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ONLINE PROPAGANDA, CENSORSHIP AND HUMAN RIGHTS IN RUSSIA'S WAR AGAINST REALITY

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Russia's invasion of Ukraine has exposed the capriciousness of state and corporate power over human rights online. Events since the invasion have demonstrated the coercive power of the state over online expression, privacy, and public protest. Russia's longtime "war against reality" has deepened in its repression and is dependent on the raw power of criminal law enforcement, surveillance by security forces, censorship by its media regulator, and legal and extralegal demands against internet platforms.[1] Without drawing an equivalence, the European Union has imposed a comprehensive ban on Russian state-controlled media outlets, encouraged in part by the Ukrainian government, whose moral authority under the circumstances has been particularly strong. Notwithstanding state power over them, technology companies continue to be capable of causing or mitigating, if not preventing, human rights harms. Foreign companies and local partners have heroically maintained internet access in Ukraine and resisted Russian censorship and propaganda, the latter resulting in the blocking of key internet platforms by Russia. It is the latest chapter in the struggle among governments, companies, and individuals to control online space.[2] But it is also an opportunity for reflection, for while the Kremlin has flouted its international obligations, governments and companies committed to human rights law cannot so behave. They should exercise their power over public space according to transparent rule of law standards of non-discrimination, legality, necessity, and legitimacy. A headlong rush to Russia-specific rules and enforcement, unmoored from public articulation of human rights standards, risks corroding the global normative framework for fundamental rights online.

The Human Rights Legal Framework

Russia, Ukraine, and every member of the European Union are parties to the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).[3] Article 19(2) of the

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[1] Peter Pomerantsev, This Is Not Propaganda: Adventures in the War Against Reality 80–108 (2019). On Russian state-media, see Mona Elswah & Philip N. Howard, *"Anything that Causes Chaos": The Organizational Behavior of Russia Today (RT)*, 70 J. Commc'n 623 (2020).

[2] *See, e.g.*, Rebecca MacKinnon, Consent of the Networked: The Worldwide Struggle for Internet Freedom (2012); David Kaye, Speech Police: The Global Struggle to Govern the Internet (2019).

[3] The Council of Europe expelled Russia on March 16, 2022; its status as a party to the European Court of Human Rights will cease on September 16, 2022. Resolution CM/Res(2022)3 on Legal and Financial Consequences of the Cessation of Membership of the Russian Federation in the Council of Europe (Mar. 23, 2022).

ICCPR guarantees the right to seek, receive, and impart information and ideas of all kinds, regardless of frontiers and through any media. The Human Rights Committee, the monitoring body for the ICCPR, has called Article 19(2) "the foundation stone for every free and democratic society."[4] It comprises the "expression and receipt of communications," with a "free, uncensored and unhindered press" at its center.[5] Article 19(3) recognizes that public authorities may only impose limitations on the exercise of the right to freedom of expression in accordance with a three-part test of legality, necessity, and legitimacy. This cumulative test means, among other things, that restrictions must be rooted in rule of law standards that are designed and likely to achieve their asserted purpose, using the least intrusive means to do so. Legitimate grounds for restriction are the protection of "the rights or reputations of others, national security or public order (*ordre public)*, or public health or morals."

Article 19 is the centerpiece of the global regime for the protection of freedom of expression, but Article 20(1) of the ICCPR obligates states parties to prohibit "propaganda for war" and Article 20(2) requires prohibition of "advocacy of national, racial or religious hatred that constitutes incitement to hostility, discrimination or violence," prohibitions themselves subject to the three-part test of Article 19(3).[6] The prohibition of war propaganda may seem like a powerful weapon to wield against Russian state media, but it entails some risks. For one thing, it is a pure speech restriction; its proscription does not require a further consequence (such as the incitement under Article 20(2)).[7] Neither does it define its operative terms, giving room for excessive government discretion and limited guidance to companies. The Human Rights Committee sought to narrow its breadth, defining the prohibition as applying to "all forms of propaganda *threatening or resulting* in an act of aggression or breach of the peace contrary to the Charter of the United Nations."[8] Such narrowing clarifies that Article 20(1) does not address broader state propaganda or audience manipulation.

