

# ASSESSMENT OF CERTAIN PROVISIONS OF THE CRIMINAL CODE OF UKRAINE CONCERNING OFFENSES AGAINST MEDIA PROFESSIONALS

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## I. INTRODUCTION

This assessment is being provided at the request of the Committee of the Ukrainian Parliament on Freedom of Speech and Information Policy. The Committee requested the assistance of the Council of Europe in evaluating a number of provisions of the country's Criminal Code devoted to protection of journalists, particularly as to their compliance with Council of Europe standards.

The referred provisions are the result of recent amendments to the Criminal Code, undertaken in the last two years. In May 2015, Parliament introduced four new special offenses that criminalize serious attacks against the life, limb, liberty and property of journalists, providing for higher sanctions than in normal situations (see Articles 345-1, 347-1, 348-1 and 349-1). Shortly afterwards, in February 2016, a set of amendments to the pre-existing Article 171 expanded the notion of criminal interference with journalistic activities, beyond the existing offenses of impediment and persecution of journalists; the new crime figures under Article 171 include unlawful seizure of equipment, denial of information and other forms of adverse influence.

These comprehensive legislative changes introduced after the 2014 revolution indicate a serious willingness on the part of national legislators to strengthen legal defenses and ensure an enabling environment for journalism in the newly democratic Ukraine. As the legislative history of the 2015 amendments shows, they were guided, in part, by an explicit intent to meet Council of Europe standards that prior legislation and practice were considered to fall short of.

The recent request of the Parliamentary Committee is a further step in that direction, and must be welcomed. It also comes a year after the April 2016 adoption by the Council of Europe's Committee of Ministers of an important guidance instrument on the safety of journalists and other media actors,<sup>1</sup> which was not available at the time of the most recent legislative changes in Ukraine and may serve as a key reference of up-to-date standards.

At the same time, the Committee's request also indicates an acknowledgment that this slate of new legislative provisions has not been sufficient to ensure adequate accountability for serious attacks against journalism in the country, a view that is shared by many in the national and international media community. This confirms the widely accepted premise that tackling impunity, including for crimes against journalists, requires much more than adequate legal provisions. For this reason, this assessment has sought, whenever possible, to include political and institutional aspects, as well as other practical elements that tend to have an important role in either undermining or facilitating the enforcement of relevant criminal legislation.

We are also keenly aware of the special challenges that Ukraine faces as the result of the ongoing security situation in certain parts of its territory, and more generally, the tumultuous developments of the past several years. It has been encouraging, therefore, to see a strong commitment by all sides to the need to uphold democratic values in the current context. The

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<sup>1</sup> Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors (adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies).

authorities' engagement with the Council of Europe's platform to promote the protection of journalism and safety of journalists is another indication of such willingness.

This assessment benefitted greatly from interviews held in Kyiv with a wide range of stakeholders, including media rights groups, media lawyers, senior law enforcement and prosecutorial personnel, judicial representatives, and senior officials from the Presidential administration and the ministry of information. We were also able to consult extensive documentary materials provided (in English) by the Council of Europe office in Kyiv. These included law enforcement statistics; and a methodological guidance prepared by the Office of the Prosecutor General specifically in relation to criminal investigations of crimes against journalists (hereinafter, "GPO Guidance").<sup>2</sup> We understand that the National Police has developed a similar guidance document for its investigators. The author wishes to thank all interlocutors and others that provided invaluable assistance; special thanks are due to Dr. Oleksandra Yanovska for her advice on questions of Ukrainian law and her contributions to our analysis and recommendations.

The assessment is organized as follows: it starts with a discussion of the scope of the problem; followed by an overview of relevant Council of Europe standards; detailed comments on the legislative provisions indicated by the Parliamentary Committee; a discussion of certain additional legal and practical questions; an overview of other comparative models, focusing on Georgia and Serbia; a short concluding section; and recommendations.

## II. SCOPE OF THE PROBLEM

The precise scope and causes of the problem – namely, impunity for attacks against and other interferences with journalistic activities in Ukraine – is subject to some debate, with critics and authorities pointing to different trends over the last several years. There is also a lack of systematic monitoring and research into the causes of impunity. However, it seems indisputable that the current level of accountability, through the effective enforcement of the relevant penal legislation, is not satisfactory.<sup>3</sup>

According to some representatives of the journalistic community, the number of successful prosecutions since the 2014 revolution remains extremely low, and most high-profile instances of attacks continue to go unpunished. Most interlocutors agreed that the attacks do not appear to be centrally coordinated, and that violent incidents involving government personnel have gone down in recent years. However, criminal interferences by private individuals and interests, such as corrupt businesspeople, have increased. And some of the most high-profile interferences are still carried out by government officials, especially local officials and law enforcement personnel.

<sup>2</sup>The full title of the document is: "Methodical recommendations on the peculiarities of procedural guidance in criminal proceedings into facts of impeding lawful professional activities of journalists, threats or violence against journalists, intentional destruction of or damage to property of a journalist, attempts against his/her life and taking as a hostage" (Kyiv, 2017).

<sup>3</sup>Historically, the judgments of the European Court of Human Rights in a number of leading cases involving violence against journalists in Ukraine appear to confirm the serious normative and especially practical challenges in ensuring effective investigations, accountability and safety for journalists. See, in particular, *Khaylo and Others v. Ukraine*, Judgment of 13 November 2008; and *Gongadze v. Ukraine*, Judgment of 8 November 2005. Both cases are under enhanced supervision by the Committee of Ministers of the Council of Europe with respect to Ukraine's execution of the Court's judgments.

Of particular concern is the fact that there has been no progress regarding serious violations of journalistic rights that occurred during the Euromaidan events. Furthermore, the unresolved July 2016 assassination of the renowned journalist Pavel Sheremet in a car bomb attack, and the widely reported problems with the police investigation in that case,<sup>4</sup> cast an ongoing shadow on government efforts to reduce the accountability deficit.

The above picture is also endorsed, at least to some extent, by the government's own numbers. According to statistics provided by the National Police, for the period 2012 to mid-2017, less than 10 percent of the total number of registered offenses against journalists have resulted in formal charges brought against perpetrators ("cases brought to court"). Around 55 percent of these cases were dropped or closed by investigators, more or less summarily; whereas 34 percent of the registered incidents remain under investigation, often with yet unidentified perpetrators.

Law enforcement authorities provide a range of justifications for these poor statistics: from a supposedly high number of unsubstantiated complaints, to high overall caseload and limited resources, lack of familiarity with the new Criminal Code provisions, and numerous personnel changes among both prosecutors and police investigators after the 2014 revolution.

Senior government officials also pointed to positive trends that arguably indicate a stronger government effort to tackle the impunity problem in the last two years. Thus, the number of total cases sent to court rose from 11 in 2015 to 32 in 2016 and 13 in the first semester of 2017. Around 750 police investigators have been trained on effective prosecution of offenses against journalists, and some degree of specialized expertise has developed in every region and district. Furthermore, these cases are reportedly treated with the same level of internal priority and high-level supervision as homicides and other serious crimes, until performance improves. Finally, the Presidential Administration set up a council on protection of journalistic activity and freedom of speech, whose membership includes law enforcement personnel and representatives of the media freedom community, in order to closely monitor the performance of these investigations.

Representatives of the Institute of Mass Information (IMI), who sit in the presidential Council mentioned above, agreed that there has been progress, both in the resources devoted to media-related cases and the investigation of specific incidents that they and other actors bring to the attention of the Council. IMI and government interlocutors also highlighted challenges related to the judiciary, pointing out, for example, that a significant number of criminal cases involving journalist victims end up in acquittals, which is highly atypical for Ukrainian criminal justice. The judiciary also finds itself in the middle of a comprehensive justice sector reform and important personnel changes, which complicates efforts such as proper training of judges on these issues.

