

ICCPR List of Issues Joint Submission to the UN Human Rights Committee prior to the Adoption of the List of Issues for the review of Ukraine

Violations of Confidentiality of Journalistic Sources and Inadequate Protection for Whistleblowers

I. Reporting Organization(s)

This submission is made by Freedom House, an organization based in the United States, and the following media and human rights organizations based in Ukraine: NGO "Institute of Mass Information," NGO "Human Rights Platform," and NGO "ZMINA. Human Rights Center."

II. Issue Summary

In recent years, civil society organizations have documented a number of growing threats and obstacles to investigative journalists in Ukraine, including surveillance and other efforts aimed at revealing journalists' confidential sources. These developments imperil the important work of investigative journalists in a democratic society and undermine journalists' and the wider public's right to seek, receive, and impart information enshrined in the Covenant.

III. Relevant ICCPR Articles and Concluding Observations

- Articles 2, 17, 19
- In its 2013 Concluding Observations, the Committee recommended that Ukraine "should ensure that journalists, human rights defenders, and individuals are able to freely exercise their right to freedom of expression, in accordance with article 19 of the Covenant and the Committee's general comment No. 34" (para. 20) and noted that "the State party should ensure that acts of aggression, threats, and intimidation against journalists are investigated, prosecuted and punished, and victims are provided with appropriate remedies." (para. 20).
- In its 2006 Concluding Observations, the Committee recommended that Ukraine "protect the freedom of opinion and expression, including the right to freedom of the press" (para. 14) and "should vigorously investigate and prosecute attacks against journalists." (para. 14).

IV. Current Ukraine Government Policy or Practice

Violation of the confidentiality of journalistic sources is a growing problem in Ukraine, especially with respect to journalists reporting on high-profile cases of corruption. While there is a formal national legal framework on protection of confidentiality of journalistic sources,¹ the implementation remains problematic. In two recent cases, against Natalia Sedletska², a reporter for the RFE/RL program *Schemes* and the Ukrainian Public Broadcaster, and Krystyna

¹ The Law of Ukraine "On Information" grants the journalist the right not to disclose a source of information or information that will allow the source's identity to be established, except when such a requirement is provided for by a legitimate court decision (p. 3, Article 25); The law "On printed mass media (press) in Ukraine" supplements the provision by defining the journalist's right to "preserve the secrets of authorship and sources of information, except for cases when these secrets are made public upon the request of the court" (Article 26); The right to "preserve the secrecy of the person who passed the information" is also in Article 59 of the law "On Television and Radio Broadcasting."

² Journalists outraged by Ukrainian court's decision to allow access to muckraker's phone, hromadske.ua:

<https://en.hromadske.ua/posts/journalists-outraged-by-ukrainian-courts-decision-to-allow-access-to-muckrakers-phone>

Berdynskykh³, a writer for *Novoe Vremia*, prosecutors sought to violate the confidentiality of journalistic sources by gaining access to the journalists' telephone records through court order. In at least one instance, prosecutors may have received access to information about confidential communications between a journalist and their sources without the journalist's knowledge. In the case of the reporter of Ivan Verstiuk, of the publication *Novoe Vremia*, a court gave access to "all internal documents"⁴ of the media outlet, including information about the outlet's sources. This practice of providing broad access to journalists' materials and potentially, communications with their confidential sources, puts individuals who have disclosed information in the public interest, which constitutes an essential element of investigative journalism and enables gathering and imparting information for the public, at significant risk. A draft law "On Whistleblower Protection" which would clarify legal protections for journalists' confidential sources and public-interest whistleblowers was introduced to the Verkhovna Rada in 2016, but it was neither debated nor adopted.

What is more, Ukraine's excessively narrow definition of a journalist excludes many people who carry out journalistic activity though without formal accreditation such as camera operators, journalists working for online media, and bloggers from important legal protections provided to accredited journalists.

V. Human Rights Committee General Comments

- The Human Rights Committee has said that states "should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression" (par. 23). The Committee has also acknowledged that many people can be journalists, stressing that "journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere" (par. 44).
- The Committee has said that states should honor the confidentiality of sources by recognizing and respecting "the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources." (par. 45)

VI. Other UN/OSCE Body Recommendations

- UN bodies have said that protections for journalists, including the protection of confidential sources, should extend broadly to those fulfilling a journalistic function in society. The Special Rapporteur on the Promotion and the Protection of the Right to Freedom of Opinion and Expression in their 2015 report⁵ to the General Assembly on the Protection of Sources and Whistleblowers concluded that "laws guaranteeing confidentiality must reach beyond professional journalists, including those who may be performing a vital role in providing wide

³ 235 порушень свободи слова зафіксовано в Україні у 2018 році: дослідження IMI, [235 violations of press freedom documented in Ukraine in year 2018: research by IMI], Institute of Mass Information's website:

<https://imi.org.ua/monitorings/235-porushen-svobody-slova-zafiksovano-v-ukraini-u-2018-rotsi-doslidzhennia-imi/>

⁴ ГПУ наступає на пресу. Ведомство Юрія Луценка вимагає доступ до внутрішніх документів редакції НВ, [GPU attacks the press. The Office of Yuriy Lutsenko requires access to the internal documents of the editorial board of Novoe Vremia], nv.ua: <https://nv.ua/ukraine/politics/gpu-nastupaet-na-pressu-vedomstvo-yuriya-lucenko-trebuuet-dostup-k-vnutrennim-dokumentam-redakcii-nv-50006576.html>

⁵ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/70/361, September 8, 2015: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361

access to information of public interest such as bloggers, “citizen journalists,” members of non-governmental organizations, authors, and academics, all of whom may conduct research and disclose information in the public interest.”

VII. **Recommended Questions**

- How does Ukraine ensure the confidentiality and anonymity of journalistic sources in its national legislation and policy?
- Do the national legislative framework and policies in Ukraine provide those who seek, receive and impart information or otherwise conduct journalistic activities, including journalists of online media outlets, though operating without formal journalistic accreditation, with the same rights and protections accorded to formally accredited journalists?
- Does the current framework on the protection of confidentiality of journalistic sources provide adequate guarantees for the protection of whistleblowers who serve as valuable sources of information about human rights violation and other abuses of power?

VIII. **Suggested Recommendations**

- The State Party should amend national law to provide for the protection of the confidentiality of journalistic sources which includes development of the mechanism for effective appeal against decisions on excessive interference with journalist’s right not to disclose their sources; and adopt the necessary legal framework for the protection of whistleblowers;
- The State Party should ensure that the provisions of the Criminal Code, as well as other laws and policies related to the protection of journalists and their sources, applies to the full range of actors undertaking journalistic activity, such as journalists for online media and bloggers on the internet, regardless of their status as an accredited journalist;
- The State Party should commit to vigorously investigating and prosecuting attacks against journalists.