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Comparative Legal Analysis of Ukrainian Regulation of Hate Speech in the Media

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Table of Contents

1. Summary of Main Findings

There is the one area where international law actually requires States to ban expression content, with Article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR) stating:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

This is generally understood as at least requiring States Parties to introduce criminal provisions on what, in this Analysis, we will call "hate speech" and most democracies have indeed done this. Better practice is also to provide for civil and administrative law regimes for responding to hate speech.

To ensure an appropriate balance between the goals of Article 20(2), namely promoting equality and public order, and the right to freedom of expression, guaranteed in Article 19(2) of the ICCPR, international and regional courts and other human rights bodies have imposed five conditions on criminal hate speech provisions. First, only expressive acts undertaken with the specific intention of promoting hatred may be prohibited. This rules out speech which, even if it does incite others to hatred, was not disseminated with that as its aim.

Second, the term "hatred", as used in Article 20(2), refers to a very strong and negative emotion towards the target group which goes beyond mere dislike or stereotyping and involves an intense sense of opprobrium or enmity. Third, only expressive content which leads to violence, discrimination or hatred (hostility) is covered.

Fourth, and very importantly, only speech which actually incites to those results is covered. While incitement is not the same as actual causality, courts often assess whether the statements involved increased the risk of these results coming about. Context is clearly very important here, and similar statements may constitute hate speech in one context but not in another. The requirement of "incitement" also means that there must be a direct causal link between the statements and the risk of the result being created.

Fifth, the hatred must focus on certain grounds or characteristics. Article 20(2) is rather limited in this area – listing only three grounds, namely nationality, race and religion – and many national laws go further, for example including colour, ethnic origin, gender, disability and/or sexual orientation. At the same time, certain characteristics, such as political preferences, probably fall outside of the scope of Article 20(2).

The scope of constitutional protection for equality in Ukraine is extremely broad, ruling out not only discrimination but also any privileges or restrictions, and based not only on more recognised grounds for discrimination but also characteristics such as political belief, property status and place of residence. When it comes to protection for freedom of expression, the constitutional test for restrictions on these rights is largely in line with

international standards. However, it does allow for restrictions "in the interests of" protecting various values, rather than the far more stringent international standard which requires restrictions to be "necessary" to protect the values listed.

There are four separate criminal regimes governing hate speech in Ukraine, in the Criminal Code, the Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine the Law of Ukraine on Protection of Public Morality and the Law of Ukraine on Information. Each contains different standards governing hate speech, creating a confusing and inconsistent regime governing this area.

A challenge with these rules is that many of them include hate speech rules in provisions which contain restrictions on other types of speech, such as insulting national dignity, promoting war or violence more generally, or blasphemy. This is problematical given that these are all very different areas of restriction on freedom of expression, where different standards apply.

From among the various provisions, only Article 161(1) of the Criminal Code clearly refers to the idea of intent, and even then it is not clear whether this applies merely to the dissemination of the statements or to the specific aim of creating hatred. As noted above, intent is a key element in the offence of hate speech as defined under international law.

Article 161(1) does include a requirement of incitement ("розпалювання"), but this is not defined and the cases seem to suggest that it has been applied more broadly than this term is understood under international law. Two of the provisions – namely Article 300 of the Criminal Code and the rules in the Law on Morality – apply when the content has merely been disseminated, which automatically rules out any requirement of incitement. For its part, the Law on Discrimination defines its equivalent of incitement too broadly – including mere "appeals to discrimination", while the Law on Information is unclear on this issue.

In many cases, the rules prohibit speech leading to results which are broader than those recognised under international law. The Law on Discrimination is limited to speech promoting discrimination, which is recognised under international law. Article 161(1) refers to "hostility" (ворожнеча), as does the Law on Information. While this is the same term as is used in Article 20(2) of the ICCPR, it might still be susceptible of overbroad interpretation, so it would be useful to define it more precisely or replace it with the more exigent term "hatred". Article 300 refers to mere "intolerance" (нетерпимість), which is clearly a less strident emotion, while the Law on Morality does not even refer to a result. On the other hand, Article 161(1) fails to refer to the idea of violence, which would be a useful addition given that incitement to violence based on hatred is different than more generic incitement to violence (which presumably is prohibited elsewhere in the Criminal Code).

In line with the finding on the Constitution, noted above, many of the provisions are unduly broad when it comes to the grounds upon which hate speech may be prohibited. Thus, they go beyond clearly recognised grounds for discrimination to include areas

which are questionable in this regard, such as political activity and often also catch-alls (such as “other spheres of life”).

Finally, none of the provisions include robust regimes of defences, such as the defence of truth.

When it comes to the civil liability rules, the problem of multiple and inconsistent regimes again arises. Although this is less problematical in the civil law context, it would still be useful to address. A key problem here is that none of the provisions make it clear that a civil claim might only be made out where the plaintiff could show that he or she had personally suffered damages and that these were based directly (causally) on the impugned speech.

Finally, Ukrainian law – in particular the Law of Ukraine on Print Media (Press) in Ukraine and the Law of Ukraine on Television and Radio Broadcasting – does prohibit hate speech in both the print and broadcasting sectors. However, the penalties for this – in both cases extending to termination of the media outlet’s licence to operate – are extremely severe. More serious, however, is the fact that in Ukraine there is no proper system of complaints for the media, whether print or broadcast, including in response to speech which is racist in nature. In many democracies, these systems provide for far more stringent rules in the area of racist speech than the narrowly circumscribed criminal hate speech regimes, meaning that they are important means for addressing racism.

2. Key Recommendations

- Consideration should be given to introducing a more stringent test for restrictions on freedom of expression into the Constitution based on the idea of "necessity" or a similar concept, rather than allowing restrictions whenever this would be "in the interests of" protecting the values listed there.
- Consideration should be given to amending the relevant laws so that there is only one set of rules on criminal liability for hate speech, ideally in the Criminal Code, or at least amending them so that they establish consistent standards in this area.
- Criminal rules on hate speech should be isolated from criminal rules prohibiting other forms of speech, so that they are found in provisions which focus only on hate speech.
- Article 161(1) of the Criminal Code should be amended to: a) require a specific intention to incite to hatred; b) define "hostility" so as to make it clear that it is an intense emotion, c) include a reference to incitement to violence; d) limit the scope of discrimination covered; and e) clarify the meaning of "incitement" by incorporating at least key elements of a definition.
- Article 300 of the Criminal Code should incorporate an explicit requirement of intent, should be based on the idea of hatred rather than mere "intolerance", and should include a requirement of incitement, rather than mere dissemination of content.
- Both Article 161(1) and Article 300 should provide for a defence of truth and consideration should be given to including defences for works of art, literature, science and culture.
- Only one regime for providing for civil redress for hate speech should be retained in Ukrainian law, preferably in the Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine.
- The Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine should allow for civil compensation for hate speech only where individuals have suffered directly and where clear causality or a link between the speech and the discrimination and/or violence is shown.
- Relevant stakeholders in Ukraine – including media outlets, senior journalists, non-governmental organisations working on media issues, academics and the government – should engage in a process of consultation with a view to establishing an effective complaints system or systems for the media in line with relevant international standards.

3. Introduction

Hate speech, at least in its strongest manifestations, represents an attack on equality, one of the most cherished human rights. It can also create serious risks of violence, thereby posing a threat to public order. As a result, international law has long recognised the need to regulate at least the most strident forms of hate speech.

