

Council of Europe Project  
“Safeguarding Freedom of Expression and Freedom of Media in Ukraine” (SFEM-UA)

LEX\_2025\_2

15 January 2025

**LEGAL OPINION**

On the Draft Law of Ukraine ‘On Amendments to the Criminal Code of Ukraine Regarding the Establishment of Criminal Liability for Unauthorised Interference, Sale, or Distribution of Information Processed in Public Electronic Registers and Strengthening Criminal Liability During Martial Law for Criminal Offenses in the Sphere of Using Information and Communication Systems’

The role and responsibility of the Council of Europe in protecting freedom of expression has been underlined in the "Reykjavik Principles for Democracy", the [Reykjavík Declaration – United around our values](#).

Funded within the Council of Europe Action Plan for Ukraine “Resilience, Recovery and Reconstruction” 2023-2026, the Project “[Safeguarding Freedom of Expression and Freedom of Media in Ukraine](#)” aims to address urgent needs of major stakeholders and media players in the country. The Project’s objective is “Enabling a pluralistic media environment in Ukraine through harmonisation of legal and policy frameworks in line with European standards” and it is built around three main components:

- (1) Alignment of Ukraine’s framework on media, freedom of expression and freedom of access to information with the European standards;
- (2) Effective implementation of the legal framework governing the protection of journalists, public broadcasting and regulatory authority in line with European standards;
- (3) Effective and efficient communication strategies governing a balanced media coverage and preventing information disorder.

Prepared within the Project “Safeguarding Freedom of Expression and Freedom of Media in Ukraine” by Sejal Parmar, Council of Europe Consultants.

[www.coe.int/freedomofexpression](http://www.coe.int/freedomofexpression)

## Contents

I.	Introduction.....	5
II.	Background. The amendments to the Criminal Code introduced by the Draft Law.....	6
III.	Legal assessment.....	7
A.	The impact of derogations upon Ukraine’s obligations on freedom of expression.....	8
1.	Human rights law framework for the protection of freedom of expression in Ukraine .....	8
2.	Limitations on measures taken under derogations suspending Ukraine’s freedom of expression obligations.....	8
3.	‘To the extent strictly required by the exigencies of the situation’ .....	9
4.	‘Other obligations under international law’: international humanitarian law.....	11
B.	Permissibility of the Draft Law’s restrictions on freedom of expression.....	12
1.	Prison sentences as restrictions on freedom of expression.....	12
2.	Restrictions on release of confidential information in the public interest .....	13
3.	Restrictions on release of information based on national security, territorial integrity or public order .....	13
C.	Strengthening of European protection of journalists’ rights: European Media Freedom Act ..	13
IV.	Conclusions.....	15

## LIST OF ABBREVIATIONS

Draft Law of Ukraine ‘On Amendments to the Criminal Code of Ukraine Regarding the Establishment of Criminal Liability for Unauthorised Interference, Sale, or Distribution of Information Processed in Public Electronic Registers and Strengthening Criminal Liability During Martial Law for Criminal Offenses in the Sphere of Using Information and Communication Systems’ (registered No.10242)	Draft Law
Universal Declaration on Human Rights	UDHR
International Covenant on Civil and Political Rights	ICCPR
European Convention on Human Rights	ECHR
Charter of Fundamental Rights of the European Union	EU Charter
European Media Freedom Act	EMFA
Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, 19 July 2011, CCPR/C/GC/34	General Comment No. 34
Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), 31 August, 2001, CCPR/C/21/Rev.1/Add11	General Comment No. 29

## **I. Introduction**

1. This Legal Opinion has been prepared within the framework of the Council of Europe Project ‘Safeguarding Freedom of Expression and Freedom of the Media in Ukraine’ (‘the Project’). It assesses the compliance of the Draft Law of Ukraine ‘On Amendments to the Criminal Code of Ukraine Regarding the Establishment of Criminal Liability for Unauthorised Interference, Sale, or Distribution of Information Processed in Public Electronic Registers and Strengthening Criminal Liability During Martial Law for Criminal Offenses in the Sphere of Using Information and Communication Systems’ (registered No.10242) (the ‘Draft Law’) with human rights standards on freedom of expression, particularly Council of Europe standards on freedom of expression, as well as relevant provisions of the European Union’s legislative framework in light of the country’s pre-accession commitments. It is based on an unofficial translation of the Draft Law prepared within the framework of the project.

