemination of propaganda limiting access of the society to impartial, credible information and at the same time fueling the escalation of the armed conflict⁴³.

Taking all this into consideration, it has to be concluded that the safety of journalists as well as other media freedom guarantees have been routinely and systematically violated in the eastern Ukraine and other conflict-affected parts of the country. Therefore it is important to recognize that the maltreatment suffered by the journalists who are Applicants in the given case before the Court does not seem to be incidental, random acts or collateral damage during military operations. The evidence gathered by several international and national human rights and journalistic organisations suggests that these attacks might have been a part of the existing (at the time) pattern of grave violations of freedom of expression and a “policy” to deliberately target media actors in the conflict zones because of their professional work and in order to suppress independent reporting. Such strategy aims at discouraging critical journalists and foreign observers from covering the situation in the conflict zones, turning areas such as Slovyansk into news and information “black holes” with full control of the information-flow exercised by military forces.

4. International standards on protection of journalists in armed conflicts.

Protection of journalists in armed conflicts is regulated both by the international humanitarian law, as well as the international human right law, including the Convention. According to the Court’s case-law, safeguards provided by the two legal orders “co-exist” in a time of armed conflict⁴⁴ and therefore we think it is important to take into consideration both of the regimes.

4.1 International humanitarian law

Under the international humanitarian law the protection enjoyed by journalists covering armed conflicts depends on their nature, namely whether they qualify as an international or non-international armed conflict. Exact determination of the status of the armed conflict in Ukraine exceeds the scope of this third-party intervention. Since, however, the Office of the Prosecutor of the International Criminal Court concluded in its November 2016 Report on Preliminary Examination Activities that the available information “would suggest the existence of an international armed conflict in the context of armed hostilities in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict”⁴⁵, we think it is essential to present legal standards for both types of conflicts.

Under international humanitarian law, journalists in international armed conflicts are afforded protection either as war correspondents or as civilian (or independent) journalists. According to Article 4(A)(4) of the 1949 Third Geneva Convention relative to the Treatment of Prisoners of War, war correspondents are journalists “who accompany the armed forces without actually being members thereof” and “who received authorization, from the armed forces which they accompany”. They continue to be civilians (non-combatants), but when captured by a belligerent force, they are accorded prisoner of war status.

Other journalists, who are not authorized to accompany the armed forces (referred sometimes as “civilian”⁴⁶ or “independent”⁴⁷) enjoy a general protection granted to non-combatants under humanitarian law, provided they do take

⁴² For example a recriminalisation of defamation, introduction of the law restricting or terminating telecommunication services and public communications network usage which went into effect on 12 September 2014, or attempts by the National Television and Radio Broadcasting Council to get cable operators to stop the broadcast of Russian language or Russian produced programmes. See: OSCE RFM, *Regular Report to the Permanent Council for the period from 19 June through 26 November 2014*, 27 November 2014, s. 31-32; and Report – Media under siege, op. cit. p. 10

⁴³ Ibidem, p. 8.

⁴⁴ The ECtHR judgment [GC] from 16 September 2014, *Hassan v. the United Kingdom*, Application no 29750/09, par.102.

⁴⁵ Office of the Prosecutor of the International Criminal Court, Report on Preliminary Examination Activities (2016), par. 169. The Report from 2017 stated that “for the purpose of determining whether the otherwise non-international armed conflict involving Ukrainian armed forces and anti-government armed groups could be actually international in character, the Office continues to examine allegations that the Russian Federation has exercised overall control over armed groups in eastern Ukraine”, Office of the Prosecutor of the International Criminal Court, Report on Preliminary Examination Activities (2017), par. 95.

⁴⁶ International Committee of the Red Cross (ICRC), *Rule 34. Journalists*, “Customary International Humanitarian Law Database”, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule34, accessed 1 May 2018.

⁴⁷ B. Saul. Op. Cit. p. 108; A. Balguy-Gallois (2004), *The protection of journalists and news media personnel in armed conflict*, International Review of the Red Cross 86 (2004), p 42.

direct part in hostilities. This rule was explicitly confirmed in the Article 79 of 1977 Additional Protocol I to the Geneva Conventions of 1949.