This recognition dates back to at least the Nuremburg Tribunals, established after World War II to try war crimes committed by individuals associated with the Nazi regime in Germany. Most of those brought before the Tribunal were military or political leaders, but Julius Streicher, the publisher of a major newspaper, was convicted of crimes against humanity based only on his role in fomenting hatred towards Jews.[1] The 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* included as a crime: "Direct and public incitement to commit genocide".[2] Similar crimes were included in the Statutes of both the International Criminal Tribunal for the former Yugoslavia[3] and the International Criminal Tribunal for Rwanda.[4] Hassan Ngeze, the editor of the Rwandan newsmagazine *Kangura*, who was responsible for overseeing the production of inflammatory articles calling for mass violence against the country's Tutsi minority, was one of a number of media figures convicted of crimes against humanity by the Rwandan Tribunal in the *Nahimana* case for their role in inciting and directing the genocide.[5]

International law recognises that (certain) legal prohibitions on hate speech are legitimate as restrictions on freedom of expression. Indeed, it goes further, with Article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR)[6] actually requiring States to prohibit hate speech. Significantly, this is the only provision in the ICCPR that requires States Parties to ban expressive content.

Both of the examples of hate speech cases given above involve what have now come to be known as the legacy media, no doubt due to the particular power of the media to spread ideas in society, including hateful ideas. Today, this power has spread to other means of communication, including social media.
The legal/regulatory provisions governing hate speech and other forms of speech directed against protected groups tend to operate at four different levels. First, the constitution

[1] Decision available at: http://www.jewishvirtuallibrary.org/nuremberg-trial-judgements-julius-streicher.
[2] Article III(c). General Assembly Resolution 260 A (III), 9 December 1948, in force 12 January 1951. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx.
[3] 25 May 1993. Available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.
[4] 8 November 1994. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunalForRwanda.aspx.
[5] See *Prosecutor v. Nahimana, Barayagwiz and Ngeze*, 3 December 2003, ICTR-99-52-T (Trial Chamber). Available at: http://unictr.unmict.org/en/cases/ictr-99-52.
[6] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

normally provides the framework for legal and regulatory measures, including by providing the standards for balancing the values of equality and public order against freedom of expression interests. Second, most democracies have criminal laws prohibiting the dissemination of hate speech. Third, an increasing number of countries allow victims to bring civil cases to recover damages for harm caused to them by hate speech. Fourth, in most democracies there are systems for promoting or enforcing professional standards in the media – whether they are self-regulatory, co-regulatory or statutory in nature – and these commonly include standards relating to hate speech and, indeed, less extreme forms of racist speech.

This Analysis starts by outlining key international standards regarding hate speech, including some of the key rules for ensuring that restrictions do not unduly restrict freedom of expression. It then canvasses each of the four areas noted above, looking at some better democratic practices from different countries and assessing the Ukrainian laws/systems against both these and international standards.

4. Assessment

4.1 International Standards

As noted above, Article 20(2) of the ICCPR specifically calls on States to prohibit hate speech, normally understood as being via the criminal law,[7] stating:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The *European Convention on Human Rights* (ECHR)[8] does not include an analogous provision. However, its Article 17 prohibits the abuse of human rights, stating:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 14 also prohibits discrimination in the enjoyment of rights, stating:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

These two provisions, combined with the power of States under international law to restrict freedom of expression, have been relied upon by the European Court of Human Rights to justify hate speech laws but they do not necessarily require States to adopt them.

International law also protects the right to freedom of expression, specifically at Article 19(2) of the ICCPR, which 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.

This is not an absolute right and Article 19(3) of the ICCPR sets out a three-part test for restrictions on freedom of expression:

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[7] See, for example, the first recommendation relating to Legislation in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Available at: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

[8] Adopted 4 November 1950, entered into force 3 September 1953.

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 10 of the ECHR contains reasonably similar provisions both guaranteeing freedom of expression and setting out the test for restrictions to it.

The juxtaposition of Articles 19 and 20 of the ICCPR means that, while States must adopt criminal rules prohibiting hate speech, in doing so they must be careful not to unduly limit free speech. The United Nations Human Rights Committee (HRC) is the body which is formally tasked with overseeing implementation of the ICCPR. In a 2011 General Comment on freedom of expression the HRC specifically noted that Articles 19 and 20 are "compatible with and complement each other". Furthermore, "a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3".[9] In other words, hate speech laws must meet the three-part test for restrictions on freedom of expression set out in Article 19(3).

This is a complex balancing exercise. Freedom of expression protects unpopular and even offensive speech, as the European Court of Human Rights noted in the case of *Handyside v. United Kingdom*:

> [F]reedom of expression ... is applicable not only to "information" or "ideas" that are favourably received ... but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[10]

Five key elements are implicit in Article 20(2) of the ICCPR, at least as this has been interpreted by international courts. First, the term "advocacy of hatred" means that only speech which is intended to incite others to hatred may be prohibited. This is clearly illustrated in the European Court of Human Rights case of *Jersild v. Denmark*.[11] The case involved a journalist who was convicted by Danish courts of hate speech after broadcasting a documentary about a racist group in Denmark which included footage of members of the group making highly racist statements. The European Court found that the conviction was a breach of Jersild's right to freedom of expression. An important factor was that he had made the documentary with the objective of exposing racism in Denmark and generating discussion about it, rather than to promote racism. As the Court stated:

> [A]n important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.[12]

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[9] General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 50.
[10] 7 December 1976, Application No. 5493/72, para. 49.
[11] 22 August 1994, Application No. 15890/89.
[12] *Ibid.*, para. 31.

The Court held that the purpose was quite clearly not to promote racism but, on the contrary, to expose and analyse it.[13] In the absence of racist intent, the conviction represented a breach of the right to freedom of expression.

Second, "hatred", as used in Article 20(2), should be understood as a very strong emotion, which goes beyond simple racism or stereotyping to encompass very strong feelings against a group. Unfortunately, this term has neither been defined in international treaties nor clarified by international courts. As the UN High Commissioner for Human Rights noted:

> [T]he implementation of the [rules on incitement to hatred] is weak, partly because of lack of clarity on key elements of the law such as the definition of incitement, hatred and hate speech.[14]

According to the *Camden Principles on Freedom of Expression and Equality*, which were agreed during a series of expert workshops, hatred should be defined as "a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group".[15]

Some academics have sought to draw the line between hate speech and merely offensive speech by distinguishing between expression targeting ideas, including offensive expression, which is protected, and abusive expression which targets human beings, which may not be protected.[16] In *Giniewski v. France*, the European Court of Human Rights seemed to support this approach, holding that imposing sanctions on speech which was not a gratuitous attack on religion but, rather, part of a clash of ideas ('débat d'idées') was a breach of the right to freedom of expression.[17]

Third, it is only expressive content which leads to certain proscribed results that is covered by Article 20(2), specifically "discrimination, hostility or violence". The scope of violence and discrimination are reasonably clear and these notions are normally defined in national law. Furthermore, it is clear when these harms actually result, because they are observable phenomena. "Hostility", on the other hand, is a state of mind which cannot, at least directly, be observed. The idea here is that society should not wait for matters to degenerate into violence or discrimination before action is taken; if hatred is created, it will inevitably lead to tangible results at some point. It is not clear why the term "hostility" was used here, rather than the relatively clearer and more evidently

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[13] Para. 33.
[14] Study of the United Nations High Commissioner for Human Rights compiling existing legislations and jurisprudence concerning defamation of and contempt for religions, UN Doc. A/HRC/9/25, 5 September 2008, para. 24.
[15] Article 19, *The Camden Principles on Freedom of Expression and Equality*, (London: Article 19, 2009). Available at: http://www.refworld.org/docid/4b5826fd2.html.
[16] See, for example, Gaudreault-DesBiens, J., "From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" (2000) 46 *McGill Law Journal* 121, p. 135.
[17] 31 January 2006, Application No. 64016/00, para. 50.

strong term "hatred". It might have been simply to avoid repetition. Regardless, the rationale described above for ascribing strong values to "hatred" applies equally to the notion of "hostility".