This Legal Opinion was requested on 24 December 2024 by Yaroslav Yurchyshyn, the Chair of the Committee on Freedom of Speech of the Verkhovna Rada (Parliament) of Ukraine. The Committee sought an assessment of the draft law’s compliance with the Council of Europe and EU legal frameworks related to freedom of expression and freedom of media. Both the Committee and the Ukrainian media community have expressed concerns that the proposed amendments may restrict freedom of expression and silence many Ukrainian journalists.

## II. Background. The amendments to the Criminal Code introduced by the Draft Law

2. The Draft Law introduces a number of provisions amending the Criminal Code of Ukraine with significant implications.
3. *First*, a number of provisions – specifically Article 361, 361-2, 362, 363, 363-1 and 365-2 – introduce the language of ‘public electronic registers’ into the Criminal Code. Article 361 Note 2 now suggests that the Draft Law indicates that the meaning to be given to this term is defined in Article 6 of the Law On Public Electronic Registers. However, it is in fact Article 2(1)(12) of the Law ‘On Public Electronic Registers that sets the meaning of ‘public electronic register’, which is defined as ‘the information communications system providing collection, accumulating, protection, accounting, display, processing of register data and provision of register information’. This is a technical mistake which ought to be corrected.
4. *Second*, a number of provisions rely on the application of ‘martial law’ in order to mandate the imposition of serious sanctions – both criminal penalties, including imprisonment for ten to fifteen years, as well as disqualification from holding certain positions or engaging in certain activities for up to three years. This is a most significant feature of the Draft Law.
5. Article 361 Part 5 provides that ‘actions’ indicated in Article 361 Parts 3 or 4 ‘*committed during martial law or by an official using his official position*’ shall be punishable by imprisonment for a term of ten to fifteen years with disqualification from holding certain positions or engaging in certain activities for a term of up to three years’ (emphasis added). Such actions include: ‘Unlawful interference with the operation of computers, computer systems, including public electronic registers, or networks that resulted in confusion or destruction of computer information or information media, and also dissemination of computer viruses by means of software or hardware devised for unlawful penetration into computers, computer systems or networks and capable of confusing or destroying computer information or information media’ (Article 361 Part 1) or the ‘same actions that caused significant damage, or repeated, or committed by a group of persons upon their prior conspiracy’ (Article 361 Part 2) if ‘they resulted in leakage, loss, forgery, blocking of information, distortion of information processing or violation of the established procedure of its routing’ (Article 361 Part 3) or ‘caused significant damage or created a danger of severe technological accidents or environmental disasters, death or mass disease of the population or other grave consequences’ (Article 361 Part 4).
6. A number of other similar provisions provide that ‘certain actions ... committed during martial law shall be punishable by imprisonment for a term of ten to fifteen years with disqualification from holding certain positions or engaging in certain activities for a term of up to three years’ (emphasis added). Such actions, which could be committed by anyone (i.e. not only public officials), include:
  - i. Those provided for in Article 361-1 Parts 1 and Part 2, namely the ‘creation for the purpose of illegal use, distribution or sale, as well as distribution or sale of malicious software, intended for unauthorised interference with the operation of information (automated), electronic communication networks’ and ‘the same acts committed repeatedly or by prior conspiracy by a group of persons, or if they caused significant damage’ (Article 361-1 Part 3);
  - ii. Those provided for in Article 361-2 Parts 1 and Part 2, namely ‘unauthorised sale or distribution of restricted information stored in information and communication systems, including public electronic registers, electronic computers, automated systems,

computer networks or carriers, systems, computer networks or on the carriers of such information created and protected in accordance with the current legislation’ and ‘the same acts committed repeatedly or by prior conspiracy by a group of persons, or if they caused significant damage or by an official using his official position’ (Article 361-2 Part 3);

- iii. Those provided for in Article 362 Parts 1 to 3, namely ‘unauthorised alteration, destruction or blocking of information processed in electronic computers machines (computers), automated systems, information and communication systems, including public electronic registers or computer networks or stored on the carriers of such information, committed by a person who has the right of access to it’, ‘unauthorised interception or copying of information processed in electronic computers (computers), machines (computers), automated systems, information and communication systems, including public electronic registers, computer networks or stored on the carriers of such information, if this lead to its leakage, committed by a person who has the right of access to such information’, and such ‘actions committed repeatedly or by prior conspiracy by a group of persons’ (Article 362 Part 4).