While human rights law obligates only states, technology companies provide access to information for hundreds of millions of people in Europe and Russia, and their decisions can have significant impact on the enjoyment of fundamental rights. The UN Guiding Principles on Business and Human Rights (UNGP), adopted by the UN Human Rights Council in 2011, provide a framework for corporate prevention or mitigation of human rights harms.[9] The UNGP seek to limit the ways corporations burden individual enjoyment of human rights, promoting corporate policy commitments to respect human rights, due diligence to assess human rights risks, communication to the public about the steps they are taking to prevent or mitigate human rights harms, and accountability for interference with rights. A crisis such as the one generated by Russia's aggression provides an occasion to assess whether companies are in fact meeting the UNGP's objectives.

[4] General Comment 34: Article 19: Freedom of Opinion and Expression, para. 2, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011).

[5] *Id.*, para. 11.

[6] *Id.*, paras. 50–52.

[7] A narrower, better formulation, "propaganda that constitutes incitement to war," was rejected during the provision's negotiation. *See* Michael Kearney, *Propaganda for War, Prohibition*, *in* Max Planck Encyclopedia of Public International Law, at para. 11 (Rüdiger Wolfrum, 2009).

[8] General Comment 11: Prohibition of Propaganda for War and Inciting National, Racial, or Religious Hatred (Article 20) (July 29, 1983) (emphasis added).

[9] *See generally* United Nations Office of the High Commissioner for Human Rights, UN Guiding Principles on Business and Human Rights (2011); David Kaye, Report of the Special Rapporteur on the Right to Freedom of Opinion and Expression, UN Doc. A/HRC/38/35 (Apr. 6, 2018).

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State Power and Online Expression

Corporate power operates in the shadow of the state, and in this case, Russia has trampled on human rights standards. Moscow has adopted and implemented laws to quash independent reporting, criticism, and dissent.[10] Russia spent years constructing an aggressively restrictive information space, even as foreign technology companies participated in it.[11] As it emptied public space of independent media and dissent, the government filled it with turbo-charged disinformation, and most recently state media has told endless fictions about the Russian actions and Ukrainian "responsibility" for the war and for Russia's crimes. So in addition to the punitive edge of censorship and criminalization, the Russian government has undermined public institutions and the individual's ability to distinguish fact from fiction. Whether or not state propaganda is a violation of international law, it often constitutes an interference with the public's ability to distinguish accurate information from official lies.[12]

In response, the Council of the European Union (EU) prohibited the broadcast of RT and Sputnik, the principal arms of Russian state media, within the EU. The EU Regulation cites as reasons for the ban disinformation, foreign interference, and influence operations; Russian "media manipulation" to destabilize European countries; and threats to public order and security.[13] EU operators may not broadcast, facilitate, or otherwise contribute to the dissemination of any content from RT or Sputnik. Social media must block Russian state media outlets and search engines must ensure that RT and Sputnik links and content "do not appear in the search results delivered to users located in the EU."[14] Russian state media has been banned and binned, deposited into a contemporary memory hole.

The European Union has long committed to human rights norms in its policymaking and regulation, but its response to Russia's aggression, understandable as it may be, has not included an articulation of how banning individual access to RT and Sputnik satisfies the demands of international human rights law. Igor Popović has noted that the potential of other approaches to counter Russian disinformation (such as labeling state media as such or instituting a "notice and takedown" regime for illegal content) raises questions about the proportionality of the EU's measures.[15] Further, the ban applies across the entirety of EU territory, even though the impact of Russian state media varies across the continent. For instance, Poland and the Baltic countries may face serious risks from state disinformation not faced elsewhere, given their proximity to Russia and substantial ethnic Russian populations—and their publics may also have the greatest interest in knowing what Russian media is saying.[16] Their case for restriction may look quite different, therefore, than the broader EU one.