There is, certainly, no shortage of challenges for the Ukrainian criminal justice system at this moment in time, and recent developments provide some encouragement that the government is

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<sup>4</sup> See, among other sources, Committee to Protect Journalists, "Justice Denied: Ukraine comes up empty in probe of Pavel Sheremet's murder" (July 2017); at <https://cpj.org/reports/2017/07/justice-denied-ukraine-pavel-sheremet-murder-probe-journalist-impunity-introduction.php>.

more serious about tackling crimes against journalists. However, it remains to be seen whether they will make a real difference on the ground, in terms of ensuring accountability, deterring future attacks and enhancing journalistic safety.

How the authorities handle serious or high-profile cases, especially involving government personnel as suspected perpetrators, will be very important. In a 2015 incident involving alleged assaults by the State Security Service of Ukraine (“SBU”) personnel against journalists of Radio Soboda (“Radio Liberty”), the investigation has been closed by military prosecutors, without charges, three times in a row, despite repeated court orders to re-open the investigation.<sup>5</sup> Such instances do little to generate public and journalistic confidence in official accountability, and the authorities must simply do better than that to improve perceptions, and the realities, of impunity in the country.

### III. KEY COUNCIL OF EUROPE STANDARDS

As noted, the key Council of Europe reference document in this area is the recent Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors,<sup>6</sup> which was the product of a long process of consultations and deliberations within the Council. The Recommendation is one of the most comprehensive standard-setting documents in this field, outlining a series of 29 guidelines to member states, followed by the elaboration of 38 underlying principles. As such, the Recommendation also incorporates the relevant jurisprudence of the European Court of Human Rights.<sup>7</sup>

A number of aspects that are particularly relevant to the Ukrainian situation can be highlighted.

Thus, as the title of the document makes clear, the entirety of the Recommendation applies equally to journalists and “other media actors”. The latter may not necessarily fit the traditional understanding or legal definition of a “professional journalist”, but they contribute to public debate and may even be considered to perform “journalistic activities” or other watchdog functions:

4. This alarming situation [of impunity] is not exclusively limited to professional journalists and other traditional media actors. As the European Court of Human Rights and many intergovernmental bodies have recognised, including the United Nations in its Plan of Action on the Safety of Journalists and the Issue of Impunity and the Human Rights Committee in its General Comment No. 34, the definition of media actors has expanded as a result of new forms of media in the digital age. It therefore includes *others who contribute to public debate and who perform journalistic activities or fulfil public watchdog functions*.<sup>8, 9</sup>

<sup>5</sup> See Detector, “The military prosecutor’s office again closed the case of SBU officers attacking journalists of the ‘Scheme’ program”, 6 July 2017 (in Ukrainian), at <http://detector.media/infospace/article/116583/2016-07-06-viiskova-prokuratura-znovu-zakrila-spravu-pro-napad-spivrobotnikiv-sbuna-zhurnalistiv-programi-skhemi/>

<sup>6</sup> Available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016806415d9](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9).

<sup>7</sup> For a separate factsheet on ECHR case law regarding impunity for attacks on journalists, see: <https://rm.coe.int/factsheet-on-impunityrev26june2017/168072bcad>.

<sup>8</sup> All emphasis is added where the text of the Recommendation is cited, here and elsewhere in this section.

<sup>9</sup> The Russian Federation was the only country to express reservations regarding the inclusion of the notion of “other media actors”.

Another important reference in this respect is the much-cited Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media. The latter recommends that Member States “adopt a new, broad notion of media which encompasses *all actors involved in the production and dissemination*, to potentially large numbers of people, *of content* (for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) ..., *while retaining editorial control or oversight of the contents.*”<sup>10</sup> Regulatory models of the new media should be graduated (in the degree of regulation) and differentiated (in the type of regulation), according to the role they play in content production and dissemination.<sup>11</sup>

Returning to Rec(2016)4, it includes the following general requirements on the effectiveness of investigations into crimes affecting journalists and other media actors:

8. Legislation criminalising violence against journalists should be backed up by law enforcement machinery and redress mechanisms for victims (and their families) that are effective in practice. Clear and adequate provision should be made for effective injunctive and precautionary *forms of interim protection for those who face threats of violence.*

18. Investigations into killings, attacks and ill-treatment must be effective and therefore respect the essential requirements of adequacy, thoroughness, impartiality and independence, promptness and public scrutiny.

20. For an investigation to be effective, the persons responsible for, and who are carrying out, the investigation must be independent and impartial, in law and in practice. Any person or institution implicated in any way with a case must be excluded from any role in investigating it. Moreover, investigations *should be carried out by specialised, designated units* of relevant State authorities in which officials have been given adequate training in international human rights norms and safeguards. ... In all cases *the victim’s next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.*

23. Member States must ensure that effective and appropriate remedies are available to victims and, as relevant, to their families, including *legal remedies, financial compensation, medical and psychological treatment, relocation and shelter.* Remedies should take due account of cultural, ethnic, religious gender-related and other aspects. An ongoing or pending criminal prosecution should not preclude victims from seeking civil remedies.

With respect to the question of journalists’ credentials, especially in the context of demonstrations and other mass events, the Recommendation includes the following:

<sup>10</sup> Item 7; available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cc2c0](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0). Emphasis added.

<sup>11</sup> Ibid.

14. ... Press or union cards, relevant accreditation and journalistic insignia should be accepted by State authorities as journalistic credentials, and *where it is not possible for journalists or other media actors to produce professional documentation, every possible effort should be made by State authorities to ascertain their status.*

Finally, in reference to crisis situations and the overall chilling effects of entrenched impunity, the Recommendation notes:

27. The effectiveness of a system of protection may be influenced by contextual factors, such as in crisis or conflict situations, where there are heightened risks for the safety and independence of journalists and other media actors, and where State authorities may experience *difficulties in exerting de facto control over the territory. 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.

28. Ensuring the safety and security of journalists and other media actors is a precondition for ensuring their ability to participate effectively in public debate. The persistence of intimidation, threats and violence against journalists and other media actors, coupled with the failure to bring to justice the perpetrators of such offences, *engender fear and have a chilling effect on freedom of expression and on public debate.* States are under a positive obligation to protect journalists and other media actors against intimidation, threats and violence irrespective of their source, whether governmental, judicial, religious, economic or criminal.

## IV. SPECIFIC COMMENTS ON THE RELEVANT CRIMINAL CODE PROVISIONS

As a general comment, some of the following provisions are quite detailed and comprehensive, in a way that is not typical for most European countries. This additional (or special) protection through criminal legislation is, of course, positive for the preservation of media freedom and general openness at this delicate moment for Ukrainian democracy, and must be welcomed. However, it may be advisable to consider whether certain specific elements of these provisions properly belong in criminal legislation, and what their implications might be for the effectiveness of investigations into more serious offenses against the media, given finite law enforcement resources.

### A. Article 171. Obstructing lawful professional activities of a journalist<sup>12</sup>

#### ▪ Section 1

This section criminalizes various forms of interference with professional journalistic activities that are deemed to be “lawful.”

<sup>12</sup> See Annex for the full English text of the Criminal Code provisions reviewed in this analysis.