Protection afforded to war correspondents and other journalists under international humanitarian law means, among others, that they cannot be the object of attacks (unless they participate directly in the hostilities)⁴⁸ and that they enjoy all fundamental guarantees, such as right to be treated humanely and protection from all acts of violence, including torture and threats thereof⁴⁹. Furthermore, if they are deprived of liberty, their personal details have to be recorded and transmitted as rapidly as possible to protecting power, the ICRC or the national Red Cross or Red Crescent societies of the State concerned⁵⁰.

Journalists in non-international conflicts are protected under the Common Article 3 of the four 1949 Geneva Conventions, which stipulates that persons taking no active part in the hostilities shall in all circumstances be treated humanely, which includes, among others, protection from violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, taking of hostages and outrages upon personal dignity, in particular humiliating and degrading treatment. Furthermore, protection of journalists has been recognized as a norm of the customary law, applicable also in non-international armed conflicts – as confirmed by the International Committee of the Red Cross (ICRC) authoritative study of the customary international humanitarian law (Rule 34: “Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities”)⁵¹.

Both in relation to international and non-international armed conflicts, journalists lose their protection only when they take a direct part in hostilities, i.e. conduct “acts of war that by their nature or purpose struck at the personnel and matériel of enemy armed forces”⁵². Expressing sympathy for the cause of one of the parties cannot be recognized as direct participation. This has been recognised as part the customary law by the ICRC⁵³ and has been confirmed by the practice of e.g. Inter-American Commission on Human Rights⁵⁴, ICTY⁵⁵ and International Criminal Court⁵⁶. What is more – a civilian media installation cannot be treated as a military legitimate target only because it spreads propaganda, including propaganda intended to generate support for the war effort⁵⁷. However, not all forms of propaganda are authorised in this aspect: the situation changes, when the media is used to incite crimes as in the case of *Radio-Television Libre des Mille Collines* in Rwanda – then it becomes a legitimate target under international humanitarian law⁵⁸.

4.2 International human rights law

Physical safety journalists as a necessary precondition of free media has become in recent years a matter of truly global concern⁵⁹. International law on this matter has been rapidly and steadily developing in virtually all universal and regional human rights systems. The protection of journalists from physical assaults as a question of safeguarding freedom of expression has been addressed many times by – among others – UN Security Council⁶⁰, UN Human Rights

⁴⁸ Article 51(2) of 1977 Additional Protocol I to the Geneva Conventions of 1949.

⁴⁹ Article 75 of 1977 Additional Protocol I to the Geneva Conventions of 1949.

⁵⁰ ICRC, *Rule 123. Recording and Notification of Personal Details of Persons Deprived of their Liberty*, “Customary International Humanitarian Law Database”, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule123, accessed 1 May 2018; Articles 122-124 of the 1949 Geneva Convention III relative to the Treatment of Prisoners of War ; Articles 136-141 of the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War.

⁵¹ ICRC, *Rule 34. Journalists*, op. Cit.

⁵² B. Zimmermann, C. Pilloud, C. F. Wenger, H-P. Gasser, J. Preux, P. Eberlin, S. S. Junod and Y. Sandoz, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1987, p. 1453.

⁵³ ICRC, *Rule 6. Civilians' Loss of Protection from Attack*, “Customary International Humanitarian Law Database”, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule6, accessed 1 May 2018.

⁵⁴ Inter-American Commission on Human Rights, Third report on human rights in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, Chapter IV, par. par. 53 and 56.

⁵⁵ ICTY, *Prosecutor v. Pavle Strugar* (Judgment on Appeal), case no. IT-01-42-A, 17 July 2008, par. 172–178.

⁵⁶ ICC, *Prosecutor v. Callixte Mbarushimana*, (Decision on the Confirmation of Charges), case no. ICC-01/04-01/10-465-Red, 16 December 2011, par. 148.

⁵⁷ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, par. 47.

⁵⁸ Ibidem.

⁵⁹ S. Parmar, *The international human rights protection of journalists*, in: O. Andreotti (ed.) *Journalism at risk: Threats, challenges and perspectives*, Strasbourg 2015, p. 38.