Fourth, the statements must represent "incitement" to the proscribed results. International courts have looked at a number of factors when assessing whether incitement is present, focusing on the nexus between the statements and the proscribed result, and issues such as causation and context.

Incitement to something is not the same thing as actually causing it, and international courts have often focused on whether the statements created a risk of the proscribed results occurring. Thus, in *Erbakan v. Turkey*, a hate speech case, the European Court of Human Rights found a breach of the right to freedom of expression, stating:

> [I]t was not established that at the time of the prosecution of the applicant, the impugned statements created an "actual risk" and an "imminent" danger for society ... or that they were likely to do so.[18]

In the *Nahimana* case, mentioned above, the International Criminal Tribunal for Rwanda noted that, in hate speech cases, international courts often do not look at the matter from a direct causal perspective: "Rather, the question considered is what the likely impact might be, recognizing that causation in this context might be relatively indirect."[19]

In *Faurisson v. France*, another hate speech case, the HRC noted that, based on the facts of the case, the impugned statements "were of a nature as to raise or strengthen anti-Semitic feelings".[20] However, as the concurring opinion by Evatt, Kretzmer and Klein noted, the law itself was overbroad inasmuch as it did not specifically require a "tendency [on the part] of the publication to incite to anti-Semitism."[21] In a series of cases involving sanctions being imposed on hate speech which were rejected by the European Commission and Court of Human Rights as inadmissible, the focus was on impact.[22] In some cases, the Commission or Court referred to the likelihood of the impugned

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[18] *Erbakan v. Turkey*, 6 July 2006, Application No. 59405/00, para. 68. Unofficial translation from the original French: "il n'est pas établi qu'au moment de l'engagement des poursuites à l'encontre du requérant, le discours incriminé engendrait « un risque actuel » et un danger « imminent » pour la société (paragraphe 48 ci-dessus) ou il était susceptible de l'être.

[19] Note 5, para. 1007.

[20] 8 November 1986, Communication No. 550/1993, para. 9.6.

[21] Para. 9. On the facts of that particular case, however, the statements did incite anti-Semitism. See para. 10.

[22] See, for example, *Glimmerveen and Hagenbeek v. Netherlands*, 11 October 1979, Application No. 8406/78; *B.H., M.W., H.P. and G.K. v. Austria*, 12 October 1989, Application No. 12774/87; *Kühnen v. Germany*, 12 May 1988, Application No. 12194/86; *Ochensberger v. Austria*, 2 September 1994, Application No. 21318/93; *Remer v. Germany*, 6 September 1995, Application No. 25096/94; and *Garaudy v. France*, 7 July 2003, Application No. 65831/01.

statements fostering anti-Semitism,[23] while in others the negative impact of the statements on the underlying Convention objectives of justice and peace was noted.[24]

Context is clearly of the greatest importance in assessing whether particular statements are likely to incite to genocide or hatred, as it may well have a bearing on intent and/or causation. In *Faurisson*, for example, the HRC noted a statement by the "then Minister of Justice, which characterized the denial of the existence of the Holocaust as the principal vehicle for anti-Semitism." Similarly, in *Ross v. Canada*, the HRC, in line with decisions at the national level, was very sensitive to the contextual fact that the author of the racist statements had been a teacher:

> In the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students.[25]

In two cases from Turkey, the European Court distinguished otherwise arguably similar statements on the basis of context. In *Zana v. Turkey*, the Court upheld a conviction for having "defended an act punishable by law as a serious crime" and "endangering public safety",[26] in part based on contextual factors such as the fact that the applicant was a former major of a town in south-east Turkey and that the statements "coincided with murderous attacks" in the area.[27] In *Incal v. Turkey*, the Court found a breach of the right to freedom of expression stating that although it was "prepared to take into account the background to the cases submitted to it … the circumstances of the present case are not comparable to those found in the *Zana* case. Here the Court does not discern anything which would warrant the conclusion that Mr Incal was in any way responsible for the problems of terrorism in Turkey, and more specifically in İzmir."[28] [references in the original have been omitted]

It is clearly important, when assessing whether or not incitement is present, to look for a causal connection between the hate (or risk thereof) and the impugned statement. Where there is a general context of hatred, there are often many contributing factors, such as inequality, unemployment and other social problems. Speech should only be deemed to be inciting where it is specifically and directly shown to have increased the risk of hatred.

Fifth, the hatred must focus on certain grounds or characteristics. Article 20(2) limits this to "national, racial or religious" characteristics but many countries extend this to cover other analogous grounds, usually based on immutability (i.e. characteristics that one cannot or cannot easily change) and historical disadvantage. Some common grounds include colour, ethnicity, social origin, gender, disability and sexual orientation.

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[23] See *Kühnen* and *Garaudy*, note 22.
[24] See *Remer* and *Garaudy*, note 22; and *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v. Germany*, 29 November 1995, Application No. 25992/94.
[25] 18 October 2000, Communication No. 736/1997, para. 11.6.
[26] *Zana v. Turkey*, 25 November 1997, Application No. 18954/91, para. 26.
[27] *Ibid.*, para. 59. See generally paras. 58-60.
[28] 9 June 1998, Application No. 22678/93, p ara. 58.

Generally speaking, attacks based on political affiliation, no matter how strident, do not qualify as hate speech, partly because political affiliation is not an immutable quality the way for example one's race is, but also due to the importance of facilitating robust political debate and the need to avoid creating a chilling effect on this vital area of public discourse.

A very useful elaboration of these and other conditions for speech to qualify as hate speech is found in the *Joint Statement on Racism and the Media* which was issued in 2001 by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. The Joint Statement calls for hate speech laws to be clear and narrowly defined, and to be applied by an independent body in a manner which is neither arbitrary nor discriminatory and which incorporates safeguards against abuse. The Joint Statement further states:

> - no one should be penalized for statements which are true;
> - no one should be penalized for the dissemination of "hate speech" unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
> - the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
> - no one should be subject to prior censorship; and
> - any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.[29]

For its part, the OSCE has tried to tread a careful line between calling for the media to combat discrimination and intolerance and manifesting respect for freedom of expression. An important statement in this regard can be found in paragraph 37 of the OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century which states, in part:

> While fully respecting freedom of expression, the OSCE will strive to combat hate crime which can be fuelled by racist, xenophobic and anti-Semitic propaganda on the Internet.[30]

The OSCE has also focused on the positive role of the media in this space and the importance of self-regulatory initiatives with the Ministerial Council stating, in Decision No. 13/06 on Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding, that it:

> Recognizes the essential role that the free and independent media can play in democratic societies and the strong influence it can have in countering or exacerbating misperceptions, prejudices and in that sense encourages the adoption of voluntary professional standards by journalists, media self-regulation and other appropriate mechanisms for ensuring increased professionalism, accuracy and adherence to ethical standards among journalists.[31]

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[29] The Joint Statement is available at: http://www.osce.org/fom/40120?download=true.
[30] Maastricht 2003. Available at: http://www.osce.org/mc/17504?download=true.
[31] MC.DEC/13/06, Brussels, 5 December 2006, paragraph 9. Available at: http://www.osce.org/mc/23114?download=true.