*“Illegal seizure of journalistic materials”*

This provision is useful in relation to seizure of “materials and technical means” by both government officials and private individuals with an interest in suppressing certain media coverage. However, its proper application will depend on whether the seizure is illegal and, by implication, on the extent to which Ukrainian legislation allows for legal seizure of journalistic materials, in line (or not) with the Article 10 jurisprudence of the ECHR. The latter includes strong substantive and procedural protections designed to safeguard confidential journalistic sources and the integrity of media operations generally.<sup>13</sup>

A proper review of the compatibility of Ukrainian legislation with the ECHR in these respects would be advisable. One of the most topical issues, in this context, is the ability of media professionals to record the public activities and conduct of law enforcement personnel, e.g. during public protests or crowd control operations, without being subjected to seizure of such recordings or publication bans, absent compelling considerations to the contrary. In the absence of clear rules on permissible seizure of journalistic material, in exceptional and well-defined circumstances, it is unlikely that this part of Article 171 can be effectively enforced where seizures by government officials are involved.

*“Illegal refusal to provide access to information”*

A provision of this nature is highly unusual in European comparative practice. First, it is not clear whether it only applies to government officials who are subject to freedom of information laws, or other persons as well. Secondly, it does not seem to require an element of bad faith on the part of person refusing access to information, which could end up penalizing even good faith (if erroneous) applications or interpretations of the legislation on access to public information. Thirdly, it is unclear whether the offense ought to be carried out with an intent to hinder journalistic activities.

Such an approach is generally considered detrimental to the proper application of access to information laws, and it appears that it has already created perverse incentives for Ukrainian officials in practice (e.g. to provide misleading answers without a proper denial). For such reasons, European legal practice usually reserves criminal sanctions only for particularly serious violations of access to information laws, such as the deliberate destruction of state-held information or other serious, deliberate acts aimed at obstructing the right of the public to access governmental information.

Finally, it is not clear how a private person can be held liable for “illegally” refusing to provide information to a journalist; and in which circumstances, if any, does Ukrainian legislation create such a legally enforceable duty for private citizens, and what the implications would be for personal data protection. These issues can perhaps be elaborated in the police and GPO guidance notes on these articles.

*“Illegal prohibition of covering certain topics, portrayal of certain persons, criticizing government authorities”*

This kind of prohibition is the textbook definition of government censorship, and it is valuable, in principle, to make such conduct criminal. It is not entirely clear, however, whether the provision refers to formal prohibitions (such as e.g. a written order by a military officer) or even informal pressure to the same effect. At the same time, it is hard to imagine under what circumstances such

<sup>13</sup> See, inter alia, the leading case of *Sanoma Uitgevers BV v. The Netherlands*, Judgment of 14 Sept. 2010 (ECHR, Grand Chamber).

a prohibition would not be illegal, other than in the case of a judicial injunction issued pursuant to a clear legal basis (such as defamation law). In practice, in our view, situations of this nature are likely to be more amenable to prosecution under Article 345-1, section 1, which sanctions “threats ...made against a journalist” for reasons related to his professional activities.

A more complex, and potentially problematic question, arises in respect to what happens inside a media outlet: is an editor or owner of the outlet committing an offense under this article by restricting his/her reporters from covering certain topics? In most respects, it is the prerogative of a chief editor to decide matters of coverage, even without engaging in self-censorship. Conversely, as a matter of good policy – and in some countries, even as a matter of law – editorial autonomy should be properly insulated from the whims of a media outlet’s owners. However, this is not typically a matter that can be regulated through the sharp-edged tools of criminal law. In our view, the provision should not be applied to purely media-internal situations.

*“Any other intentional impediment to performing lawful professional activities of a journalist”*

This provision is rather open-ended, but the requirement of an intent to obstruct journalistic activity does limit its scope. In fact, it appears that such an intent ought to be a material element of all the other offenses foreseen in Article 171.<sup>14</sup> It is hard to imagine that such conduct should be criminalized in the absence of an intent to interfere with journalism, and Ukrainian court practice also seems to point in that direction.<sup>15</sup> Even though, in practice, it may sometimes be a challenge for prosecutors to prove such an intent, it is difficult to arrive to a different conclusion as to the need to prove intent to obstruct. There are, however, good practices that journalists themselves can follow, whenever possible, to help document the perpetrators’ intent to interfere with their editorial activities (see below).

At the same time, one concern needs to be highlighted here with reference to the GPO Guidance, which seems to place strong emphasis on the fact whether the journalist victim identified him/herself to the perpetrators.<sup>16</sup> This is problematic as prosecutors and investigators need to appreciate that sometimes it may not be safe, possible or desirable for media professionals to identify themselves in the course of a journalistic investigation. The GPO Guidance should be sensitive to the realities of journalism in the Ukrainian context and avoid making any sweeping generalizations that might undermine otherwise legitimate investigations.

## ▪ Section 2

*“Any form of influence aimed at obstructing the performance of journalistic duties”*

This provision is also quite broadly formulated, as different actors try to “influence” journalists’ views in all sorts of ways that are normally not considered criminal or unlawful. However, it can be assumed that the provision will be interpreted to outlaw forms of influence that are typically unlawful – e.g. when applicable to public officials – such as bribes or similar enticements. In addition, this offense can cover forms of threat or intimidation that are not covered by (i.e. not as serious as) the threats provided for in Article 345-1: these could include e.g. threats to cause a journalist, or her family members, to be fired by their employer, or to bring about any other adverse consequence.

<sup>14</sup> The GPO Guidance appears to be in agreement on this point; at p. 9 (unofficial English version, on file with author).

<sup>15</sup> See e.g. Judgment of the High Specialized Court of Ukraine for Civil and Criminal Cases, 1 Oct. 2015, Criminal proceeding no. 12013100040001895 [names of parties redacted], as reproduced in an annex to the GPO Guidance.

<sup>16</sup> At p. 9 (English version).

However, other situations would be more subtle or borderline: e.g. would a promise to invite the journalist to follow a presidential trip abroad, at government expense, in exchange for favorable coverage be an offense under this provision? Does that amount to “obstruction” of journalism? It is hoped that judicial practice will help clarify these and related questions.

*“Persecution of journalists for work-related reasons”*

“Persecution” does not appear to be defined by the Criminal Code or national court practice generally. In any event, it is likely to overlap significantly with other forms of interference provided for in Article 171, provided they are committed against the same person repeatedly and with the single-mindedness that is typical of persecution offenses in other jurisdictions, as an aggravated form of harassment.

*Cross-cutting question: what constitutes “lawful professional activity”?*

A common element of all the offenses envisaged in this Article is that they ought to undermine the “lawful” professional activities of a journalist. That suggests, understandably, that unlawful activities of a journalist are not protected by the provision.

That distinction, however, may not be so straightforward in practice. The GPO Guidance notes that, in this respect, “it is necessary to balance the rights and duties of the journalist, the rights and legitimate interests of other persons, as well as the public interest” in the publication of information at stake.<sup>17</sup> The GPO Guidance continues with a detailed discussion of the rights and duties of journalists under Ukrainian law.<sup>18</sup>

However, it appears that such a balancing act would be more appropriate for civil law disputes, and that a more “bright line” approach may be necessary in the application of a criminal law provision of this nature, in the interest of legal certainty. One solution would be to adopt a presumption that journalistic activities are to be treated as lawful for the purposes of this provision, unless they are manifestly illegal to a reasonable person.

The GPO Guidance provides a few examples of journalistic actions that would be illegal, such as trespassing on private property or making secret recordings that infringe upon personal privacy rights, pursuant to a referenced judgment of the Constitutional Court of Ukraine.<sup>19</sup> However – and with all due respect to the latter judgment – such a strict position with respect to secret recordings undertaken by the media may clash with the jurisprudence of the ECHR, which has recognized the right of the media under Art. 10 to use secret recordings, including of private individuals in private settings, under certain circumstances.<sup>20</sup> This is to illustrate the point that European human right law should be taken into account in assessing the prima facie lawfulness of journalistic actions.