⁶⁰ UN Security Council Resolution 1738 (2006) of 23 December 2006, S/RES/1738; United Nations Security Council Resolution S/RES/2222 on

Council⁶¹, UN General Assembly⁶², UN Human Rights Committee⁶³ and UN Special Rapporteur on freedom of opinion and expression⁶⁴; by the Organization of American States Special Rapporteur on Freedom of Expression⁶⁵ and the Inter-American Court of Human Rights (IACHR)⁶⁶; by the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information⁶⁷ and the African Commission on Human and Peoples' Rights⁶⁸; by the Council of the European Union⁶⁹; by the CoE Committee of Ministers⁷⁰, CoE Parliamentary Assembly⁷¹ and the Court⁷². In our opinion, these developments indicate a universal uniform conception of the significance of safety of journalists for protection of freedom of expression – namely that the killings, ill-treatment or arbitrary detentions of journalists related to their work do have a specific feature that exceeds violations of Article 2, Article 3 or Article 5 of the Convention. Therefore, regarding the international human rights law, we would like to emphasize that in order to capture the specific features the communicated case, it is necessary to examine the complaints of the Applicants Sergiy Oleksandrovych Lefter and Irma Mykolayivna Krat – who are journalists – also in the context of freedom of expression.

In this context we would like draw the Court's attention to the fact that Applicants S.O. Lefter and I.M. Krat were detained and allegedly subject to ill-treatment while performing their professional duties of journalists (i.e. while covering armed conflict in eastern Ukraine). This prevented the Applicants from doing their work, i.e. from receiving and imparting information on unfolding events. Such action, as the Court already established, may raise issues under Article 10, more specifically, when done by state agents, may constitute an interference with the negative obligation of a state.⁷³ This is particularly so (but not only then), when a journalist has made clear effort to identify himself as a journalist performing his/her work and observing the unfolding events⁷⁴. As the UN Human Rights Commission in its views in the case *Njaru v. Cameroon* confirmed, there can be no legitimate restriction to the freedom of expression, which would justify the arbitrary arrest, torture and threats to life⁷⁵. Therefore when there is relationship between such treatment and journalist's activities, this constitute a violation of freedom of expression⁷⁶.

We are aware of several complexities of the communicated case regarding the jurisdiction and attribution of responsibility. In our third-party intervention we are not examining these issues and by no means we do not intend to suggest what kind of obligations can be attributed to particular states in the communicated case. In our opinion, however, it is crucial to analyse the present case regarding all possible type of duties that result from the freedom of expression, i.e. not only in the view of negative obligations indicated in the previous paragraph, but also taking into account positive obligations, both of substantive and procedural character.

The CoE Committee of Ministers acknowledged in the context of positive obligations regarding the safety of journalists, that the effectiveness of a system of protection may be influenced by contextual factors, including conflict

the Protection of civilians in armed conflict, 27 May 2015.

⁶¹ UN Human Rights Council Resolution 21/12 of 27 September 2012, A/HRC/RES/21/12.

⁶² UN General Assembly Resolution 68/163 of 18 December 2013, A/RES/68/163.

⁶³ UN Human Rights Committee, *Njaru v. Cameroon*, Communication 1353/2005, views adopted on 19 March 2007.

⁶⁴ Report of the UN Special Rapporteur to the Human Rights Council on limitations to the right to freedom of expression, safety and protection of journalists and media professionals in conflict zones, and right of access to information in situations of extreme poverty, 30 April 2009, A/HRC/11/4.

⁶⁵ Organization of American States (OAS), Special Rapporteur for Freedom of Expression, Violence against journalists and media workers: Inter-American standards and national practices on prevention, protection and prosecution of perpetrators, 31 December 2013, OEA/Ser.L/V/II, CIDH/RELE/INF.12/13.

⁶⁶ Inter-American Commission on Human Rights (IACHR) Report No. 38/97, Case 10.548, *Hugo Bustios Saavedra v. Peru*, October 16, 1997

⁶⁷ Press Release by the Special Rapporteur on Freedom of Expression and Access to Information in Africa on the abduction and assault of Mr. Ericino de Salema in the Republic of Mozambique, 6 April 2018, available at: <http://www.achpr.org/press/2018/04/d396/>, accessed 1 May 2018.

⁶⁸ African Commission on Human and Peoples' Rights (ACHPR), 185: Resolution on the Safety of Journalists and Media Practitioners in Africa, 12 May 2011.

⁶⁹ Council of the European Union (2014), EU human rights guidelines on freedom of expression, Foreign Affairs Council meeting, Brussels, 12 May 2014.

⁷⁰ CoE Committee of Ministers, Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors, 13 April 2016

⁷¹ Parliamentary Assembly of Council of Europe, Resolution 1438 (2005), op. Cit.