4.2 Constitutional Provisions

The main constitutional provisions that are relevant to the question of balancing regulation of hate speech with freedom of expression are those relating to equality and to freedom of expression. The 1996 Constitution of Ukraine includes a number of provisions relating to equality. In a very general way, Article 15 provides: "Social life in Ukraine is based on the principles of political, economic and ideological diversity."

Article 21, the first in the Chapter on Human and Citizens' Rights, Freedoms and Duties, states: "All people are free and equal in their dignity and rights." The main provision in that chapter on equality is Article 24, which states, in part:

> Citizens have equal constitutional rights and freedoms and are equal before the law.
>
> There shall be no privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics.
>
> Equality of the rights of women and men is ensured.

For its part, freedom of expression is protected in Article 34, as follows:

> Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.
>
> Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.
>
> The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.

The scope of constitutional rights in many countries needs to be understood in light of the way these rights have been interpreted by the courts. It is beyond the scope of this Analysis to provide a deep assessment of these constitutional provisions based on court interpretation. However, a few comments based on the text are made below.

In terms of Article 24, the idea that there should be no "privileges or restrictions" at all based on these grounds could be problematical if this were interpreted broadly. For example, this would seem to justify a claim that progressive taxation (i.e. taxing the rich at a higher rate than the poor) was an unacceptable "restriction" based on "property status". The same might be argued in relation to special benefits allocated to those living in difficult, more remote locations (here on the basis of "place of residence"). In contrast, many democratic constitutions provide for equality before the law and prohibit only discrimination rather than the much wider idea of allocating any privileges or restrictions.

Second, the scope of the prohibited grounds for privileges and restrictions is very broad. It includes not only relatively immutable characteristics but also matters of choice/change, such as political beliefs, property status and place of residence. This is appropriate if it is understood as being limited only to constitutional rights and freedoms but not, as shown by the examples above, if it extends to all privileges and restrictions. Furthermore, it ends with an open reference to "other characteristics". Presumably the courts in Ukraine have placed some constraints on this, since otherwise it could be open to any sort of claim. In Canada, in contrast, the analogous provision, in section 15(1) of the Constitution Act, 1982,[32] prohibits discrimination "in particular" based on a list of stated grounds. This has allowed the courts to expand the list – for example to include sexual orientation – but also requires additional grounds to be analogous to those listed (for example to categories or groups which have historically been disadvantaged).

In terms of Article 34, protecting freedom of expression, this lacks some of the characteristics spelt out in Article 19 of the ICCPR, such as the freedom to "seek, receive and impart" information, "of all kinds", "regardless of frontiers" and through any media. However, this is common for many constitutional guarantees of freedom of expression, and these features may relatively easily be read in by courts.

Perhaps more serious is the test for restrictions. This includes the "provided by law" part of the international test for such restrictions. The list of interests for restricting the right goes beyond what is envisaged in Article 19(3) of the ICCPR, although it is almost identical to the list found in Article 10(2) of the ECHR. However, the standard of protection seems to be much lower, with restrictions allowed "in the interests of" the protected values rather than where "necessary" for (Article 19(3) of the ICCPR) or where "necessary in a democratic society" for (Article 10(2) of the ECHR) such protection. Much here depends on how the courts have understood the phrase "in the interests of", but it would appear to provide for a far less freedom of expression protective balancing standard than is established under international law.

Recommendations:

- Consideration should be given, in due course, to adding a reference to the idea of discrimination in Article 24 of the Constitution of Ukraine, rather than prohibiting all privileges and restrictions. Alternately, it could be made clear that the scope of this provision is limited to constitutionally protected rights and freedoms.
- Similarly, consideration should be given to limiting the grounds of discrimination in Article 24 to relatively more immutable characteristics and allowing only for additional grounds which are analogous to those listed.
- Consideration should also be given to introducing a more stringent test for restricting freedom of expression based on the idea of "necessity" or a similar concept, rather than allowing this whenever it would be "in the interests of" protecting the listed values.

[32] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

4.3 Criminal Liability

A number of provisions in Ukrainian law provide for criminal responsibility for hate speech or related speech. The most direct is found in Article 161 of the Criminal Code, which states, in part:

> 1. Intentional actions inciting national, racial or religious hostility and hatred, humiliation of national honor and dignity, or the insult of citizens' feelings in respect to their religious convictions, and also any direct or indirect restriction of rights, or granting direct or indirect privileges to citizens based on race, color of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics, -
> shall be punishable by a fine of 200 to 500 tax-free minimum incomes, or restraint of liberty for a term up to five years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

According to sub-Article (2), where such acts are accompanied by violence, deception or threats, or are committed by an official, the fines are increased and the restraint of liberty shall be for between two and five years. According to sub-Article (3), acts falling within the scope of sub-Article (2) shall, if they are done by an organised group of persons or they cause grave consequences, attract a penalty of imprisonment of between five and eight years.

According to Article 300, the importation into Ukraine of works for sale or distribution, or motion pictures or films, where those works or films "propagandize violence and cruelty, racial, national or religious intolerance and discrimination" shall attract a variety of penalties including fines, arrest, restraint of liberty and forfeiture of the offending materials. The penalties increase where these acts are committed repeatedly, by conspiracy among a group of persons or with the forcible involvement of minors.

A review of criminal cases under these provisions over the last ten years (i.e. from 2007) reveals some interesting patterns.[33] First, of the 11 discrete cases under Article 161, all date from 2010 or later. Five of these cases, including five of the six most recent cases, involve attacks on the religious group Jehovah's Witnesses. Furthermore, in all of these cases, the defendant engaged in some form of violence, in most cases leading to minor bodily harm for the victims. Obviously hate speech cases which involve violence perpetrated directly by the offender represent a more serious class of cases. Two of the cases appear to be general attacks on Jews and other religious/racial groups (Muslims, Africans), while three appear to be based on expressions of Russian superiority over other groups, including Tatars, and one is indeterminate in nature. One case was dismissed for falling outside of the statute of limitations, another was closed when the person expressed "effective repentance" and in a third the victims dropped the charges when the case was sent back to the trial court. In the eight other cases, the defendants were found guilty.

[33] Authored by Oleksandr Bourmagin in Ukraine. Available at: http://www.osce.org/project-coordinator-in-ukraine/366401.

In terms of Article 300, all six discrete cases date from 2013 or later. Fully five of the six involve the distribution of the books Mein Kampf and/or The Blow of the Russian Gods. The former is of course German dictator Adolf Hitler's notorious political treatise while the latter, by Vladimir Istarhov, is emblematic of anti-Semitism in Former Soviet Union countries. The other case involved the posting of photos and videos on the Russian social network VK.com which incited hatred against Jews, African-Americans and "the peoples that predominantly inhabit the Caucasus". The defendants were found to be guilty in all six cases.