[10] *See, e.g.*, Letter from the Special Rapporteur on Freedom of Expression, OL RUS 4/2019 (May 1, 2019); OHCHR Press Release, Russia: UN Experts Alarmed by "Choking" Information Clampdown (Mar. 12, 2022).

[11] Greg Miller & Joseph Menn, *Putin's Prewar Moves Against U.S. Tech Giants Laid Groundwork for Crackdown on Free Expression*, WASH. POST (Mar. 12, 2022).

[12] *See, e.g.*, Joint Declaration on Freedom of Expression and "Fake News," Disinformation and Propaganda, para. 2(c) (Mar. 3, 2017) ("State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).").

[13] Council Regulation (EU) 2022/350, OJ L65, paras. 5–8 (Mar. 1, 2022).

[14] Government Request Removal Complaint to Google (Mar. 4, 2022).

[15] Igor Popović, *The EU Ban of RT and Sputnik: Concerns Regarding Freedom of Expression*, EJIL:*TALK!* (Mar. 30, 2022).

[16] Chancellery of the Prime Minister of Poland, Letter to Big Tech by Prime Ministers of Estonia, Latvia, Lithuania and Poland (Feb. 28, 2022).

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Internet Companies Facing Repression and Demand

Technology companies thus find themselves caught between business models that value user-generated content and official demands restricting that same content. The Russian invasion spun many companies into rapid response, from resistance to Russian demands for content removal and protecting Ukrainian and Russian users to relaxing the enforcement of rules involving threats against Russian military personnel in Ukraine.[17] Some actions seem brave in light of the damage to their businesses, while others seem poorly reasoned and *ad hoc*. The intense pressure companies have faced may be typified by the Ukrainian government's early demands that they exit the Russian market, framed in part as solidarity with the obvious victim of aggression.[18] Yet it remains difficult to do any sort of comprehensive assessment at this time, when public knowledge of company actions remains limited. Broader questions, beyond the narrow ones concerning specific content, should be answered: Are the companies taking the kinds of steps called for by the UNGP, such as human rights risk assessment and transparent articulation of their rules and enforcement, to mitigate or prevent human rights harms? To what extent are changed company policies driven by human rights decision making as opposed to public or governmental pressure, and how do these outcomes vary, if at all, from decisions made in environments that lack the same kind of public attention?

Several of the biggest technology companies adopted human rights policies well before the Russian invasion. Facebook, for instance, has adopted a human rights policy that commits to the UNGP's due diligence and transparency standards and to the protection of human rights defenders.[19] Apple likewise has adopted a policy rooted in the UNGP, committing to "conduct human rights due diligence to identify risks and work to mitigate them."[20] Google has as well, while many others in the telecommunications sector—particularly those that are members of the Global Network Initiative—also make commitments to observe human rights in their activities.[21] These commitments are important parts of the UNGP framework.

Still, human rights policies have impact only if they actually guide company product development, marketing, and country-level decision making. In the context of the Russian aggression, that impact is unclear because most have not connected their decisions to resist government demands to broader human rights commitments.[22] Admittedly, it remains early, but no company has released a public human rights impact assessment that shows how or whether they struggled with the demands made by Russia and the EU and its member states. The problem of transparency of decision making goes back some years, since the present repression in Russia is the culmination of increasing restriction and threat, with the companies like the urban-mythical frogs that fail to jump from lukewarm water as it comes to a boil. While companies entered the Russian market at a time of relatively modest restrictions, they seemed to comprehend the dilemmas they would face.[23] Yet they pushed forward to build a presence in Russia. Did they undertake the kind of ongoing due diligence that the UNGP prescribe, such that they reviewed the growing difficulty of operating in an increasingly repressive environment? Did they have a human rights-oriented plan for how to respond to government demands that could compromise their users' personal data

[17] *See, e.g.*, Sinéad McSweeney, *Our Ongoing Approach to the War in Ukraine*, Twitter Blog (Mar. 16, 2022).