Finally, there is a rather disturbing reference in the GPO Guidance, inviting investigators to assess whether the journalist may have provoked the alleged perpetrators.<sup>21</sup> While this may be legitimate as a matter of clarifying all the facts that may have a bearing on the liabilities of all parties, the suggestion that any alleged “provocations” by the journalist would either make her conduct automatically illegal or excuse the criminal conduct of other persons involved in the incident is clearly inappropriate.

<sup>17</sup> At p. 7 (English version).

<sup>18</sup> Some of these are problematic under international law, such as the duty to identify themselves under all circumstances, which would effectively outlaw all undercover investigations.

<sup>19</sup> Dated 20 Dec. 2012, No. 2-pn/2012.

<sup>20</sup> See, inter alia, *Haldimann and Others v. Switzerland*, Judgment of 24 Feb. 2015 (ECHR).

<sup>21</sup> At p. 11 (English version).

## B. Article 345-1. Threats or violence against journalists

The first section of this article criminalizes “threats of murder, violence, and destruction or damage to property” made against journalists, or their family members, in connection with their professional activities. As already noted, threats of a different or less serious nature could still be prosecuted under section 2 of Article 171.

One question that seems to have arisen in practice is whether the threats should be considered “credible” in order to constitute an offense under this provision. According to media representatives, prosecutors have at times declined to investigate such cases because threats were deemed “not credible or serious.” Such an interpretation would appear to be at odds with a straightforward reading of the text of section 1, and would also undermine the legislative intent and deterrent effect of the provision. The deciding factor should be whether the threat was, and could be reasonably, perceived by the victim as a genuine one. We understand that the High Specialized Court of Ukraine on Civil and Criminal Cases has reached a similar conclusion in its unification of court practice.<sup>22</sup>

The second and third sections of this article, which criminalize the infliction of bodily injuries of various levels of gravity, are generally clear and do not appear to raise any major issues of interpretation.

### ▪ The all-important note to Art. 345-1: who is a journalist?

The note to this article includes an important clarification regarding the definition of journalism, for the purposes of not only Article 345-1, but also the other Criminal Code provisions discussed here (i.e. Art. 171, Art. 347-1 and Art. 348-1). The note defines professional journalistic activity as “a person’s systematic activity” for the collection and dissemination of information “among an indefinite range of persons through print media, television and radio organizations, information agencies, or the Internet.”

**“Systematic activity.”** Some interlocutors from the media community criticized the requirement of “systematic activity”, noting that it would exclude occasional (i.e. not regular) contributors to journalism. This is true, and Council of Europe guidelines recommend that “other media actors” be granted the same or similar protections to those enjoyed by traditional journalists.<sup>23</sup> There is therefore a risk that “systematic activity” may be understood exclusively as “traditional journalism,” leaving outside its scope all or most forms of “new media.”

At the same time, in the interest of ensuring a degree of legal certainty in the application of criminal law, it does not seem unreasonable to require that the persons protected by these provisions exercise journalism with some degree of regularity. That said, it is very important that the term “systematic” be applied with a level of flexibility, in a way that does not exclude e.g. freelancers,

<sup>22</sup> See, with respect to the crime of “threat of murder” (Art. 129 CC), High Specialized Court of Ukraine on Civil and Criminal Cases, “Generalization of judicial practice: On case law of criminal proceedings related to crimes against the life and health of a person in 2014”, 3 June 2016.

<sup>23</sup> Also, the criterion of regular renewal of content should not be applied too strictly in determining what constitutes media. See para. 28 of the Annex to 2011(7): “The periodic or regular renewal or updating of content should also be given due consideration. This indicator of media has to be applied with precaution given the importance of constant or occasional renewal. Moreover, in a new communications environment where users exercise considerable control over the shaping and the timing of access to content, updating or renewal may well relate more closely to user experience than to timing or to the content itself.”

bloggers or other contributors who clearly engage in regular journalism or content dissemination, but without being full-time employees of a media outlet. Otherwise, it may become desirable to replace “systematic activity” with “regular activity” or another, less stringent formulation.

In the absence of clear case law, the GPO Guidance could usefully elaborate on what the threshold of “regular contribution” should be for these purposes. Relevant factors in this respect may include the activity of the person/outlet over a period of time or their commitment to covering any particular set of topics or periodic events (such as elections).<sup>24</sup>

**Through media outlets or the Internet.** The listing of the traditional kinds of outlets through which journalism is exercised is also limiting, considering the ongoing evolution of various forms of “new media” and the potential for future technological developments. The reference to Internet-based media is also less than precise as there is huge variation among the different kinds of platforms engaging in some form of content dissemination through the Internet and other new technologies (mobile, applications etc). However, understood as a shorthand, this should be sufficient to bring under the special protection of the Criminal Code journalists and other media actors working for various types of online-only media.

A greater complication is brought about by the fact that Ukrainian mass media legislation does not recognize Internet-based media as such; in fact, many online outlets are formally registered as news agencies or some other traditional classification. According to our interlocutors, this has led some investigators to refuse to recognize the status of journalists working for online-only media, which clearly goes against the wording and legislative intent behind the Note to Article 345-1. It is therefore important that the national media legislation is amended to properly recognize Internet-based media and avoid, inter alia, conflicting interpretations in the prosecution of criminal offenses against all journalists.

**Other media professionals.** Another set of concerns has been expressed regarding the exclusion in practice of other media professionals, such as producers, photographers, operators, cameramen and so on. Such practices seem hard to reconcile with the plain text of the note to Article 345-1, which includes activities related to “collection, receipt, creation, dissemination, storage or other use of information.” In our view, any confusion arising from the classification of journalism in other legislative acts should defer to the plain legislative intent expressed in the relevant provisions of the Criminal Code.

**Obligation to provide an identity document.** Perhaps the single most controversial issue in the application of these provisions appears to be the Note’s requirement, or guidance, that “the status of journalist or his/her affiliation with a mass media outlet shall be confirmed by an editorial or official identity card or other document issued by the mass media, its editorial office, or a professional or creative union of journalists.”

<sup>24</sup> It is understandable, to some extent, why law enforcement officials prefer to avoid these questions of interpretation in borderline cases, relying instead on the possession (or not) of a journalistic ID by the alleged victim. However, from a systematic perspective, the simple possession of an ID is no greater guarantee that the person is indeed someone who regularly engages in journalistic work.

Media representatives complained that the requirement creates obstacles for non-affiliated journalists, whereas law enforcement representatives argued equally forcefully that it was important for police investigators to be able to rely on the production of some form of recognized ID card by the alleged victim. According to one government source, about 20 percent of criminal complaints under these articles are filed by persons working for online media, and 10 percent by persons who claim to be journalists but cannot prove their affiliation to any kind of media outlet.

As a general comment, it is unusual for a Criminal Code provision to delve into questions of how various elements of the offense should be proved. Of greatest concern, however, is the fact that the GPO Guidance appears to take a strict position that, for the purposes of these provisions, “journalists are persons who have valid editorial or official identity cards” or equivalent documents. This is an excessively formalistic approach that may defeat, to some extent, the very purpose of the legislative protections it is meant to apply. The journalistic status of the alleged victim of the offense is simply a question of fact that (whenever in doubt) ought to be proven in a criminal investigation like all other allegations of fact. Provision of an official ID could be one common way of proving the status, but not an absolute requirement.