There are at least three other forms of criminal prohibition on hate speech or related forms of speech in Ukrainian law. The first is found in the 2012 Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine.[34] Discrimination is defined broadly in Article 1(1)(2) of the Law to cover cases where persons, on the basis of a long and open list of grounds (ending with "other features"), suffer limitations on the rights recognised in the Law. Article 4 includes a list of the prohibited forms of discrimination, which include various services (education, housing and general access to goods and services), labour relations, public and political activity and "other spheres of public life". Article 5 defines incitement to discrimination as a form of discrimination, which is then prohibited by Article 6. For its part, Article 1(1)(4) defines "instigation to discrimination" (which is presumably the same as incitement) as "directions, instructions or appeals to discrimination".

In terms of enforcement, the Ukrainian Parliament Commissioner for Human Rights is given a range of roles, including to lodge appeals with the courts (see Article 10 of the Law). Article 14 gives anyone who feels he or she has suffered from discrimination the right, among other things, to appeal to the courts, while Article 16 provides for "civil, administrative and criminal responsibility" for those who breach the law. Article 15 additionally grants a "right to compensation of material and moral damages" to those who have suffered from discrimination.

Second, Article 2 of the 2003 Law of Ukraine on Protection of Public Morality[35] prohibits propaganda for "war, race and religious hostility" or "fanaticism, blasphemy, disrespect for national and religious shrines", as well as mocking others for physical defects, insanity or age. Article 4 recognises a defence or limitation of the Law by stating that it "does not extend to production or distribution of documentary materials, works of art of literature, art and culture which are recognized as classical or world art, on turnover of scientific, popular scientific, publicistic, educational materials concerning floor and sex and products of sexual nature of medical appointment."

Article 15 grants a number of bodies the power to control observance of the Law, including the Ministry of Internal Affairs, the police, the State Committee for Television and Broadcasting of Ukraine (the leading executive body – it reports to the Cabinet – which is responsible for broadcasting policy) and the National Council of Ukraine on

[34] Verkhovna Rada Journal (VRJ), 2013, No. 32, art. 412.
[35] November 20, 2003, No. 1296-IV.

Television and Broadcasting (the broadcast regulator). According to Article 21, violation of the law may lead to "civil, disciplinary, administrative or criminal liability".

Finally, Article 46 of the 1992 Law of Ukraine on Information[36] states:

> Information shall not be used to call for overthrow of constitutional system, territorial disintegration of Ukraine, propaganda of war, violence, brutality, incitement to race, national, religious hostility, terrorist attacks, encroach on rights and freedoms of an individual.

According to Article 47, violation of the law entails "disciplinary, civil and legal, administrative or criminal responsibility", while Article 49 provides for compensation for material or moral damages.

Different democracies have taken different approaches to the criminal regulation of hate speech. As an example, the main provision on incitement to hated in Canadian law is found at section 319(2) of the Criminal Code, which states:

> Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of [an offence].[37]

An identifiable group is defined in section 318(4) as "any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation". Two important limitations apply to the use of this provision. First, pursuant to section 319(6), no prosecution may be launched without the consent of the Attorney General. This has resulted in very few criminal cases having been brought under this provision.

Second, section 319(3) contains four important defences to a charge of hate speech, so that no person may be convicted:

> (a) if he establishes that the statements communicated were true;
> (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
> (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
> (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

In France, the main criminal rules on incitement to hatred are found in the Law of 29 July 1881 on freedom of the press (Loi du 29 juillet 1881 sur la liberté de la presse).[38] Within this, the main provision is Article 24bis, initially inserted via Law No. 90-615 of 13 July 1990 aiming to suppress any racist, anti-Semitic or xenophobic act (Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe, popularly known as the Gayssot Act, after its sponsor).[39] This provision creates two offences. The

[36] Verkhovna Rada Journal (VRJ), 1992, N. 48, art. 650.
[37] Avaialble at: http://laws-lois.justice.gc.ca/eng/acts/C-46/.
[38] Available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722.
[39] Available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000532990.

first is to deny the existence of crimes against humanity as defined in the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 (the Nuremburg Tribunal). The second is to deny, minimise or grossly trivialise the existence of a crime of genocide, another crime against humanity, a crime of enslavement or exploitation of person reduced to slavery or a war crime as defined in the Rome Statute of the International Criminal Court. It will immediately be clear that this is significantly broader than the Canadian rules and, as noted above, it has been criticised by the UN Human Rights Committee for this.[40]

According to Articles 32 and 33 of the same Law of 29 July 1881, defamation and insult against a person or a group of persons for belonging to or not belonging to an ethnic group, a nation, a race or a religion, or on the basis of their gender, sexual orientation, gender identity or disability is a crime and may also be pursued as a civil matter (or both).

The rules in the United Kingdom are somewhat complicated. Part III of the Public Order Act 1986[41] deals with racial hatred, while Part IIIA deals with hatred on religious grounds or grounds of sexual orientation. The former is defined as "hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins" (section 17), while the latter is defined as "hatred against a group of persons defined by reference to religious belief or lack of religious belief" (section 29A) or "hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both)" (section 29AB).

The main provision, in section 18(1) (with an analogous provision in section 29B(1)), defines the following offence:

> A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if— (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

An offence may be committed in either a public or private place, but private homes are excluded. Subsequent sections establish analogous, but slightly different, crimes for distributing materials in written form, via a play or through a recording or broadcasting, as well as for possession of offending material. In both cases, as in Canada, the consent of the Attorney General is needed to bring a prosecution.

Significantly, the following protections for freedom of expression apply to religion and sexual orientation (but there is nothing along these lines for race):

> Section 29J. Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief

[40] See *Faurisson v. France*, 8 November 1986, Communication No. 550/1993.
[41] Available at: https://www.legislation.gov.uk/ukpga/1986/64.

> system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.
>
> Section 29JA (1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.
>
> (2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.

The main hate speech provision in German law is found at Section 130 of the Criminal Code (Strafgesetzbuch),[42] with sub-section (1) providing:

> Whosoever, in a manner capable of disturbing the public peace
>
> 1. incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or
> 2. assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population,
>
> shall be liable to imprisonment from three months to five years.

Sub-section 2 prohibits the production, dissemination or display of written materials which incite to hatred. Sub-section 3 makes it a crime publicly to approve, deny or downplay an act committed during the period of National Socialism rule of the kind described in Article 6(1) of Germany's Code of Crimes Against International Law[43] (essentially genocide) in a manner capable of disturbing the public peace. Finally, sub-section 4 makes it a crime to disturb the public peace "in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule".

Once again, we see a broader definition of hate speech in terms of its scope – albeit narrower inasmuch as it does not extend to gender or sexual orientation – more along the lines of the rules in France. In Germany, understandably, the focus is very much on the period of National Socialist rule and the crimes committed during that time.

Coming back to the Ukrainian provisions, a first general point is that it is very unhelpful to have different and yet largely overlapping provisions which purport to create criminal liability for hate speech. Given that the rules each establish different standards and conditions, this creates uncertainty about what is prohibited and potentially gives rise to a range of different rules regarding prohibited speech in this area. It would be preferable simply to have one set of criminal provisions on hate speech, ideally in the Criminal Code, while other laws might create civil and/or administrative liability. As an

[42] 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322. English translation used for this analysis is available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.
[43] Available at: http://www.iuscomp.org/gla/statutes/VoeStGB.pdf.

alternative, the standards and conditions in each of the laws should be made consistent, so as to limit uncertainty.

A second general point is that it is again unhelpful to combine, as most of the legal provisions cited above do, rules on hate speech in the same place as rules on other issues, such as insulting national dignity, generally promoting violence or war, overthrowing the constitutional system, or blasphemy. These are all very different issues and, to the extent that they are legitimate, they deserve to be dealt with separately in legislation, including as to limitations on the offences and defences.