[18] *See, e.g.*, Mykailo Fedorov, @FedorovMykhailo, Twitter (Feb. 25, 2022).

[19] Facebook, *Corporate Human Rights Policy* (2021).

[20] Apple, *Our Commitment to Human Rights* (2021).

[21] Google, *Human Rights*. *See also* Global Network Initiative (in disclosure, the author is independent chair of the Global Network Initiative Board).

[22] *But see* Telia Company, Steps Taken by Telia Company Related to Russian Originated Content (TV and Internet Sites) (Apr. 25, 2022).

[23] Sam Schechner & Gregory White, *U.S. Social-Media Giants Are Resisting Russian Censors*, Wall St. J. (Dec. 26, 2014).

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and freedom of expression, not to mention physical safety? Opacity deprived users of any idea of how open and secure the platforms genuinely were.

To give one example of companies in the Russian environment, the government adopted a law, effective at the beginning of 2022, requiring foreign websites and social media platforms with over 500,000 daily Russian users to register as legal entities, with a locally based point of contact.[24] Many companies complied with the so-called "landing law," but it marked the most recent, pre-aggression point at which companies had to determine how to justify staying in Russia while complying with increasingly censorial government demands. In a sign of what was to come, during the fall of 2021, Apple and Google resisted Kremlin demands that they remove from their stores an election app developed by opposition leader Alexei Navalny's team. The government then physically intimidated Google personnel in Moscow, after which the companies complied.[25] Once the law entered into force, they could have, but failed to, challenge it.[26]

Companies could have imagined the coming repression, one could argue, but what role did their human rights policies play in their decisions to comply? Moreover, they have explained their actions since the invasion largely without reference to human rights standards. This has a broad effect on how other states view their behavior, and how susceptible they may be to future pressure. So, was it the fact of Western public and government outrage over the invasion that led to their actions? What distinguishes Russia from the situations in Ethiopia, India, Myanmar, or any other place where the companies face difficult questions of market share, popularity, government demand and human rights protection? It would be useful to know if the standards they apply are drawn from the same source of law or principle, and if they are devoting the same kinds of resources to protect their users, their employees and the public in each of the varied environments.

Conclusion

The inconsistencies are jarring. On the one hand, Russian repression and European censorship have forced companies to take sides, and they seem generally to be on the side of Ukraine and access to information in Russia. They should be applauded for that. Yet the opacity of recent actions suggests they still seem unprepared to acknowledge that their massive power requires something more than *ad hoc* rule changes and inconsistency with respect to demands in other zones of conflict and repression. In the case of the EU ban, few if any seem to be complaining, and most—if not all—seem to have rolled over in compliance. Their human rights policies would seem to lead them to challenge the ban, which would enable the articulation of guidelines for when state authorities have the power to restrict access to state media of hostile governments. It could provide space for civil society and the companies to argue for alternatives to bans and enhance company credibility when they challenge government orders in other countries. As future governments ban future propagandists, the failure to challenge may come to haunt the companies.

With global attention on the tensions between government demands and human rights, the companies could use this moment to strengthen public commitments to the UNGP. It is possible that they have reached rights-compliant conclusions, but they have not always articulated their positions in keeping with UNGP's process-oriented approaches to prevent or mitigate human rights harms. Neither the public communication of human rights policies and risk assessment nor the transparent adoption and enforcement of rules has been an obvious element of company practice since the Russian invasion of Ukraine. But it is not too late to change.

[24] Russian Law 1176731-7; *Putin Signs Law Forcing Social Media Giants to Open Russian Offices*, Reuters (July 1, 2022).

[25] Miller & Menn, *supra* note 11.

[26] *Russia: Internet Companies Must Challenge "Landing Law" Censorship*, Article 19 (Jan. 21, 2022).

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