Otherwise, Ukrainian journalists run the risk that what the legislator gives with one hand, it takes away with a strict evidentiary requirement. This would, for all practical purposes, go against the Council of Europe’s recommendation that Member States ensure protections for all media actors, including through the operation of criminal law, and that they “adopt a new, broad notion of media which encompasses all actors involved in the production and dissemination, to potentially large numbers of people, of content,” with some editorial control.<sup>25</sup>

Finally, the position of the GPO guidance on this question is in contradiction with the position of the National Police guidance, which appears to adopt the interpretation that lack of a journalistic ID is not an impediment to the application of the relevant Criminal Code provisions. Obviously, this inconsistency is likely to create significant tension between police and prosecutors in the investigative process.

**Alternative approaches.** Some countries, including Georgia (which is discussed below), have chosen a different approach, namely one that criminalizes grave interferences with freedom of expression generally, in addition to any legal provisions granting special protections to journalists. Such a solution would solve several of the difficult questions of interpretation that arise in the Ukrainian context in borderline cases, such as who is a journalist, what constitutes Internet media or “systematic journalism”, or whether possession of some form of official ID is necessary.

As such, Ukrainian lawmakers may wish to consider the Georgian approach as an alternative to current regulation, especially if they conclude that challenges of interpretation have become a major practical impediment to accountability. However, it is not a solution without its own problems. First and foremost, it introduces a significant amount of vagueness in the application of criminal law,

<sup>25</sup> Recommendation CM/Rec(2011)7, note 9 *supra*. See also Annex to the Recommendation, para. 71: “The [duty to protect all media professionals] may extend, in certain cases, to providing protection or some form of support (for example guidance or training so that they do not put their own lives at risk) to actors who, while meeting certain of the criteria and indicators set out in Part I of this appendix, may not fully qualify as media (for example individual bloggers). A graduated response should take account of the extent to which such actors can be considered part of the media ecosystem and contributors to the functions and role of media in a democratic society.”

which in some instances may end up hurting free speech interests with boomerang effects (e.g. peaceful counter-demonstrators may be charged with criminally interfering with the free speech rights of others). In addition, it might “over-criminalize” freedom of expression law and extend its reach into situations that can be resolved more appropriately through the application of civil or constitutional law. Finally, it could stretch law enforcement resources as a result of its broader scope of application. It is, perhaps, for these and related reasons that it is not an approach commonly found in established democracies.

### **C. Articles 347-1 (damage to property), 348-1 (murder) and 349-1 (kidnapping)**

These three provisions are relatively clear and do not appear to raise any major interpretative questions, with one exception: Article 349-1 defines the offense as the kidnapping of a journalist or their family members “for the purpose of making such journalists carry out or refrain from any actions” as a condition for release of the hostage. As such – and unlike in any of the other provisions discussed here – the motive for the kidnapping does not have to be related to the journalist’s professional activity.

## **V. OTHER LEGAL AND PRACTICAL QUESTIONS**

This section addresses a number of legal and practical questions that, while not directly linked to the analysis of the Criminal Code provisions indicated by the Parliamentary Committee, appear to undermine the effective enforcement of those provisions and, ultimately, the safety of Ukrainian media professionals.

### **Access to legal aid for journalist victims**

According to journalist organizations, journalist victims of assaults and other crimes often face criminal investigations and trial proceedings that last for many months or even years. While it is crucial for them to have adequate legal advice and representation throughout these proceedings, the journalists and their media outlets often do not have the resources to privately retain lawyers for long periods of time.

As a result, access to adequate, state-provided legal aid must be ensured. Representatives of journalists’ unions and other media rights groups, especially those with legal capacities, should begin a dialogue with the Coordination Centre for Free Legal Aid Provision with a view to establishing a specialized legal aid mechanism for journalists who have the status of victims in ongoing criminal proceedings. Such legal aid should be available from the earliest, crucial stages of a criminal investigation, through trials and any possible appeals (at least in the most serious or legally significant cases).

Media rights groups and their donors should also consider developing some capacity for “strategic litigation” of these cases, understood as the ability to intervene, in a focused fashion, in a subset of cases involving attacks against journalists that are of special legal or policy significance.

Such cases might involve clarification of a new area of law, raising the level of legal protection granted to victims, the need to ensure unification of judicial practice or some other strategic aspect. Setting in motion such a strategic intervention capacity requires regular monitoring of relevant proceedings, close collaboration with the journalistic community and specialized legal expertise, among others.

### **The victim's procedural rights in criminal investigations and trials**

Attorneys specializing in defense of media cases also raised concerns that victims enjoy limited procedural rights and/or practical obstacles in exercising their rights in the course of criminal proceedings, especially at the pre-trial stage. They complained e.g. that access to crucial information about evidence and other file materials is often restricted, at the sole discretion of the case prosecutor.

This is, of course, a general question of criminal procedure that goes beyond the rights of journalist victims. It was also suggested that the legal framework concerning victims' rights in criminal proceedings is currently undergoing review and possible overhauling. While this is not the place to conduct a thorough analysis of the issue, media freedom groups should at least seek to collect information about the violations of the journalist victims' procedural rights in order to inform any future policy discussions about reform of this area.

### **Educating journalists on criminal investigations and their role therein**

Journalists themselves should also receive basic training about what to expect in the criminal investigation of crimes in which they are victims. Law enforcement officials noted that sometimes journalists fail to provide ongoing cooperation, beyond the initial reporting of an assault, or fail to appreciate the needs of a criminal investigation.

Trainings for journalists could usefully cover some of the following aspects:

- the overall importance of reporting crimes against journalists, cooperating with investigations and developing jurisprudence that protects their rights in the long term;
- basic information about the stages of a criminal investigation and what is to be expected at each stage;
- basic information about the offenses against journalists discussed in this paper, their elements and the evidentiary requirements of each offense (e.g. the need to prove a perpetrator's intent to interfere with lawful journalistic activities);
- practical information as to things journalists can do when faced with (likely) criminal conduct in order to facilitate future prosecution of such offenses, without compromising their security. These could include steps to identify themselves in advance, whenever appropriate or safe; record the presence and identities of perpetrators and witnesses, and their conduct; measures to secure and preserve evidence etc.
- basic information on the rules of evidence, including rules that apply to collection and preservation of different kinds of evidence (photographs, audio/video recordings etc).

Such capacity-raising activities would usefully supplement the trainings of law enforcement personnel on the new offenses against journalists that have been carried out. Indeed, it would be useful to involve specialized investigators and prosecutors in trainings of journalists.

## VI. SOME COMPARATIVE MODELS

While Ukrainian criminal legislation on offenses against journalists is quite comprehensive, compared to the European average, there are a number of other countries with similar provisions, whose experience might be useful to consider in this context. Georgia and Serbia have been selected as two representative models of the approaches followed in their respective regions, which represent both similarities and differences compared to the Ukrainian legal regime.

### Georgia

Georgia's Penal Code includes the following provisions related to criminal encroachment upon freedom of speech and unlawful interference with a journalist's professional activities, introduced in 2006:<sup>26</sup>

#### *Article 153 - Encroachment upon freedom of speech*

Illegal interference with the exercise of the freedom of speech or of the right to obtain or disseminate information, which has resulted in considerable damage, or performed by abusing one's official position, -  
shall be punished by a fine or corrective labor for up to a year, or with imprisonment for up to two years, with or without deprivation of the right to hold an official position or to carry out a particular activity for up to three years.

#### *Article 154 - Unlawful interference with a journalist's professional activities*

1. Unlawful interference with a journalist's professional activities, i.e. coercing a journalist into disseminating or not disseminating information, -  
shall be punished by a fine or community service from 120 to 140 days or with corrective labour for up to two years.
2. The same act committed using threat of violence or official position, -  
shall be punished by a fine or imprisonment for up to two years, with or without deprivation of the right to hold an official position, or to carry out a particular activity for up to three years.