This problem is exacerbated by the fact that at least some of the included prohibitions are not even legitimate. For example, speech should not be restricted to protect "national honour and dignity", whatever that may be, against humiliation. While defamation laws protecting individuals are found in all democracies, it is not legitimate to protect abstract notions such as national honour and dignity in this way.[44] It is also not legitimate to impose restrictions on speech to protect the feelings of religious observers or to prevent the showing of disrespect for religious icons and shrines (blasphemy laws), except where these are limited to protecting individuals against incitement to hatred against them based on their religion. In other words, while it is legitimate to protect individuals, religions as such should not be protected against criticism, even of a harsh and unfair nature. As the UN Human Rights Committee has stated:

> Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.[45]

Focusing now on the different provisions, all fail in one or another way to meet the standards for hate speech rules noted above. Article 161(1) of the Criminal Code refers to intentional actions inciting national, racial or religious hostility and hatred, as well as direct or indirect restrictions on rights (discrimination) based on various grounds. The term "intentional" in this provision appears to encompass the idea of intent, as required under international law. However, it is not entirely clear whether this intent goes merely to the action of disseminating the statements or to the specific desire to incite others to hatred. The latter is required under international law. The cases do not make it clear whether this specific form of intent was always present and proven. In particular, this does not always appear to have been the situation for the cases involving expressions of Russian superiority.

Article 161(1) includes a requirement of inciting "hostility and hatred" and, as such, it formally requires incitement of hatred. However, hostility is commonly understood as a far less intense emotion than hatred. Including it might encourage some cases to be brought where only an emotion falling short of hatred was created. Although 'hostility' is the term used in Article 20(2) of the ICCPR, it is still potentially problematical in national legislation. It would also be preferable if hatred was defined for purposes of this

[44] See the UN HRC's General Comment No. 34, note 9, paras. 38 and 47.
[45] *Ibid.*, para. 48.

provision in a manner that made it clear that it is an intense form of opprobrium against the target group. Once again, some of the cases seem to suggest that only a less intense form of dislike was at risk of being promoted.

Article 161(1) focuses on inciting to hatred or discrimination. Violence, also covered under international law, does not appear to be included. Although presumably incitement to violence generally is prohibited in the Criminal Code, the specific context of inciting to hate-based violence is different and it would be useful to include this here. In addition, as with the constitutional provisions on equality, the definition of discrimination in Article 161(1) is very broad, both as to the prohibited grounds (including "other characteristics") and as to its scope, namely any direct or indirect restriction on rights or granting any direct or indirect privilege. It may be noted that the Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine defines discrimination in a somewhat more precise and limited way, although it is also very broad in scope.

Although, by terms, Article 161(1) includes the term "incite", it is not clear either from the text or the cases whether this is interpreted in the relatively narrow way that international courts have done. Some of the cases seem to suggest that it is enough if the material is racist in nature, while in others the context – for example public statements before a large number of people – does appear to have been taken into account. While it is challenging to define 'incitement' precisely, it would be useful to at least set out some required elements in the law.

Moving now to Article 300, it is clear that it is much wider in scope, as regards hate speech, than Article 161(1). There is no specific reference to intent, although presumably courts do impose some form of *mens rea* or criminal intent requirement as a general principle of criminal responsibility.[46] As with Article 161(1), it should be made clear that this goes to the idea of inciting others to hatred. Instead of 'hatred', Article 300 refers to "intolerance", which is clearly a far less strident emotion. There is no requirement of incitation; instead, all that is required is to disseminate these ideas. This is a massive expansion of the scope of offence, since incitement is a key tool under international law for circumscribing the offence. On the other hand, the grounds listed in Article 300 are limited to the three recognised in Article 20(2) of the ICCPR, namely race, nationality and religion.

These problems with Article 300 clearly come out in the cases, which mostly relate to the dissemination of Mein Kampf and/or The Blow of the Russian Gods. While this activity might in some cases fall within the scope of Article 20(2) of the ICCPR, it may also be noted that Mein Kampf, at least, is almost required reading for certain historical investigations, such as the development of racist theories by Hitler. The cases appear to criminalise the mere distribution of these books without necessarily inquiring into whether this was part of an attempt to incite others to hatred.

[46] This requirement is found in the academic commentary to the Criminal Code. See: http://yurist-online.com/ukr/uslugi/yuristam/kodeks/024/297.php.

Neither Article 161(1) nor Article 300 appears to provide for any defences. As the *Joint Statement on Racism and the Media* makes clear, there should at a minimum be a defence of truth for charges of hate speech, so that statements which simply put forward accurate facts would not attract liability. The Joint Statement also calls for penalties to be proportionate. Here, the Ukrainian provisions seem to be more in line with international standards, with relatively modest fines and shorter periods of imprisonment which in practice have always been suspended during a period of probation (so that they would come into effect only in case of reoffending). The Law of Ukraine on Protection of Public Morality also recognises a defence for works of art, literature, science and culture, and this reflects better practice.

In the area of hate speech, the Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine focuses on incitement to discrimination, one of the grounds for hate speech under international law. The provision on incitement does not refer to any explicit intent requirement, contrary to international standards. Furthermore, it defines "incitement" far more broadly than is permitted under international law, including "directions, instructions or appeals to discrimination". It is clear that giving directions or instructions about how to do something is far broader than inciting others to do it, and this is even true of appeals to do something. As noted above, the grounds for discrimination under this Law are also very broad, including a general catchall of "other spheres of public life".

The rules on hate speech in the Law of Ukraine on Protection of Public Morality are far too broad to be acceptable as criminal prohibitions. Instead of the narrow notion of 'hatred', they refer to far more general ideas such as "religious hostility" and "mocking others". There does not appear to be any requirement of intent. In place of 'incitement', they refer to mere dissemination of material, showing disrespect or mocking others. Indeed, they do not even refer to a prohibited result – such as discrimination, violence and/or hatred – which might be incited to. They are, on the other hand, relatively limited in terms of grounds, focusing on race, religion, age and disability.

Finally, the hate speech rules in the Law of Ukraine on Information seem to be somewhat narrower. Although other parts of the relevant provision – Article 46 – are overbroad, the hate speech elements focus on incitement to racial, national or religious hostility. As with other such provisions, it is important that the terms "incitement" and "hostility" be defined narrowly so as to be in accordance with international standards and that an intent element be added.

Recommendations:

- Consideration should be given to removing the rules on criminal liability from all but one of the four laws canvassed in this section, ideally the Criminal Code. As an alternative, the standards and conditions for penal liability in each of the laws should be made consistent so as to limit uncertainty in this area.
- Criminal rules on hate speech should be isolated from criminal rules prohibiting other forms of speech, and located in provisions which focus only on hate speech.