- 7. *Third*, particular individuals associated with a public electronic registry may be subject to similar severe criminal penalties and other sanctions for abusing their authority. Article 365-2 now identifies ‘public registrar or creator of registry information of a public electronic registry for the purpose of obtaining unlawful benefit’ amongst those individual functions who could be punished for abuse of authority which ‘caused significant harm to the legally protected rights or interests of individual citizens, state or public interests or interests of legal entities’ by a fine, a ‘restriction of liberty for a term of up to three years, or by imprisonment for the same term with deprivation of the right to hold certain positions or engage in certain activities of up to three years’.
- 8. These amendments are significant because they raise challenges to the right to freedom of expression – in terms of both the right to impart information, on the one hand, and the right to seek and receive information, on the other – which is essential for journalist, the media, and other public watchdogs, as well as individuals in the public at large.<sup>1</sup> Essentially, in addressing various specified offences concerning the ‘interference, sale or dissemination of information processed in public electronic registers and strengthening criminal liability during martial law for criminal offences in the field’, the Draft Law imposes a severe penalty of imprisonment of between ten and fifteen years without providing any safeguards for the release of confidential information in the public interest. It also fails to recognise the importance of investigative journalism and the protection of whistleblowers in a democratic society.
- 9. The next Part examines the Draft Law from the perspective of relevant human rights standards on freedom of expression.

### **III. Legal assessment**

- 10. This section presents the framework for Ukraine’s obligations on freedom of expression and assesses whether the Draft Law’s amendments which address the current context of ‘martial law’ are acceptable from the perspective human rights law.

---

<sup>1</sup> In relation to an earlier draft of the Draft Law see ‘Media Movement, human rights advocates call on Verkhovna Rada not to pass bill No. 10242 as it may be exploited to pressure journalists’ 2 December 2024. <https://imi.org.ua/en/news/media-movement-human-rights-advocates-call-on-verkhovna-rada-not-to-pass-bill-no-10242-as-it-may-be-i65213>

## **A. *The impact of derogations upon Ukraine's obligations on freedom of expression***

### *1. Human rights law framework for the protection of freedom of expression in Ukraine*

11. As a State party to the International Covenant on Civil and Political Rights ('ICCPR') and Article 10 of the European Convention on Human Rights ('ECHR'), Ukraine is legally required to guarantee to all individuals within its jurisdiction the right to freedom of expression. This right – which, broadly speaking, encompasses the freedom to seek, receive and impart information or ideas of any kind, regardless of frontiers, through any media of an individual's choice – is protected by Article 19 of the Universal Declaration of Human Rights, and similar provisions of two core human rights treaties, namely Article 19 of the ICCPR (which gives legal force to the civil and political rights in the UDHR),<sup>2</sup> and Article 10 of the ECHR.<sup>3</sup> Article 11 of the Charter of Fundamental Rights of the European Union ('EU Charter') also protects freedom of expression and also explicitly protects 'freedom and pluralism of the media' as such.<sup>4</sup>
  12. Under Article 20 of the ICCPR, Ukraine is required to prohibit, though not necessarily criminalise 'any propaganda for war' and 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Ukraine does not have any reservations to Articles 19 or 20 of the ICCPR.
  13. Under the ICCPR and the ECHR, Ukraine's state authorities may limit freedom of expression as long as any such restrictions meet a strict three-part test. Restrictions must be (1) provided by law; (2) pursue a legitimate aim which is explicitly indicated (including national security or public order); and (3) be necessary and proportionate to that aim). The implications of this test for assessing the permissibility of the restrictions introduced by the Draft Law, namely criminalising 'unauthorised interference, sale or interference of information' with imprisonment as a penalty, will be examined after consideration of the constraints on Ukraine's ability to suspend its obligations on freedom of expression during martial law.
- ### *2. Limitations on measures taken under derogations suspending Ukraine's freedom of expression obligations*
14. Under both Article 4 of the ICCPR and Article 15 of the ECHR, Ukraine may also adopt measures 'derogating from its obligations', including in relation to the right to freedom of expression (though not freedom of opinion), 'in time of public emergency which threatens the life of the nation' but only 'to the extent strictly required by the exigencies of the situation' and 'provided that such measures are not inconsistent with its other obligations under international law'.<sup>5</sup>

---

<sup>2</sup> Article 19 (2) ICCPR states: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'

<sup>3</sup> Article 10(2) ECHR states: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'

<sup>4</sup> Article 11 of the EU Charter states '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected.'

<sup>5</sup> Freedom of expression is not included in the list of non-derogable rights indicated in Article 4(2) of the ICCPR.