<sup>26</sup> English version available at the website of Georgia's Legislative Herald: <https://matsne.gov.ge/en/document/download/16426/157/en/pdf>.

A number of remarks can be made regarding the relevant Georgian law and practice. First, the definition of an “interference” under Article 154 – as “coercing a journalist into disseminating or not disseminating information” – is potentially quite broad and capable of covering a wide range of acts aimed at impeding the ability of a journalist to do her job. However, it appears that, in practice, Georgian authorities have adopted a narrow interpretation of this offense, and they often use other articles of the Criminal Code to prosecute offenses committed against journalists that are clearly related to their practice of journalism – such as threats, beatings or abuse of office by government officials.

At the same time, the provision does have its textual limitations. For example, taken literally, it concerns only the dissemination (or not) of information, leaving outside its scope other activities that are crucial to the practice of journalism, such as collection and processing of information or raw data.

Furthermore - and partly for reasons related to the above factors - there are no reliable statistics regarding the totality of offenses committed against journalists, or the status of these investigations. The Georgian Public Defender (Ombudsperson) has repeatedly called on law enforcement authorities to collect such statistics systematically, apparently to little avail.<sup>27</sup> This data gap makes it hard to assess the effectiveness of investigations into cases involving journalist victims.

Anecdotal evidence suggests that there are problems with such investigations: e.g. one case of threats and verbal abuse that occurred in 2012 was still under investigation by the end of 2014.<sup>28</sup> In other cases, they seem rather effective: e.g. the investigation of a 2015 assault on a photojournalist covering a political party demonstration was successfully prosecuted (under Article 154, sec. 2), leading to a one-year prison term for the perpetrator.<sup>29</sup>

In general, the Georgian experience would argue in favor of maintaining, for the most part, the detailed, separate offenses in Ukrainian legislation, covering different forms of interference with journalistic activities. At a practical level, this is also likely to facilitate the production of detailed statistics and make it easier to track the effectiveness of investigations.

## Serbia

Serbia can be brought as an example of yet another approach, common in Southeast Europe,<sup>30</sup> in protecting the safety of journalists through criminal legislation. The Criminal Code of Serbia was amended in 2009 to introduce “endangering the safety” of a media professional or their next of kin – essentially, making threats of serious assault in relation to their professional activities or “tasks” -- as a crime punishable by imprisonment for up to five years:

<sup>27</sup> See Public Defender of Georgia, Parliamentary Report on the Situation on Human Rights and Freedoms in Georgia: 2015, p. 413, at <http://www.ombudsman.ge/uploads/other/3/3892.pdf>. “It was noted in the 2014 Parliamentary Report of the Public Defender of Georgia that the investigation authorities, in the special statistical data of the registered crimes of interference in the professional work of the journalists, should reflect not only the crimes of interfering in the professional work of the journalists, but also all the illegal acts committed against the journalists that are related to their professional activities. The Ministry of Internal Affairs has informed us that the statistical data is still not processed according to the professional activities of the victim. The Public Defender of Georgia underlines once more that the systematization of the statistical data will make it possible to receive full information on all crimes committed against the journalists due to their professional work and to assess the effectiveness of protecting the freedom of media environment through the criminal proceedings.”

<sup>28</sup> Public Defender of Georgia, Parliamentary Report on the Situation on Human Rights and Freedoms in Georgia: 2014, p. 293, note 664 and accompanying text; at <http://www.ombudsman.ge/uploads/other/3/3510.pdf>.

<sup>29</sup> 2015 report, note 26 supra, p. 417 (case of Irakli Gedenidze).

<sup>30</sup> Croatia and Montenegro have similar provisions.

*Article 138: Endangerment of Safety*

(1) Whoever endangers the safety of another by threat of attack against the life or body of such person or a person close to him/her, shall be punished with fine or imprisonment up to one year. ...

(3) Whoever commits the offence specified in paragraph 1 of this Article against the president of the Republic, member of parliament, prime minister, members of the government, judge of the Constitutional Court, judge, public prosecutor and deputy public prosecutor, attorney-at-law, police officer and person engaged in a profession of public importance in the field of information regarding the task he/she is performing, shall be punished with imprisonment of six months up to five years.<sup>31</sup>

The legislative technique used is indirect, as the above provision must be read in conjunction with Article 112, item 32, of the Criminal Code, which defines “work in the public interest [as] practicing a profession or performing a duty which entails an increased safety risk for the person involved and it refers to occupations that are relevant to public information...”, among other fields.

In addition, the Criminal Code includes provisions that treat certain crimes against journalists as aggravated offenses. Thus, the murder of “a person who performs work in the public interest in connection with performance of their duties” – including media professionals, per the above definition – is treated as aggravated murder, punishable by up to 40 years in prison.<sup>32</sup> Similarly, serious bodily harm against the same category of persons is subject to higher sanctions.<sup>33</sup>

It is, no doubt, a positive aspect of the Serbian legislative approach that it recognizes the important social functions of journalism, and the special risks to which it is exposed, and protects the profession on the same par with the head of state and other senior state functions (as in Article 138.3 above). In addition, the definition of the protected category is broader than in Ukrainian law, as it covers all “occupations that are relevant to public information.” At the same time, the vagueness of the definition is somewhat problematic from the perspective of ensuring legal certainty in the application of criminal law. Finally, since the above provisions concern only threats, murder and serious bodily harm committed against journalists, the catalogue of special offenses is significantly more limited than in the Ukrainian case, at the exclusion of less grave – but still significant -- interferences with journalistic activities.

These textual limitations, however, have not prevented the Serbian authorities from successfully prosecuting attacks against journalists. Thus, Article 138.3 was applied for the first time in 2010, when three persons were convicted for threatening Brankica Stanković, a journalist with television station B92. The perpetrators were members of a nationalist sports club, which Stankovic had exposed in a documentary for its involvement with drug trafficking and murder. The authors of the threats were sentenced to prison terms of three to 16 months, and the journalist was placed under prolonged police protection due to ongoing concerns about her safety.<sup>34</sup>

<sup>31</sup> English translation provided by the OSCE Mission to Serbia and Montenegro, at <http://www.legislationline.org/documents/section/criminal-codes> (under Serbia).

<sup>32</sup> Article 114, sec. 8.

<sup>33</sup> Article 121, sec. 6.

<sup>34</sup> Committee to Protect Journalists, Attacks on the Press 2010: Serbia, at <https://cpj.org/2011/02/attacks-on-the-press-2010-serbia.php>.

## VII. CONCLUSIONS

The provisions of the Ukrainian Criminal Code discussed in this paper are generally adequate and provide a strong legislative basis for ensuring accountability for attacks against media professionals. In other words, assuming there is sufficient political will, resources and organization dedicated to the investigation of these crimes, the legislative text would provide few excuses for the lack of desired results in the fight against impunity.

That said, there are a number of aspects of the legislation that can be improved, and we have made recommendations to this effect in the following section. However, as a note of caution, these recommendations are offered in the awareness that the relevant Criminal Code provisions are themselves quite new, and have not had the benefit of sufficient time to either reshape investigative practices or even to fully display their own shortcomings. In particular, the amount of case law under the new provisions is very limited, which means that we are missing the extremely helpful input of the judiciary on various interpretative questions. More generally, overly frequent legislative changes to the same area of law tend to confuse those who are charged with enforcing the law and other stakeholders.