- Article 161(1) of the Criminal Code should make it clear that the requisite intent goes to the issue of inciting hatred and not simply the act of disseminating statements (which may incite to hatred).
- Consideration should be given to removing the reference to "hostility" from Article 161(1), limiting it to cases of incitement to hatred, and consideration should be given to defining "hatred" with the aim of making it clear that it is an intense emotion.
- Incitement to violence should be added to Article 161(1) while the scope of discrimination covered should be more limited both in terms of the grounds of discrimination (to focus more on essentially immutable characteristics) and the nature of the discrimination (to focus on specific rights and services).
- The nature of "incitement" for purposes of Article 161(1) should be clarified, ideally by incorporating at least key elements of a definition into the Criminal Code.
- Article 300 of the Criminal Code should incorporate a requirement of intent, should be based on the idea of hatred rather than mere "intolerance", and should include a requirement of incitement, rather than mere dissemination of the content.
- Both Article 161(1) and Article 300 should provide for a defence of truth and consideration should be given to including defences for works of art, literature, science and culture.
- If a criminal prohibition on incitement to discrimination is to be retained in the Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine it should incorporate an appropriate intent requirement and limit incitement to its scope under international law, and the grounds for discrimination should either be more limited or spelt out more clearly.
- If the hate speech rules in the Law of Ukraine on Protection of Public Morality are to be retained, they should be completely revised so as to be limited to incitement, as understood under international law, to the narrow results of hatred (understood as an extreme emotion), discrimination and/or violence, and to include a clear requirement of intent to incite.
- Once again, if the hate speech rules in the Law of Ukraine on Information are to be retained, clear and narrow definitions of "incitement" and "hostility" should be added, along with a requirement of intent.

4.4 Civil Liability

It is clearly better practice to provide for civil remedies in the context of hate speech. The *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, adopted after a lengthy international process, describes three possible areas for action:

> In terms of general principles, a clear distinction should be made between three types of expression: expression that constitutes a criminal offence; expression that is not criminally punishable but may justify a civil suit or administrative sanctions; expression that does not

> give rise to criminal, civil or administrative sanctions but still raises a concern in terms of tolerance, civility and respect for the rights of others.[47]

Within Europe, the European Commission Against Racism and Intolerance (ECRI) has adopted a policy recommendation on legislation to combat racism which spells out quite clearly what they consider different branches of law should cover in this area. While they recommend that certain forms of hate speech should be subject to criminal sanction, they also recognise an important role for the civil and administrative law.[48] A Recommendation of the Committee of Ministers of the Council of Europe calls on States to establish a legal framework consisting of civil, criminal and administrative law provisions on hate speech.[49] The Recommendation specifically refers to using the civil law to provide compensation and a right of reply or retraction.[50]

Three of the laws described above – namely the Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine, the Law of Ukraine on Protection of Public Morality and the Law of Ukraine on Information – provide for civil as well as criminal liability for hate speech. Of these, the first refers specifically to the idea of compensation for material and moral damages for breach of its provisions, noting that the procedures to be followed for this are set out in the "Civil Code and other laws of Ukraine" (Article 15).

For its part, the Law on Morality simply provides that violation of its provisions "attracts civil, disciplinary, administrative or criminal liability according to the current legislation of Ukraine" (Article 21). However, it also provides that control over implementation of the law shall vest, among others, in the National Council of Ukraine on Television and Broadcasting (Article 15).

The Law on Information also provides for compensation for material and moral damages, if necessary pursuant to a court action, but does not stipulate the procedures for this (Article 49). Article 47, setting out the responsibility for violation of the legislation, sets out a number of grounds of responsibility, but these do not include incitement to hatred. Article 48 does provide for a procedure for appealing against the Article 47 breaches, namely first to higher level authorities and then to the courts.

Given that the civil law is a less intrusive instrument for regulating speech than the criminal law, the five conditions for criminal restrictions outlined in the International Standards part of this Analysis do not necessarily apply in the same way. For example, intent is a key requirement for a criminal conviction – and international courts have made it clear that in hate speech cases this should be an intention to incite to hatred – but this is not the same in civil cases.

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[47] Paragraph 20. Available at: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.
[48] General Policy Recommendation N° 7: On National Legislation to Combat Racism and Racial Discrimination, adopted 13 December 2002.
[49] Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on 'Hate Speech', 30 October 1997, Appendix, Principle 2.
[50] *Ibid.*

At the same time, civil penalties can exert a strong chilling effect on freedom of expression, as demonstrated by overbroad civil defamation laws in many countries. To prevent systems of civil redress from being used to harass those who discuss controversial issues in society, certain limits need to be placed on the use of the civil law in this context. First, it should be limited to cases where the individual in question has suffered directly and personally from the impugned speech. Otherwise, the risk of abuse is simply too high. Anyone associated with a group that could claim to be the target of hate speech could bring a case.

Second, this also means that only incitement to violence or discrimination would be covered, since no one could credibly claim to be directly affected by hatred alone. In other words, some act would need to have been taken to the detriment of the claimant, upon which a claim for damages could rest.

Finally, the requirement of incitement or, to put it differently for purposes of the civil law context, the existence of a clear chain of causality between the impugned statements and the resulting violence or discrimination, would need to be shown. In other words, a defendant would only bear civil liability where his or her words were shown to be responsible, in the causal sense of that word, for the violent or discriminatory suffering of the plaintiff.

Looked at in this way, several of the criticisms noted above in relation to these three laws, as well as some new criticisms, are apposite. As was noted in relation to the criminal law, there is no need for overlapping but different provisions on this. One set of rules on civil compensation for hate speech is enough, and the Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine seems the most appropriate candidate for this given that it is more defined and also clearer in terms of creating civil liability.

That Law does not clarify the conditions upon which one might claim compensation for incitement to discrimination and, in particular, it does not make it clear that a plaintiff would have needed to have suffered directly from discrimination to make out a case. This might be derived to some extent from general principles of civil law, but it would be preferable for it to be made explicit. As noted above, this Law defines incitement far too broadly for purposes of the criminal law and this remains problematical in the civil law context because it does not require causality or a sufficiently close nexus between the speech and the prohibited result. Finally, the grounds for discrimination under this law are unduly broad.

As in the criminal law context, the Law of Ukraine on Protection of Public Morality seems particularly ill-suited to serve as the basis for a civil claim of compensation for hate speech, among other things because it defines hate speech far too broadly. If a civil compensation regime were to be envisaged under this Law, it would need to be limited to cases where an individual had suffered direct harm based on incitement to discrimination or violence.

The Law of Ukraine on Information also seems poorly suited to underpin a civil compensation regime for hate speech, although it is at least more limited in scope than the Law of Ukraine on Protection of Public Morality. For it to serve this purpose, the conditions for a civil claim – namely having directly suffered from discrimination or violence – would need to be spelt out and incitement would need to be defined clearly and narrowly.

Recommendations:

- Ideally, only one regime for providing for civil redress for hate speech should be retained in Ukrainian law, preferably in the Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine.
- If the civil law provisions are to be retained in the Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine, compensation should be provided for hate speech only where individuals have suffered directly and where clear causality or a link between the speech and the discrimination and/or violence is shown. In addition, consideration should be given to limiting the grounds for discrimination, at least for purposes of this sort of compensation claim.
- If the Law of Ukraine on Protection of Public Morality is to provide a basis for civil liability for hate speech, its provisions in this area would need to be completely revised so as to be limited to cases where an individual had suffered direct harm based on incitement to discrimination or violence.
- If individuals are to be able to bring civil cases for compensation based on the Law of Ukraine on Information, it should limit those eligible to bring a case to those who have suffered direct damages and define incitement clearly.