15. Armed conflict – such as that precipitated by the large-scale military invasion of Ukraine by Russia on 24 February 2022 – is recognised as one of the likely situations that will prompt a ‘public emergency threatening the life of the nation’.<sup>6</sup>
16. Ukraine has adopted derogations temporarily suspending some of its obligations to protect certain human rights under both the ICCPR and the ECHR. The Decree of the President of Ukraine No. 64/1011 of 24 February 2022, which imposes martial law, allows for the restriction of a broad range of human rights including the ‘right to freedom of thought and speech, and to the free expression of ... views and beliefs’ and ‘the right to freely collect, store, use and disseminate information by oral, written or other means’, which are also guaranteed by Article 34 of the Constitution of Ukraine. Despite the scope of the derogations being ‘significantly reduced’ on 4 April 2024,<sup>7</sup> the derogations with respect to freedom of expression remain in place. Ukraine has complied with the conditions set out in Articles 4 of the ICCPR and Article 15 of the ECHR and its derogations to those provisions have been assessed as being validly declared, though the derogations ought to be understood as ‘a continuing process’.<sup>8</sup>
17. At the same time, Ukraine’s derogations do not remove its obligations with respect to freedom of expression entirely. They instead establish a particular framework towards the limitation of those obligations.<sup>9</sup> There are therefore constraints on the Draft Law’s approach to limiting freedom of expression on the basis of ‘martial law’, which are outlined below.<sup>10</sup>

### 3. ‘To the extent strictly required by the exigencies of the situation’

18. Broadly speaking, Ukraine needs to ensure that, the derogating measures (i.e. the amendments referencing ‘martial law’) in the Draft Law comply with the certain principles, of legality, legitimacy, necessity, proportionality and non-discrimination.<sup>11</sup> The derogating measures should meet requirements of legality, including in terms of the quality of the law and specificity, and not be applied arbitrarily.<sup>12</sup> In any assessment of the necessity of the derogating measures, the essential question would be whether the provisions were ‘directed to an actual, clear, present or imminent danger and not imposed merely because of an apprehension of potential danger’.<sup>13</sup> Any derogation measures would be not be necessary ‘where ordinary measures permissible under the specific limitation clauses ... would be adequate to deal with the threat to the life of the nation’.<sup>14</sup> Finally, any derogation measures

<sup>6</sup> UN Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), 31 August, 2001, CCPR/C/21/Rev.1/Add.11 (General Comment No. 29).

<sup>7</sup> Note of Information, 30 April 2024, <https://rm.coe.int/1680af84ff>

<sup>8</sup> Council of Europe (2022) ‘Legal analysis of the derogation made by Ukraine under Article 15 of the European Convention of Human Rights and Article 4 of the International Covenant on Civil and Political Rights’, p 35. See also Council of Europe/ECtHR, Guide on Article 15 of the European Convention on Human Rights. Derogation in time of emergency, Updated on 31 August 2024, para 24.

<sup>9</sup> General Comment No. 29, Para 4. The Human Rights Committee, which supervises the implementation of the ICCPR, has stated that ‘the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that *specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation.*’ (emphasis added). See also The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Commission on Human Rights, 28 September 1984, E/CN.4/1985/4.

<sup>10</sup> From the perspective of its obligations under the ICCPR, Ukraine cannot invoke Article 4 of the ICCPR to engage in ‘propaganda for war’ or ‘advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence’. General Comment No. 29, Para 13(e).

<sup>11</sup> See General Comment No. 29, paras 3, 4, 8, and 16. See also Council of Europe (2022) ‘Legal analysis of the derogation made by Ukraine under Article 15 of the European Convention of Human Rights and Article 4 of the International Covenant on Civil and Political Rights’, paras 104–7, 123.

<sup>12</sup> *Baş v Turkey*, ECtHR, Application No. 66448/17, 7 September 2020, paras 159–160.

<sup>13</sup> The Siracusa Principles, paras 51, 52, 55.

<sup>14</sup> The Siracusa Principles, para. 53.

should proportionate in that there ought to be a reasonable relationship between a legitimate aim and the means used to achieve that aim.

19. Ukraine's national authorities enjoy a wide margin of appreciation with respect to Article 15 of the ECHR.<sup>15</sup> But the question of whether Ukraine has gone beyond the 'extent strictly required by the exigencies' through the Draft Law still remains subject to the assessment of the particular standards reflected in the jurisprudence of the European Court of Human Rights ('ECtHR').<sup>16</sup> These standards require giving appropriate weight to such factors as the nature of the rights affected by the derogation (i.e. freedom of expression), the circumstances leading to, and the duration of, the emergency situation.<sup>17</sup> This would involve considering, on the basis of the 'conditions and circumstances' at the time that the Draft Law is eventually adopted and subsequently applied (if indeed it is)<sup>18</sup> such as questions as:<sup>19</sup>