It is therefore for the Parliamentary Committee, and ultimately the full legislature, to decide whether the benefits of the improvements we recommend -- with the few exceptions, below, that concern clearly problematic clauses -- would outweigh the costs of an immediate legislative intervention. It is possible that many of these issues can be resolved through changes to the guidance documents elaborated by the GPO and the National Police, and further trainings for the relevant personnel. In any event, it is hoped that our findings and recommendations will be useful to the Parliamentary Committee in the longer term, with a view to making any further improvements at whatever time they consider appropriate. Such interventions may become necessary if courts begin to interpret any ambiguous aspects of these provisions in problematic ways, which may warrant corrective legislative measures.

Our main conclusions on the legislative provisions can be summarized as follows:

- Some aspects of Article 171 can be better formulated and others should be decriminalized and/or treated as administrative offenses. The latter is especially true for the offense of “illegal denial of access to information” as it is likely to distort and/or cause harm to the operation of the freedom of information laws.
- The definition of “professional activities of a journalist” can be broadened and improved, in line with Council of Europe standards and the examples of other countries (e.g. Serbia). The requirement of providing a journalistic ID should ideally be removed from the text of the note to Article 345-1, or clarified in GPO and Police guidance notes as a non-absolute condition.

On practical issues:

- Access to legal aid schemes and legal remedies for journalist victims should be strengthened.
- Efforts to train and specialize investigators and prosecutors on these offenses should continue. The national police and GPO should also be urged to undertake their own internal reviews of the reasons for the accountability deficit, with participation and input from other key stakeholders, including media representatives. If such measures fail to produce improvements within a

reasonable time, the authorities should consider setting up dedicated investigative units, national-level supervision and other measures aimed at stepping up investigations. The experience of Latin American countries, like Mexico or Colombia, may be relevant in this respect.

- Adequate prevention mechanisms should be put in place to deal with particularly serious threats to the life and limb of journalists.

## VIII. RECOMMENDATIONS

### On amendments to the Criminal Code and other primary legislation:

1. Consider revising the definition of journalism in the Note to Art. 345-1 CC with a view to broadening it, including by adding explicit references to “new media” and/or “other media persons”, within the meaning of that term in Council of Europe Recommendation CM/Rec(2016)4.
2. At the earliest opportunity, remove references to the requirement to present a journalistic ID from the Note to Art. 345-1 CC, or otherwise ensure its flexible interpretation in practice.
3. At the earliest opportunity, decriminalize the offense of “illegal denial of access to information” in Art. 171 CC and consider replacing it with a properly crafted set of administrative offenses that sanction deliberate or other serious violations of the right of access to state-held information.
4. Amend the general laws on media and/or public information to recognize various forms of Internet-based media as such, but without imposing excessive registration or other requirements.
5. Review the legislative framework on free legal aid and the procedural rights of victims with a view to ensuring adequate access to legal aid and other procedural safeguards and legal remedies for journalist victims of crime.
6. Review the legislative framework on investigation of crimes suspected to be committed by law enforcement personnel in order to ensure the integrity and impartiality of such investigations.

### On revisions to the GPO Guidance:

7. Consider adopting a more systematic structure for the guidance notes, by including commentary and sub-sections on the various crime figures and other elements of each relevant provision of the Criminal Code.
8. In particular, further elaborate on the various offenses foreseen in Art. 171 CC, including illegal seizure of material, intentional impediment, and other obstructive influences.

9. Adopt the broadest possible interpretation (under existing law) of the definition of journalistic activities, consistent with Council of Europe recommendations. In particular, avoid any automatic exclusion of online journalism or “new media”.
10. Remove any categorical references to the requirement to produce a journalistic ID or proof of formal state registration of a media outlet, and ensure that offenses against journalists are properly registered and investigated even in the absence of an official ID (assuming that the status of journalist is otherwise confirmed).
11. Interpret the notion of “lawful professional activity” of journalists in line with the relevant jurisprudence of the ECHR; and revise references to “provocations” committed by journalist victims of crimes.
12. Elaborate on the question of “credible threats” under Art. 345-1 CC, in line with the jurisprudence of the top national courts and European standards.
13. In general, harmonize the GPO Guidance with the methodological recommendations of the National Police (National Police Guidance) on the same set of Criminal Code provisions.

### **On revisions to the National Police Guidance:**

14. Include a more explicit statement that non-possession of a journalistic ID by the victim is not an impediment to investigations.
15. Elaborate on the interpretation of the “systematic activity” requirement for the purposes of determining whether a crime against journalistic activity has taken place; such interpretation should clearly cover “new media” professionals and part-time journalism.
16. Include a more extensive discussion of the need to prove intent to interfere with journalistic activities and related practical aspects.

### **To law enforcement and prosecutorial authorities:**

17. Devote adequate resources to the effective investigation and prosecution of crimes against journalists, prioritizing the most serious of such offenses, in line with Council of Europe standards, ECHR case law, and the execution proceedings before the Committee of Ministers of the Council of Europe. Continue providing training and specialization to key personnel charged with these investigations.
18. Undertake systematic internal inquiries into the causes of poor performance in the investigation of such crimes, with the involvement of media representatives and other stakeholders.

19. Take particular care to ensure public confidence in the integrity of investigations into incidents in which government officials or law enforcement personnel are suspects.
20. If the performance of investigations fails to improve within a reasonable time, consider setting up specialized units and direct central supervision of all investigations concerning serious offenses against journalists.
21. Strengthen the prevention mechanisms, including by offering physical (close) protection to journalists at serious risk of being targeted by violent groups or individuals.

### **To the media community and media freedom groups:**

22. Collect systematic data on the status and progress of criminal investigations into offenses against media professionals, and publish the findings periodically.
23. Advocate for the establishment of more robust protection and prevention mechanisms for media professionals at serious risk of targeted violence.
24. Consult with the Coordination Center for Provision of Free Legal Aid and other stakeholders to find ways to improve access to legal aid for journalists targeted for their professional activities.
25. Undertake trainings or other capacity-raising of media professionals in relation to their rights as victims of crime, and measures for preventing, or assisting in the prosecution of, crimes against them.
26. Consider building strategic legal capacity to monitor and/or support key investigations into crimes against journalists, and the general development of law in this area.

## ANNEX

# FULL TEXT OF THE CRIMINAL CODE PROVISIONS REVIEWED (Unofficial English Translation) CRIMINAL CODE OF UKRAINE<sup>35</sup>

### Article 12. Classification of crimes

1. Depending on the gravity, criminal offenses shall be classified as crimes of minor gravity, crimes of medium gravity, grave crimes, or especially grave crimes.
2. A crime of minor gravity shall mean a crime punishable by deprivation of liberty for up to 2 years or by a more lenient penalty, except for a fine as a primary punishment in the amount of more than 3000 tax-free minimum incomes of citizens.
3. A crime of medium gravity shall mean a crime punishable by a fine as a primary punishment in the amount of up to 10 000 tax-free minimum incomes of citizens or by deprivation of liberty for up to 5 years.
4. A grave crime shall mean a crime punishable by a fine as a primary punishment in the amount of up to 25 000 tax-free minimum incomes of citizens or by deprivation of liberty for up to 10 years.
5. An especially grave crime shall mean a crime punishable by a fine as a primary punishment in the amount of more than 25 000 tax-free minimum incomes of citizens or by deprivation of liberty for more than 10 years, or by life imprisonment.
6. The gravity of a crime punishable by both a fine as a primary punishment and deprivation of liberty shall be defined by the term of punishment in the form of deprivation of liberty as provided for that crime.