4.5 Media Professionalism

Ukrainian law regulates both the print and broadcast media for hate speech. Article 3 of the Law of Ukraine on Print Media (Press) in Ukraine[51] provides: "Print media in Ukraine shall not be used for: … incitement of ethnic, national and religious hatred". Article 18 of the same law provides for the termination of a print media outlet for breach, among other things, of this provision. Similarly, Article 6(2) of the Law of Ukraine on Television and Radio Broadcasting[52] prohibits broadcasters from doing anything "to promote the idea of exclusivity, superiority or inferiority of persons on the grounds of their religious beliefs, ideology, national or ethnic affiliation, physical or material status or social origin". Once again, according to Article 37(5)(c) of this Law, the regulator, the National Council of Ukraine on Television and Broadcasting, may bring an action before the courts seeking revocation of the licence where a broadcaster fails to comply with its orders to eliminate violations of the legislation. Finally, insofar as the Law of Ukraine on Protection of Public Morality provides for the National Council of Ukraine on Television

[51] Verkhovna Rada Journal (VRJ), 1993, N. 1, p. 1.
[52] Verkhovna Rada Journal (VRJ), 2006, N. 18, p. 155.

and Broadcasting to act as an enforcement agency, it could also be deemed to establish a system of media regulation.

The restriction defined for the print media is essentially in line with international standards on criminal hate speech inasmuch as it is limited to incitement to hatred based on a few grounds. It is not clear whether termination of a print media outlet, even for the serious matter of publishing hate speech, is legitimate. The individuals within the publication who were responsible for this would all be subject to criminal due process for their actions, and this seems a more appropriate way to address the matter than cancelling the whole publication.

It is quite different with broadcasters. Here, the standards set out in the law are vastly lower than for the print media, and the mere promotion of exclusivity, superiority or inferiority is prohibited. Given this, the sanction, revocation of the licence, is quite extreme. However, the National Council may only engage this provision after it has already ordered the broadcaster to cease violating the law.

Article 37 of the Print Media Law provides for a right of reply (rebuttal) for material about a person, legal entity or government authority that is "wrong or degrading", which would appear to cover cases of hate speech or even racist speech. Similarly, Article 64 of the Broadcasting Law provides for a right of retraction for content which "does not represent the facts and/or is degrading to honour and dignity of the person", while Article 65 provides for a right of reply for content which "does not represent the facts or violates any rights or legitimate interests of such person". It is beyond the scope of this Analysis to delve into an analysis of these rights, although their scope appears to be unduly broad, covering not only content which is incorrect or breaches the rights of the claimant, but also content which is merely degrading (even if it is true). If a media outlet fails to grant these rights, the claimant may seek redress through the courts.

What appears to be missing, or largely missing, in Ukraine is a complaints driven system for promoting professionalism, including in the area of hate or even racist speech.[53] In democracies around the world, there are different types of complaints systems for the media, ranging from self-regulatory systems (which are run by the media themselves, without any legal backing) to co-regulatory systems (which are run largely by the media but which are set up by law) to statutory systems (which are established by law and which are not dominated by the media).[54] Self- and co-regulatory systems are generally employed for the print media while co-regulatory or statutory systems are more common for the broadcast media.

[53] This is called for in the Rabat Plan of Action, paragraph 58. Available at: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.
[54] See Centre for Law and Democracy (CLD) and Southeast Asian Press Alliance (SEAPA), *Myanmar: Guidance for Journalists on Promoting an Empowering Press Law*, 2012, pp. 2-3. Available at: http://www.law-democracy.org/live/wp-content/uploads/2012/08/Myanmar-Guidance-on-PressLaw.English5.pdf.

The key characteristics of these systems are as follows. They apply to media outlets rather than to individual journalists, on the grounds that it is the collective media decision to publish information that causes harm, rather than action by just one or another individual journalist. They assess complaints against an established code of conduct or code of practice which sets minimum standards which media outlets are expected to observe (as opposed to a code of ethics which sets ethical standards to which journalists generally aspire). The assessment of complaints respects basic due process rules (for example by allowing all parties to be heard, whether in person or via written evidence). And they involve only limited sanctions for breach – such as acknowledgement of the wrong and the publication of the decision of the oversight body – on the basis that the goal is to highlight appropriate standards rather than to impose punitive measures on offenders.

Almost all of the codes applied by these sorts of complaints bodies include rules on hate speech and racist speech. As has been noted by commentators, whereas the rules found in these codes for most issues – such as protection of privacy and defamation – are fairly close in nature to the legal standards, in almost all cases the codes include far more stringent rules on hate speech. As has been noted: "Codes of conduct, however, whether administrative or self-regulatory, often go far beyond the 'hate speech' standards of Article 20(2)."[55]

For example, regulations under Canada's Broadcasting Act prohibit broadcasters from broadcasting "any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability".[56] These rules are applied by the Canadian Radio-television and Telecommunications Commission (CRTC) which can impose a range of sanctions, starting with a warning but also including fines for more serious breaches.

Similarly, the Broadcasting Authority of Ireland's Code of Programme Standards[57] states, in Principle 5: Respect for Persons and Groups in Society:

> The manner in which persons and groups in society are represented shall be appropriate and justifiable and shall not prejudice respect for human dignity. Robust debate is permissible as is the challenging of assumptions but programme material shall not stigmatise, support or condone discrimination or incite hatred against persons or groups in society in particular on the basis of age, gender, marital status, membership of the Traveller community, family status, sexual orientation, disability, race, nationality, ethnicity or religion.

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[55] Toby Mendel, "Reflections on Media Self-Regulation: Lessons for Historians" (2011) 59-60 *Storia della Storiografia*, 50-65, p. 57.

[56] Television Broadcasting Regulations, 1987, SOR/87-49, clause 5(1)(b), amended 1 September 2017. Available at: laws-lois.justice.gc.ca/eng/regulations/SOR-87-49/FullText.html. Note that Canada's radio broadcasting regulations contain a substantially identical prohibition.

[57] Available at: http://www.bai.ie/en/codes-standards/#al-block-4.

In the United Kingdom, the Independent Press Standards Organisation, a voluntary self-regulatory body for newspapers and magazines, has an *Editors' Code of Practice* which states:

> Discrimination
> i) The press must avoid prejudicial or pejorative reference to an individual's race, colour, religion, sex, gender identity, sexual orientation or to any physical or mental illness or disability.
> ii) Details of an individual's race, colour, religion, gender identity, sexual orientation, physical or mental illness or disability must be avoided unless genuinely relevant to the story.[58]

It is immediately clear that all of these standards are far more restrictive than the relatively narrow rules set out in Article 20(2) of the ICCPR. The reason rules like this are generally not considered to represent a breach of the right to freedom of expression is two-fold. First, the sanctions for breach, as noted above, are very light, so the impact on freedom of expression is far less than would be the case for a criminal or even civil sanction. Second, they apply only to the media, normally only the legacy media, which is both expected to operate in a professional manner and wields enormous power in society.

Ukraine does have two independent, non-official media complaints bodies that issue decisions about media professionalism, namely the Journalist Ethics Commission, which addresses ethical issues, and the Independent Media Council, which decides on cases involving the media. Neither, however, appears to fully conform to the standards noted above for media complaints bodies. And neither is an official body.

Recommendations:

- Consideration should be give to removing the possibility of terminating a print media outlet for content restrictions and, instead, to address this through general (i.e. Criminal Code) rules relating to content.
- The scope of the rights to rebuttal, reply and retraction in the print and broadcast media laws should be reviewed to bring them more fully into line with international standards.
- Relevant stakeholders in Ukraine – including media outlets, senior journalists, non-governmental organisations working on media issues and the government – should engage in a process of consultation with a view to establishing an effective complaints system or systems for the media in line with the standards outlined above.

[58] Available at: https://www.ipso.co.uk/editors-code-of-practice/.