- i. would ordinary legislation be sufficient to meet the danger caused by the public emergency?
- ii. is the Draft Law a genuine response to the emergency situation?
- iii. will the Draft Law be used for the purpose for which it was granted?
- iv. is the Ukrainian Government able to show that there is a sufficient connection between the Draft Law and the aim pursued through its derogation?
- v. is the derogation limited in scope and the reasons advanced in support of it?
- vi. is the derogation being kept under review?
- vii. has the Draft Law been mitigated?
- viii. is the Draft Law subject to safeguards?
- ix. how important is the right (i.e. freedom of expression) at stake, and the broader purpose of judicial control over interferences with that right?
- x. is judicial control of the Draft Law practicable?
- xi. is the Draft Law proportionate, does it involve any unjustifiable discrimination, is it 'lawful' and was it effected 'in accordance with a procedure prescribed by law'?
- xii. is interpretation counter to the effective legislative provisions compromises legal certainty?
- xiii. have any highest domestic courts considered similar measures to the Draft Law and decided they were not strictly required?

20. The following considerations should be kept in mind in assessing the acceptability of the Draft Law's amendments to the Criminal Code as measures taken under its derogations to Article 19 of the ICCPR and Article 10 of the ECHR.

- i. The nature of freedom of expression, particularly its fundamental role in a democratic society, means that it ought to be given significant weight when assessing the permissibility of the Draft Law. In this context, the government of Ukraine should demonstrate that the amendments of the Draft Law are necessary to 'pave the way back

---

<sup>15</sup> Given that they are 'in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it', *Ireland v the United Kingdom*, ECtHR, Application No. 5310/71, 18 January 1978, para 207.

<sup>16</sup> *Domenjoud v France*, ECtHR, Application Nos 34749/16 et 79607/17, 16 August 2024, para 144.

<sup>17</sup> *Brannigan and McBride v the United Kingdom*, ECtHR, Application No. 14553/89; 14554/89 25 May 1993, para 43; *A and Others v the United Kingdom* [GC], Application No. 3455/05, 19 February 2009, para 173.

<sup>18</sup> *Ireland v the United Kingdom*, ECtHR, Application No. 5310/71, 18 January 1978, para 214

<sup>19</sup> See Council of Europe/ECtHR, Guide on Article 15 of the European Convention on Human Rights. Derogation in time of emergency, Updated on 31 August 2024, para 24.

to political freedom’.<sup>20</sup> The mere fact of there being a public emergency ‘must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society’ and, even in times where the state, faces serious threats, ‘one of the principal characteristics of democracy is the possibility it offers of resolving problems through public debate’.<sup>21</sup> Even in times of armed conflict, the public should have access to diverse perspectives, which can include perspectives from adversaries.<sup>22</sup>

- ii. Though the Draft Law appears a genuine response to the public emergency and meets the requirements of legality and legitimacy, there is a strong argument that the inclusion of such serious penalties as prison sentences of between ten and fifteen years is unduly harsh or disproportionate. Civil or administrative sanctions, or lesser criminal penalties (such as fines), could be applied instead.
- iii. It is unclear as to whether the Ukrainian Government has been able to clearly demonstrate that there is a sufficient connection between the Draft Law and the aim pursued through its derogation to Article 10 of the ECHR and also to Article 4 of the ICCPR. Such a connection needs to be shown.
- iv. The Draft Law does not appear to include any safeguards, such as any protection of public interest journalism. There are no amendments put forward through the Draft Law on the protection of the release of confidential information in the public interest or the protection of whistleblowers.
- v. The Draft Law might be open to abuse, particularly by state authorities, including law enforcement officials who might rely on its terms to justify, harass and threaten journalists, particularly investigative journalists working on sensitive subjects. At the same time, the scope of the Draft Law, particularly its criminal law consequences, could serve to deter journalists from working on sensitive topics, including in relation to issues of the conduct of the war and corruption, and sources and whistleblowers from coming forward and speaking with journalists about such issues in the first place. Ukrainian civil society organisations have previously expressed concerns that the Draft Law could be relied upon to prosecute journalists working on such investigations as those about the departure of conscripted soldiers or the enrichment of the associates of public officials.<sup>23</sup> The chilling effect on investigative journalism would undermine democracy and trust in public institutions at a time when Ukraine is ‘fighting for its future as a democratic state’.<sup>24</sup>

21. Note that most of these considerations (specifically those in subsections (ii) to (v) above are also relevant in assessing the permissibility of the Draft Law provisions as restrictions on freedom of expression under Articles 19(3) of the ICCPR and Article 10(2) of the ECHR.