### Article 49. Discharge from criminal liability due to the expiry of the limitation period

1. A person shall be discharged from criminal liability if the following periods have elapsed from the date of commission of the crime to the date the verdict becomes effective:
  - (1) two years where a crime of minor gravity has been committed and the prescribed punishment is less severe than the limitation of liberty;
  - (2) three years where a crime of minor gravity has been committed and

<sup>35</sup>The selected articles of the Criminal Code of Ukraine, effective as of July 1, 2017, were used for the expert analysis. Ukrainian text of the Criminal Code can be found at <http://zakon5.rada.gov.ua/laws/show/2341-14>

the prescribed punishment is the limitation of liberty or deprivation of liberty;

- (3) five years where a crime of medium gravity has been committed;
  - (4) ten years where a grave crime has been committed;
  - (5) fifteen years where an especially grave crime has been committed.
2. The limitation period shall be stopped where a person who committed a crime evaded investigation or trial. In such cases the running of the limitation period is resumed as of the date of the person's surrender or apprehension. In this case the person shall be discharged from liability if fifteen years elapsed after the commission of the crime.
  3. The limitation period shall be saved where a person, before the terms specified in paragraphs (1) and (2) of this Article have expired, commits another crime of medium gravity, grave crime or especially grave crime. In this case a limitation period starts on the date on which such new crime is committed.

The limitation period shall be calculated separately for each crime.

4. Where a person has committed an especially grave crime punishable by life imprisonment, the issue of applying the limitation period shall be decided by a court. Where a court rules out the possibility to apply a limitation period, life imprisonment may not be imposed and is commuted to the deprivation of liberty for a certain term.
5. The limitation period shall not apply where any crime against national security of Ukraine, as provided for in Articles 109 – 114-1, against the peace and humanity, as provided for in Articles 437 – 439, and part 1 of Article 442 of this Code, has been committed.

### **Article 163. Violation of privacy of correspondence, telephone conversations, telegraph and other correspondence transmitted by means of communication or via computers**

1. Violation of privacy of correspondence, telephone conversations, telegraph and other correspondence transmitted by means of communication or via computers,  
shall be punishable by a fine in the amount of 50 to 100 tax-free minimum incomes of citizens, or by correctional labour for up to 2 years, or by restraint of liberty for up to 3 years.
2. The same actions repeated or committed against state or public figures, a journalist, or committed by an official or by use of special means for disclosed reading of information,  
shall be punishable by deprivation of liberty for the term of 3 to 7 years.

*(Article 163 with amendments introduced according to the Law № 993–VIII of 04 February 2016).*

## **Article 171. Impeding lawful professional activity of journalists**

1. Illegal seizure of the materials collected, processed, prepared by a journalist and technical means which he/she uses with regard to his/her professional activity; illegal denial to provide access to information for a journalist; illegal prohibition of covering certain topics, portrayal of certain persons, criticizing governmental authorities as well as any other intentional impediment to perform lawful professional activity of a journalist

shall be punishable by a fine in the amount of up to 50 tax-free minimum incomes of citizens, or by arrest for up to 6 months, or by limitation of liberty for up to 3 years.

2. Any form of influence on a journalist aiming at impeding the performance of his/her professional duties or persecution of a journalist with regard to his/her lawful professional activity

shall be punishable by a fine in the amount of up to 200 tax-free minimum incomes of citizens, or by arrest for up to 6 months, or by limitation of liberty for up to 4 years.

3. The actions envisaged in the part two of this article in case when they are committed by an official using his/her official position or upon preliminary conspiracy by group of persons

shall be punishable by a fine in the amount of 200 to 500 tax-free minimum incomes of citizens, or by limitation of liberty for up to 5 years with the deprivation of the right to occupy certain positions or being engaged in certain activity for up to 3 years or without the above mentioned.

## **Article 345-1. Threats or violence against journalist**

1. Threat of murder, violence, destruction or damage to property made against a journalist, his/her close relatives or family members due to performance by this journalist of his/her lawful professional activity

shall be punishable by correctional labour for up to 2 years, or by arrest for up to 6 months, or by limitation of liberty for up to 3 years, or by deprivation of liberty for up to 3 years.

2. Intentional infliction of battery or minor or medium grave bodily injuries on a journalist or his/her close relatives or family members due to performance by this journalist of his/her lawful professional activity

shall be punishable by limitation of liberty for up to 5 years, or by deprivation

of liberty for the same term.

3. Intentional infliction of grave bodily injuries on a journalist or his/her close relatives or family members, due to performance by this journalist of his/her lawful professional activity

shall be punishable by deprivation of liberty for the term of 5 to 12 years.

4. The actions as envisaged in parts 1, 2 or 3 of this Article, if committed by an organised group,

shall be punishable by deprivation of liberty for the term of 7 to 14 years.

**Note.** Professional activity of a journalist shall be defined in this article and in the articles 171, 347.1, 348-1 of this Code as a person's systematic activity related to collection, receipt, creation, dissemination, storage or other use of information aiming at its dissemination among indefinite range of persons through print mass media, television and radio organisations, information agencies, Internet. Status of a journalist or his/her affiliation with the mass media outlet shall be confirmed by editorial or official identity card or other document issued by the mass media, its editorial office, professional or creative union of journalists.

*{The article 345-1 was added to the Code according to the Law No. 421-VIII of 14 May 2015}*

### Article 347-1. Intentional destruction or damage to property of a journalist

1. Causing intentional destruction or damage to the property that belongs to a journalist, his/her close relatives or family members due to performance by this journalist of his/her lawful professional activity

shall be punishable by a fine in the amount of 50 to 200 tax-free minimum incomes of citizens, or by arrest for up to 6 months, or by limitation of liberty for up to 5 years.

2. The same actions, committed by arson, explosion or in other generally dangerous way, or when they caused death of persons or other grave consequences

shall be punishable by deprivation of liberty for the term of 6 to 15 years.

*(The article 347-1 was added to the Code according to the Law No. 421-VIII of 14 May 2015)*

### Article 348-1. Infringement on the life of a journalist

Murder or attempt of murder of a journalist, his/her close relatives or family members due to performance by this journalist of his/her lawful professional activity

shall be punishable by deprivation of liberty for a term of 9 to 15 years or by life imprisonment.

*{The article 348-1 was added to the Code according to the Law No. 421-VIII of 14 May 2015}*

### Article 349-1. Taking journalist hostage

Taking or holding a journalist, his/her close relatives or family members hostage for the purpose of making such journalist to carry out or refrain from any actions as a condition for release of the hostage

shall be punishable by deprivation of liberty for a term of 8 to 15 years.

*{Article 349-1 was added to the Code according to the Law No. 421-VIII of 14 May 2015}*

### Article 375. Delivery of knowingly unjust verdict, judgment, ruling or order by a judge (or judges)

1. Delivery of knowingly unjust verdict, judgment, ruling or order by a judge (or judges)

shall be punishable by limitation of liberty for up to 5 years, or by deprivation of liberty for a term of 2 to 5 years.

2. The same actions, which caused grave consequences or committed out of mercenary motives, in other private interests or for the purpose of impeding lawful professional activity of a journalist

shall be punishable by the deprivation of liberty for a term of 5 to 8 years.

*(Article 375 with amendments introduced according to the Law No.421-VIII of 14 May 2015).*

## NOTES

[illegible]





Darian Pavli is a human rights and media lawyer with 20 years of international experience. Between 2003 and 2014, Pavli was senior attorney for freedom of expression and information with the Open Society Justice Initiative, based in New York. He has been involved with impact litigation before international and domestic human rights mechanisms, and has contributed to the recognition of the right of access to government information as a basic right. He is currently an independent expert based in Albania, where he has served as an advisor to the special parliamentary committee on justice reform and various international organizations. Previously, Pavli was a researcher for Human Rights Watch and a senior attorney for the Organization for Security and Co-operation in Europe. He holds advanced law degrees from NYU Law School and Central European University.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.