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Freedom of Expression and Opinion in Wartime: Assessing Ukraine's Ban on Citizen Access to Russian-Owned Websites

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COMMENTS

FREEDOM OF EXPRESSION AND OPINION IN WARTIME: ASSESSING UKRAINE’S BAN ON CITIZEN ACCESS TO RUSSIAN-OWNED WEBSITES

NATALIE HOLLAND

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I. INTRODUCTION

In early 2014, Russian-backed forces seized control of Crimea, an autonomous territory of Ukraine, leading to an ongoing conflict between Russia and Ukraine.¹ On May 15, 2017, Ukrainian President Petro Poroshenko signed a presidential decree banning Russian-run social media, email, and search engine services for three years.² The ban applied to the social media sites VKontakte (VK)

1. See *Crimea Profile*, BBC NEWS (Apr. 21, 2016), <http://www.bbc.com/news/world-europe-18287223> (explaining that the annexation of Crimea was “the focus of the worst East-West crisis since the Cold War” when Russian-backed forces seized control of Crimea after the territory voted to become part of Russia in a referendum deemed illegal by Ukraine).

2. Alec Luhn, *Ukraine Blocks Popular Social Networks as Part of Sanctions*

and Odnoklassniki, the email service Mail.ru, and the search engine Yandex.³ These social media sites are widely used by the Ukrainian population with almost eighty percent of Ukrainian internet users signed up for VK and nearly twenty-one million Ukrainians using one of the two banned social media sites.⁴ Mail.ru estimated that twenty-six million Ukrainian users would be impacted by the ban.⁵ Altogether, these four Russian websites are among the top ten most popular websites in Ukraine.⁶

International actors like Human Rights Watch and the Council of Europe condemned Ukraine's ban, insisting that it is a violation of commonly understood freedoms and the International Covenant on Civil and Political Rights (ICCPR), to which Ukraine is a party.⁷

The ICCPR was adopted by the United Nations General Assembly in 1966 and entered into force in 1976.⁸ It is an international human

on Russia, GUARDIAN (May 16, 2017, 12:40 PM), <https://www.theguardian.com/world/2017/may/16/ukraine-blocks-popular-russian-websites-kremlin-role-war>.

3. *Id.*

4. Isobel Koshiw, *Backlash Grows Against Ukraine's Attempts to Block Russian Social Media*, CODA STORY (May 18, 2017), <https://codastory.com/disinformation-crisis/information-war/backlash-grows-against-ukraine-s-attempts-to-block-russian-social-media>.

5. Andrew Roth, *In New Sanctions List, Ukraine Targets Russian Social-Media Sites*, WASH. POST (May 16, 2017), https://www.washingtonpost.com/world/in-new-sanctions-list-ukraine-blocks-russian-social-media-sites/2017/05/16/a982ab4e-3a16-11e7-9e48-c4f199710b69_story.html?utm_term=.993e144a00a8.

6. Luhn, *supra* note 2.

7. See Interfax-Ukraine, *Council of Europe: Sanctions on Russian Sites Violate Media Freedom Principles*, KYIV POST (May 17, 2017, 2:37 PM), <https://www.kyivpost.com/ukraine-politics/council-europe-sanctions-russian-sites-violate-media-freedom-principles.html> (citing Council of Europe Secretary-General Thorbjorn Jagland as saying that the ban "goes against our common understanding of freedom of expression and freedom of the media"); see also *Ukraine: Revoke Ban on Dozens of Russian Web Companies*, HUM. RTS. WATCH (May 16, 2017, 11:00 PM), <https://www.hrw.org/news/2017/05/16/ukraine-revoke-ban-dozens-russian-web-companies> (determining that Ukraine is in violation of the ICCPR); *Chapter IV Human Rights: 4. International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION [hereinafter ICCPR Signatories, Reservations, and Objections], https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en (last visited June 18, 2017) (showing Ukraine as both a signatory and a party to the ICCPR).

8. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

rights treaty ratified to preserve and protect basic civil and political rights.⁹ ICCPR Article 19 specifically protects rights and freedoms related to opinion, expression, and information and idea gathering and dissemination.¹⁰ However, Article 19 does provide for exceptions where such freedoms would impact the rights of others or impede national security, public order, health, or morals.¹¹

This Comment argues that under ICCPR Article 19, Ukraine, as a signatory, is obligated to maintain its citizens' rights to freedom of opinion and expression, as well as rights to receive and impart information through any media platform. By barring citizen access to certain social media sites, email services, and search engines, without a sufficient national security justification, Ukraine has violated its obligations under the ICCPR.