⁷² The ECtHR judgment from 14 September 2010 *Dink v. Turkey*, Applications nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09; the ECtHR judgment from 16 March 2000 *Özgür Gündem v. Turkey*, Application no. 23144/93.

⁷³ The ECtHR judgment from 8 October 2009 *Gsell v. Switzerland*, Application no. 12675/05, par. 49; the ECtHR judgment from 2 October 2012 *Najafli v. Azerbaijan*, Application no. 2594/07, par. 68.

⁷⁴ *Najafli v. Azerbaijan*, op. Cit.

⁷⁵ *Njaru v. Cameroon*, op. Cit. par. 6.4.

⁷⁶ *Ibidem*.

situations and “where State authorities may experience difficulties in *de facto* control over their territory”⁷⁷. The Committee indicated, however, that nevertheless “the relevant State obligations apply *mutatis mutandis* in such specific contexts, which are at all times subject to international human rights law and international humanitarian law”⁷⁸. This view has been confirmed in international law on several occasions, including in a Joint Declaration of international freedom of expression Rapporteurs on Freedom of Expression and responses to conflict situations⁷⁹, the CoE committee of Ministers Recommendation on the protection of journalists in situations of conflict and tension⁸⁰ and by the IACHR, which observed that “recently developed international practice dictates that making the work of the press possible in periods of armed conflict, even with irregular armed combatants, requires the greatest protection”⁸¹.

A particular context of an armed conflict does not, however, influence the obligation to protect journalists only in one way. Indeed, it may cause obstacles or difficulties that may lower the level of general protection that a journalist may reasonably expect from a state. However, situation of armed conflict may also result in imposing additional obligations on a state. In particular, this includes “tracing missing journalists, ascertaining their fate, providing appropriate assistance and facilitating their return to their families”, as the participating states – explicitly referring here to armed conflicts – concluded on the Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe⁸². Another additional obligation lies on the power that detains a journalist during an armed conflict (i.e. as a prisoner of war, civil internee or in a criminal procedure) – it has to notify personal details of a journalists to protecting power, the ICRC or the national Red Cross or Red Crescent societies of the State concerned as rapidly as possible⁸³.

The duty to “trace missing journalists, ascertain their fate, provide appropriate assistance and facilitate their return to their families” becomes even more important, when a state knows that the enemy armed forces violate their humanitarian obligations towards their detainees. In such cases, when a journalist working in a conflict zone is missing and the authorities are informed about it, it might be recognised that the authorities know or ought know of a real and immediate risk of ill-treatment of an identified individual from the illegal acts of a third party⁸⁴. In such situations, duty to trace missing the journalist and asserting their fate, constitutes, in our view, a minimum positive obligation that cannot be considered as imposing an impossible or disproportionate burden on the authorities.

Furthermore, indication of the particular context of an armed conflict as circumstances that may diminish a state capability to fulfil its duty to protect or to investigate cannot exceed what is necessary. In particular, legal consequences of such circumstances are time and space limited – once the authorities restore their control of a given territory after a conflict, they can be held responsible for a failure to promptly investigate upon the events that occurred when they had no real authority in the given territory (as it was in the case of *Jularić v. Croatia*⁸⁵).

Finally, among several procedural obligations arising from the duty to conduct an affective investigation into an assault of a journalist, we would particularly like to emphasize the duty to inquire sufficiently whether the attack was related to the victim’s activities as a journalist. We believe that is an essential part of any analysis of such cases under Article 10, which offers an important added value to analyses undertaken under other provisions of the Convention and reveals specific features of these human-right violations⁸⁶. Treating such attacks on journalists motivated by their work on equal footing with cases that do not have such a context would mean turning a “blind eye to the specific nature of acts which are particular destructive of fundamental rights”⁸⁷.

⁷⁷ CoE Committee of Ministers, Recommendation CM/Rec(2016)4, par. 27

⁷⁸ Ibidem.

⁷⁹ The UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and responses to conflict situations, 4 May 2015.

⁸⁰ CoE Committee of Ministers Recommendation No. R (96) 4 on the protection of journalists in situations of conflict and tension, 3 May 1996, principle 12.

⁸¹ *Hugo Bustios Saavedra v. Peru*, op. Cit., par. 73.

⁸² Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE 3 October 1991, Moscow, par. 34.