#### 4. ‘Other obligations under international law’: international humanitarian law

22. Article 4 of the ICCPR and Article 15 of the ECHR recognise that Ukraine derogation measures should not be inconsistent with its ‘other obligations under international law’. In this regard, it is important to note that, given it is in a situation of armed conflict, international humanitarian law applies and is mutually reinforcing and ‘complementary’ legal regime to international human rights law.<sup>25</sup> The ECtHR regularly interprets the scope of the ECHR in light

<sup>20</sup> *Landinelli Silva v Uruguay*, Human Rights Committee, Communication No. R.34/1978, UN Doc. CCPR/C/OP/1 at 65 (1984), para 8.4; Human Rights Committee (2011) General Comment No. 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, para 13 (‘General Comment No. 34’).

<sup>21</sup> *Mehmet Hasan Altan v Turkey*, ECtHR, 20 March 2018, para 210; *Şahin Alpay v. Turkey*, ECtHR, Application No. 16538/17, 20 March 2018, para 180.

<sup>22</sup> *Süreş and Özdemir v. Turkey*, ECtHR, Application No. 24762/94, 8 July 1999, paras 61–64

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para 106. UN Human Rights Committee (2004), General Comment No. 31 [80]: The Nature of the General Legal Obligation

of the standards of international humanitarian law when analysing potential violations in the context of an armed conflict.<sup>26</sup> Although international humanitarian law does not explicitly protect freedom of expression, it does protect journalists and implicitly their right to freedom of expression and individual's right to seek, impart and receive information in specific circumstances,<sup>27</sup> and there is a strong case that international humanitarian law itself offers basic safeguards for freedom of expression.<sup>28</sup> From this perspective, international humanitarian law reinforces rather than undermines Ukraine's obligations on freedom of expression.

## **B. Permissibility of the Draft Law's restrictions on freedom of expression**

### *1. Prison sentences as restrictions on freedom of expression*

23. The amendments to the Draft Law clearly focus on 'strengthening criminal liability during martial law for criminal offences in the field of information and communication systems', providing for serious criminal penalties of 'imprisonment for a term of ten to fifteen years' for actions of unauthorised interference, sale or dissemination of information. Such penalties can also constitute 'ordinary' restrictions on freedom of expression (i.e. those which do not require a derogation) and therefore require assessment under the three-part test in both Article 19(3) of the ICCPR and Article 10(2) of the ECHR. The considerations in Part B, para 20 also apply here.
24. The Human Rights Committee has taken a negative view of the appropriateness of criminal sanctions as restrictions on freedom of expression and has indicated that imprisonment is never an appropriate penalty, particularly in relation to defamation.<sup>29</sup> For its part, the ECtHR has emphasised that 'states should display restraint in resorting to criminal proceedings',<sup>30</sup> which should only be resorted to where states act 'in their capacity as guarantors of public order'.<sup>31</sup> In *Cumpăna and Mazăre v Romania*, the ECtHR stressed that 'imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence,' a principle which has reiterated by the Committee of Ministers.<sup>32</sup> When reasonable and less restrictive alternatives are available under civil or administrative law, the State should therefore prioritise using these measures.<sup>33</sup>

---

Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para 11. See also General Comment No. 29, para 3; UN Human Rights Committee (2019), General Comment No. 36, Article 6 (Right to Life), CCPR/C/GC/36, para 64.

<sup>26</sup> *Hassan v. The United Kingdom*, ECtHR, Application No. 29750/09, Judgment, 16 September 2014, paras 33, 77, and 100–3; *Varnava et al. v. Turkey*, ECtHR, Application Nos Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/, 18 September 2009, para 185, *Ukraine v. Russia (re Crimea)*, ECtHR, Application Nos. 20958/14 and 38334/18, 25 June 2024, paras 912–19.

<sup>27</sup> See Article 79 of Protocol I and ICRC (1987) 'Commentary to Protocol I', Article 79. See also UN Security Council (2006) 'Security Council Resolution 1738 (2006) [Protection of civilians in armed conflict]', S/RES/1738, para 3 (confirming that 'media equipment and installations constitute civilian objects, and in this respect shall not be the object of attack or of reprisals, unless they are military objectives'); Security Council resolution 2222 (2015) para 10.

<sup>28</sup> ARTICLE 19, *Clearing the Fog of War: Protecting Freedom of Expression in Armed Conflict* (Policy Brief), 2024.

<sup>29</sup> The 'criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty' in relation to defamation.

<sup>30</sup> *Castells v. Spain*, ECtHR, Application No. 11798/85, judgment of 23 April 1992, paragraph 46.