Part II of this Comment describes Ukraine's actions in banning particular social media and internet access, and Ukraine's commitments to the ICCPR.¹² Part II of this Comment also provides an overview of ICCPR Article 19, as well as the United Nations Human Rights Council's Resolution condemning governmental restrictions of Internet and social media.¹³ Part III of this Comment compares the language of Article 19 and Human Rights Council Resolution 32/13 to Ukraine's social media ban and the claim that the ban fits under the national security exception to the ICCPR.¹⁴ Part III will assess the legality of Ukraine's ban in relation to internet bans by other countries that have been condemned by the United Nations.¹⁵ Part IV recommends that the United Nations should issue a general comment condemning Ukraine's website ban.¹⁶ Furthermore, this Comment recommends that Ukraine should cease implementation of its ban and consider developing and encouraging non-Russian social media options.¹⁷

9. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, AM. C.L. UNION (Apr. 2014), <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr>.

10. ICCPR, *supra* note 8, at 178.

11. *Id.*

12. See discussion *infra* Part II.A.

13. See discussion *infra* Part II.B-C.

14. See discussion *infra* Part III.D.

15. See discussion *infra* Part III.C.

16. See discussion *infra* Part IV.A.

17. See discussion *infra* Part IV.B-C.

II. BACKGROUND

A. AN OVERVIEW OF UKRAINE'S PRESIDENTIAL DECREE

On May 15, 2017, Ukrainian President Petro Poroshenko signed Presidential Decree No. 133/2017 banning Ukrainian access to Russian Internet, email, and social media platforms.¹⁸ The ban applies to the social media sites VK and Odnoklassniki, the email service Mail.ru, and the search engine Yandex.¹⁹ Presidential Decree No. 133/2017 enacted a National Security and Defense Council (NSDC) decision from April 28, 2017.²⁰ According to President Poroshenko, the ban will remain in place for the next three years, or “after the termination of Russian aggression against Ukraine.”²¹ One member of the Ukrainian parliament has called into question the legality of the decree saying that under Ukrainian law “blocking access to sites without a court decision is not allowed.”²² This question of legality has not slowed the development of mechanisms to stop access to banned sites.²³

18. Iryna Nikolayevska, *Ukraine Expands Sanctions Against Russia to Social Media and IT Sectors*, LEXOLOGY (May 23, 2017), <http://www.lexology.com/library/detail.aspx?g=5651eefb-d0a7-4721-8fce-5bdcfac933d6>.

19. *Id.*

20. *President on the Blocking of Russian Online Resources: When the Last Russian Soldier Leaves the Territory of Ukraine, We Will Be Ready to Revise Our Decision*, PRESIDENTIAL ADMIN. UKR. (May 17, 2017, 5:08 PM) [hereinafter Presidential Administration Statement], <http://www.president.gov.ua/en/news/koli-ostannij-rosijskij-soldat-pokine-teritoriyu-ukrayini-mi-41426>; see also *Ukraine: Revoke Ban on Dozens of Russian Web Companies*, *supra* note 7 (expanding the list of those sanctioned as a result of the conflict “to 1,228 individuals and 468 legal entities in Russia, Russia-occupied Crimea, areas in eastern Ukraine’s Donetsk and Luhansk regions controlled by Russia-backed separatists, and other countries”).

21. Presidential Administration Statement, *supra* note 20 (quoting President Poroshenko’s statement on implementation of the decree).

22. Luhn, *supra* note 2 (quoting Mykhailo Chaplyga’s comment to the news agency UNIAN).

23. See *id.* (explaining that the NSDC has ordered the Cabinet of Ministers, National Security Service, and the National Bank of Ukraine “to develop a mechanism to stop access” to the banned sites, and noting that one major internet service provider in Ukraine, Ukrtelecom, was moving forward with the blocking process).