⁸³ ICRC, *Rule 123. Recording and Notification of Personal Details of Persons Deprived of their Liberty*, op. Cit.

⁸⁴ The ECtHR judgment from 8 November 2005 *Gongadze v. Ukraine*, Application no. 34056/02 par. 165.

⁸⁵ The ECtHR judgment from 20 January 2011, Application no. 20106/06, par. 46.

⁸⁶ Joint partly dissenting opinion of Judges Nussberger and Vehabović to the ECtHR judgement from 13 April 2017 *Huseynova v. Azerbaijan*, Application no. 10653/10, par. 10-11.

⁸⁷ The ECtHR judgement [GC] from 6 July 2005 *Nachova and Others v. Bulgaria*, Applications nos. 43577/98 and 43579/98, par. 160-168; the ECtHR judgement from 20 October 2015 *Balázs v. Hungary*, Application no. 15529/12, par. 52.

4.3. Protection of journalistic confidentiality while covering armed conflicts

In armed conflicts journalists may be witness to atrocities and obtain evidence about the perpetrators, sometimes as a result of receiving information from confidential sources⁸⁸. In order to be able to efficiently carry their “public watchdog” work, journalists should enjoy professional privilege protecting their sources of information in the context of covering armed conflicts. Such privilege is crucial for the preservation of both their own safety and safety of their informants while a lack of this guarantee may discourage sources from revealing information to media (which, taking into consideration the realities of the conflict zones, may not be possible to obtain otherwise).

The need to ensure that the confidentiality of journalistic sources is respected by all parties to the armed conflict has been already recognised in the international law. It has been explicitly mentioned for example in the Recommendation No. R (96) 4 of the Committee of Ministers of the Council of Europe (“Having regard to the importance of the confidentiality of sources used by journalists in situations of conflict and tension, member states shall ensure that this confidentiality is respected”⁸⁹). It has also been emphasized by the ICTY⁹⁰ which, drawing on human rights law, in particular freedom of expression, accepted that journalists serve the public interest in bringing conflicts to public attention and therefore should enjoy a general privilege against being compelled to testify about their work. According to the ICTY such a privilege is necessary to support the journalists’ work covering armed conflicts as “the accurate information is often difficult to obtain [in the conflict zones]’ but at the same time its transmission is “essential to keeping the international public informed about the matters of life and death”⁹¹. The ICTY underlined however that the journalistic privilege is not absolute and may be subject to exceptions, but these need to be narrowly circumscribed⁹².

The ICTY’s approach corresponds therefore with the well-established jurisprudence of the ECtHR concerning general protection of journalistic sources of information. The Court’s has underlined on numerous occasions the importance of protection the confidentiality of sources as one of the necessary safeguards of freedom of expression and a cornerstone of freedom of the press, without which sources may be deterred from assisting media in informing the public on matters of public interest⁹³. The ECtHR has also accepted that sources should be protected against disclosure conducted with any kind of measure – the protection covers not only cases when a journalist has been directly ordered to disclose his or her source, but also when any information that is likely lead to disclosure might be accessed (such as searches, seizures or surveillance). In fact, the ECtHR observed that indirect measures leading to source disclosure are even more “drastic” than a direct order to divulge the source’s identity, as the authorities in these “indirect” cases may act beyond the journalist’s will and control (when for example his computer is forcibly searched) and at the same time access a wider extent of protected materials (e.g. held at the searched office or contained in seized hard drives)⁹⁴. The Court has emphasised that these means should not be used to circumvent the protection of journalistic sources⁹⁵.

Taking into consideration the well-established international standards concerning the protection of journalistic sources, we believe that it is important to address this issue in the context of the case in question. In the application no. 30863/14 the Applicant who is a journalists complained that, while in detention, his cell phone and lap top had been seized and checked without his consent by the members of the pro-Russian separatist forces. Unfortunately the reports denouncing media freedom violations in Ukraine after 2013 suggest that such a conduct may not be an isolated case but again a wide-spread practice and a recurring element of harassing journalists working in the conflict-affected parts

⁸⁸ B. Saul, op. cit.,p. 126.

⁸⁹ Principle 5, Recommendation No. R (96) 4 of the Committee of Ministers to member states on the protection of journalists in situations of conflict and tension adopted on 3 May 1996.