<sup>31</sup> Ibid. See also Council of Europe Guidance on Limiting the use of Criminal Law to restrict Freedom of Expression, DC-FoE\_2024\_13 at 10.

<sup>32</sup> *Cumpăna and Mazăre v Romania*, ECtHR, Application No. 33348/96, judgment of 17 December 2004, paragraph 115. See also Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors, adopted 13 April 2016, para 35.

<sup>33</sup> *Amorim Giestas and Jesus Costa Bordalo v Portugal*, ECtHR, Application No. 37840/10, judgment of 3 April 2014, paragraph 36; *Cumpăna and Mazăre v. Romania*, Application No. 33348/96, judgment of 17 December 2004, paragraphs 113–115.

## 2. *Restrictions on release of confidential information in the public interest*

25. Given the references to ‘martial law’, the Draft Law’s amendments seem to suggest that their aim is target the sharing of confidential or sensitive State-held information, such as State secrets or ‘classified information’, which may be related to the ongoing conflict with Russia. Although the criminal law may be applied to the leaking of such confidential information, subject to the requirements of Article 10(3) of the ECHR, the ECtHR has emphasised the overriding importance of ensuring expressions in the public interest. It has recognised that the criminal conviction of a journalist for releasing confidential information may heighten the chilling effect on the public interest journalism and undermine ability of the media to play its role as a public watchdog.<sup>34</sup> While the method deployed by a journalists for obtaining the information (including whether they broke any law in obtaining the information) and the veracity of that information are relevant considerations, these factors are not decisive in determining whether the journalist acted responsibly.<sup>35</sup> The ECtHR has had that information on the management of public funds by politicians and public officials is ‘definitely a topic of general interest’ about which journalists had the right to inform the public, who in turn had the right to be informed.<sup>36</sup> The ECtHR’s standards on ensuring expressions in the public interest would therefore protect journalists working on investigations on subjects like the departure of conscripted men or corruption by public officials, which Ukrainian civil society organisations fear could be caught by the Draft Law.

## 3. *Restrictions on release of information based on national security, territorial integrity or public order*

26. The amendments of the Draft Law ramping up criminal liability and imprisonment for certain offences could be justified on the basis of national security, territorial integrity or the prevention of crime or disorder, which are particular legitimate aims for restrictions on freedom of expression under Article 10 of the ECHR. Though the Draft Law does not explicitly use those terms in its provisions, Ukraine cannot simply ‘with reference’ to these aims ‘restrict the right of the public to be informed by bringing the weight of the criminal law to bear’.<sup>37</sup> Although Ukraine has a certain margin of appreciation in national security cases, it still needs to show that the disclosure of certain information as identified in the Draft Law would cause or risk actual harm to national security,<sup>38</sup> and how the amendments contained in the Draft Law are necessary and proportionate for the risks to be averted. As the Human Rights Committee has highlighted, it would be incompatible with Article 19 (3) for the government of Ukraine to ‘suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, ... human rights defenders, or others, for having disseminated such information’.<sup>39</sup>

## **C. *Strengthening of European protection of journalists’ rights: European Media Freedom Act***

27. Ukraine’s status as a candidate country for accession to the EU and its ongoing accession negotiations being with the EU Council mean that it is important to highlight how the Draft Law engages existing EU law. The European Commission has taken a number of measures to

---

<sup>34</sup> *Stoll v Switzerland* [GC], ECtHR, Application No. 69698/01, judgment of 10 December 2007, paragraph 39, and reaffirming *Goodwin v United Kingdom*, ECtHR Application No. 17488/90, judgment of 27 March 1996, paragraph 39.

<sup>35</sup> See the Court’s discussion of the case law in *Alpha Doryforiki Tileorasi Anonymi Etairia v Greece*, ECtHR, Application No. 72562/10, judgment of 22 February 2018, paragraphs 59-69, para 6

<sup>36</sup> *Martin and others v. France*, ECtHR, Application No. 30002/08, judgment of 12 April 2012, paragraphs 79 and 80.

<sup>37</sup> *Erdogdu and Ince v. Turkey*, ECtHR, Application Nos. 25067/94 and 25068/94, judgment of 8 July 1999, paragraph 54.

<sup>38</sup> *Girleanu v. Romania*, ECtHR, Application No. 50376/09, judgment of 26 June 2018, paragraph 89, and the cases discussed therein.