⁹⁰ ICTY, Prosecutor v. T Radoslav Brdjanin & Momir Talic (Decision on Interlocutory Appeal), case no. IT-99-36, 11 December 2001, paras. 29, 36 and 50, <http://www.icty.org/x/cases/brdjanin/acdec/en/randall021211.htm>.

⁹¹ Ibidem, para. 36.

⁹² The interference with the principle of journalistic confidentiality is allowed only if: a) the evidence sought would be of direct and important value in determining a core issue in a case, and b) the evidence could not be sought elsewhere.

⁹³ ECtHR judgement (Grand Chamber), *Sanoma Uitgevers B.V. v. the Netherlands* from 14 September 2010, case no. 38224/03, para. 50; *Goodwin v. the United Kingdom* from 27 March 1996, case no. 17488/90, para. 39

⁹⁴ ECtHR judgment *Roemen and Schmit v. Luxembourg* from 25 February 2003, case no. 51772/99, para. 57; *Ernst and Others v. Belgium* from 15 July 2003, case no. 33400/96, para. 103.

⁹⁵ ECtHR judgement *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* from 22 November 2012, case no. 39315/06, para. 90.

of the country. Apart from similar cases of individual journalists, there have been also several incidents reported involving raids on media outlets resulting in searches and seizure of the equipment found there⁹⁶. Such situations raise issue of the right to privacy and personal data protection guaranteed by Article 8 of the ECHR but also clearly interferes with journalistic sources protection guaranteed by Article 10. The analysed case offers therefore an important opportunity to specifically address the problem from the freedom of expression perspective and to reaffirm the application of the standards related to the protection of journalistic sources in the context of covering armed conflicts by media.

5. Conclusions

In light of the above considerations, we would like to present the following conclusions to the Court:

1. Media play a particularly vital role in covering armed conflicts which often puts them at specific risk of intimidation, harassment and violence. There is a negative trend showing that harassing journalistic may become a part of a systematic and strategically planned practice of the parties involved in military operations. The situation in Ukraine seems to confirm this trend and therefore needs to be addressed specifically from the freedom of expression perspective.

3. Both the role played by media in armed conflicts and their vulnerability to intimidation and violence justify the application of enhanced protection standards with respect to journalists working in war zones.

4. The special status of journalists covering armed conflicts has been recognized in international humanitarian law while the general standards concerning protection of safety of journalists have been developed within international human rights law. The nature of the analysed problem and the existing consensus around the coexistence of the two regimes (confirmed also in the Court's jurisprudence) argue in favour of simultaneous, complementary application of the both frameworks in the case in question.

5. Protection afforded to war correspondents and other journalists under international humanitarian law means, among others, that they cannot be the object of attacks unless they participate directly in the hostilities and that they enjoy all fundamental guarantees, such as right to be treated humanely and protection from all acts of violence, including torture and threats. Expressing sympathy for the cause of one of the parties or even engaging in propaganda activities cannot be in principle recognized as "direct participation" and therefore do not justify losing the protection.

6. Under human rights law violence, maltreatment or arbitrary detentions of journalists related to their work during armed conflicts have a specific feature that exceeds violations of Article 2, 3 or 5 of the Convention and involves also Article 10. The protection of journalists from physical assaults in war zones is therefore also a question of safeguarding freedom of expression and may require from the state actors complying with both negative and positive obligations. The latter include in particular a duty to trace missing journalists and asserting their fate or duty to conduct an effective investigation into an assault of a journalist, inquiring sufficiently whether the attack was related to the victim's activities as a media professional.

7. It is also important to emphasize the significance of the protection of journalistic sources of information which should be enjoyed by journalists covering armed conflicts. This is particularly vital in the context of military forces' recurring practice of arbitrary searches and seizures of journalistic equipment which may contain confidential information.

8. Taking into account the ongoing war in Donbas, journalists still have – and, as we fear – will have to undertake efforts to report on the armed conflicts, also within the area of the Council of Europe. Therefore we regard the case as important for narrowing the gap between the very grave problems that journalists face when reporting from war zones and international legal standards protecting them in this context.

On behalf of the Helsinki Foundation for Human Rights,


Piotr Kłodoczyński
Secretary of the Board
Helsinki Foundation for Human Rights



⁹⁶ OSCE RFM, *Regular Report to the Permanent Council for the period from 19 June through 26 November 2014*, op. cit.