<sup>39</sup> General Comment No. 34, para 30.

protect media freedom, culminating in the European Media Freedom Act ('EMFA'), which entered into force on 7 May 2024 and will have full application as of 8 August 2025.<sup>40</sup>

28. The EMFA provides strong safeguards for the confidentiality of journalistic sources and communications, including in relation to the use of intrusive surveillance software against media, journalists and those in regular or professional relationships with media or journalists. Paragraph 19 of the Preamble emphasises the rationale for the robust guarantees:

Journalists and editors are the main actors in the production and provision of trustworthy media content, in particular by reporting on news or current affairs. Sources are tantamount to 'raw material' for journalists: they are the basis for the production of media content, in particular news and current affairs content. It is therefore crucial that journalists' ability to collect, fact-check and analyse information be protected, in particular information imparted or communicated confidentially, both offline and online, which relates to or is capable of identifying journalistic sources. Media service providers and their editorial staff, in particular journalists, including those operating in non-standard forms of employment, such as freelancers, should be able to rely on a robust protection of journalistic sources and confidential communications, including protection against undue interference and the deployment of surveillance technologies. Without such protection, the free flow of sources to media service providers could be deterred and, thus, the free exercise of the economic activity by media service providers could be hindered to the detriment of the provision of information to the public, including on matters of public interest. As a result, journalists' freedom to exercise their economic activity and fulfil their vital 'public watchdog' role could be jeopardised by such obstacles, thus affecting access to quality media services negatively.

29. In terms of the legislation's substantive provisions, amongst other things:

- i. Article 3 of the EMFA requires that Member States should ensure that journalistic sources and confidential communications are effectively protected and refrain from (i) obliging media service providers or editorial staff to identify their sources or confidential communications; (ii) 'detain, sanction, intercept or inspect media service providers or their editorial staff or subject them ... to surveillance or search and seizure for the purpose of obtaining information related to or capable of identifying journalistic sources or confidential communications; (iii) deploy intrusive surveillance software on any material, digital device, machine or tool used by media service providers, their editorial staff or any relevant persons';
- ii. Article 4 requires that any derogation from Article 3 is 'justified on a case-by-case basis by an overriding reason of public interest and is proportionate';
- iii. Article 8 requires that Member States shall ensure that media service providers, their editorial staff or any other relevant persons who might have information related to or capable of identifying journalistic sources or confidential communications have a right to effective judicial protection.

---

<sup>40</sup> Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), 17.4.2024.

- iv. Article 5 provides that Member States may deploy intrusive surveillance software, under very strict conditions, provided that the deployment: (a) complies with the conditions listed in paragraph 4; and (b) is carried out for the purpose of investigating one of the identified persons, for (i) particular offences listed in Article 2(2) of Framework Decision 2002/584/JHA punishable in the Member State concerned by a custodial sentence or a detention order of a maximum period of at least three years;
  - v. Article 6 provides that surveillance measures referred to earlier provisions are regularly reviewed by a judicial authority or an independent and impartial decision-making authority in order to determine whether the conditions justifying their use continue to be fulfilled.
30. The Draft Law fails to reflect these standards protecting journalists and their sources and providing for an individual case-by-case and proportionate approach to limitations on that protection, for independent judicial oversight, and for safeguards against intrusive surveillance software.

#### IV. Conclusions

- 31. Ukraine's derogations in relation to its obligations under the ICCPR and ECHR with respect to freedom of expression may be valid. But there are constraints on its ability to curtail freedom of expression under those derogations during martial law as well as under provisions on ordinary restrictions to the right. The robustness and scope of this *ongoing* protection for freedom of expression, notwithstanding the martial law, need to be reflected through the Draft Law.**
- i. **Certain principles, notably proportionality and necessity (as well as legality, legitimacy and non-discrimination) apply to the restrictions on freedom of expression imposed as a result of the Draft Law as a derogating measure. Necessity and proportionality also apply with respect to the assessing the Draft Law's ordinary restrictions on freedom of expression. The imposition of prison sentences by the Draft Law would be assessed as being disproportionate and incompatible with human rights law, particularly Article 10 of the ECHR. The Draft Law should be amended to replace the penalty of imprisonment with reasonable civil and administrative measures.**
  - ii. **The media plays an essential role as a public watchdog and the dissemination of expressions in the public interest, including in situations where that information is confidential in nature. The Draft Law should include an explicit protection for the disclosure of confidential information in the public interest in order to safeguard the rights of journalists disclosing such information (or 'distributing restricted information' without 'authorisation') and protect sources/whistleblowers disclosing such information.**
  - iii. **The Draft Law should be amended to be in line the principles and protections embodied in the EMFA, which provides strong safeguards for the confidentiality of journalistic sources and communications, including in relation to the use of intrusive surveillance software against media, journalists and those in regular or professional relationships with them.**