1. *Ukraine's National Security Justifications*

Ukraine's justifications for the ban stem from concern about Russian propaganda, data collection, and cyberattacks.²⁴

Ukrainian officials claim the ban is necessary because Russian-owned internet sites help to spread Russian propaganda, presenting pro-Russian views and hiding unfavorable news regarding the Russian government.²⁵ In one example, Yandex, which claims objectivity in news aggregation, *shared nothing on its news site, until the following day, when thousands of Russians around the country protested against government corruption* in March 2017.²⁶ Yandex claimed that this omission occurred because its algorithms relied on reports from the bigger media organizations which largely tend to be under government control.²⁷

With regard to VK, the social media site is traditionally home to a more pro-Russian audience and is the preferred choice of eastern Ukrainian separatists “who mistrust U.S.-owned social networks and like Vkontakte’s better Russian-language interfaces.”²⁸ Pro-Russian content on VK could be attributed to “filter bubbles and information silos” in which users are largely choosing what information they

24. See Roth, *supra* note 5 (noting that Ukraine’s Security and Defense Council justified the ban as a mechanism for protecting citizens from companies that threaten Ukraine’s cyber security and information); see also ICCPR, *supra* note 8, at 178 (establishing a prohibition of propaganda for war under Article 20; however, as discussed in this paper, propaganda is used to describe pro-Russia information the Ukrainian government considers to be harmful, but is not necessarily propaganda of war).

25. See Leonid Bershidsky, *Why Ukraine Said ‘Nyet’ to Russian Social Networks*, BLOOMBERG (May 17, 2017, 9:54 AM), <https://www.bloomberg.com/view/articles/2017-05-17/why-ukraine-said-nyet-to-russian-social-networks> (contextualizing Ukraine’s problem with VK and Yandex as preferred platforms for pro-Russian Ukrainians and noting that these platforms do allow for information selection that fuels pro-Russian information).

26. Alexey Kovalev, *Hear No Evil, See No Evil, Report No Evil*, MOSCOW TIMES (Mar. 27, 2017, 10:03 PM), <https://themoscowtimes.com/articles/hear-no-evil-see-no-evil-report-no-evil-57550>.

27. See Bershidsky, *supra* note 25 (citing a Yandex press release explaining that the company’s algorithm can only use stories produced by officially registered media outlets).

28. *Id.*

wish to see and with whom they wish to interact.²⁹ VK does not delete violent, anti-Ukrainian posts, which the Ukrainian Government may consider to be an approval of propaganda.³⁰ The Secretary of Ukraine's National Security Council, Oleksandr Turchynov, claimed that the social media sites are being used for Russian security services' recruitment and illegal collection of user data.³¹

The Ukrainian government also states the ban is needed to prevent data collection. The Ukrainian Security Service released a statement saying "Russian security agencies are waging a hybrid war against the Ukrainian population, using in their special information operations Internet resources such as VK, Odnoklassniki, Mail.ru, and so on."³² Furthermore, some Ukrainian politicians have supported the ban, citing the risk of Russian access to the social media data of soldiers and state employees.³³ However, ordinary Ukrainian users do not have access to secret information and pose no security risks.³⁴

Finally, the Ukrainian government argues that the ban on Russian internet sites relates to deterring and defending against Russian cyberattacks.³⁵ On his own official VK page, President Poroshenko noted recent cyberattacks around the world, particularly Russian

29. *Id.*; see also Megan Burnside, *Are You a Victim of Media Silos or Silo Mentality?*, LEXISNEXIS: BIZ BLOG (Dec. 31, 2015), https://www.lexisnexis.com/communities/lexisnexis_biz/b/bizblog/archive/2015/12/31/are-you-a-victim-of-silos-or-silo-mentality.aspx (explaining that information silos occur when individuals only receive pieces of information from specific sources based on their interests).

30. See Bershidsky, *supra* note 25 (finding that this policy distinguishes VK from similar social media websites like Facebook).

31. Koshiw, *supra* note 4.

32. Christopher Miller, *Public Sharply Divided Over Ukraine's Ban on Russian Social Networks*, RADIO FREE EUR. RADIO LIBERTY (May 17, 2017 1:45 PM), <https://www.rferl.org/a/ukraine-ban-russia-social-networks-slammed-praised/28493634.html>.

33. Luhn, *supra* note 2 (citing MP Volodymyr Arieiev).

34. Miller, *supra* note 32 (citing Andrei Soldatov in explaining that VK is intrusive and cooperates with the Russian government but is not a security threat).

35. See Nolan Peterson, *Ukraine Shuts Down Putin's Facebook*, NEWSWEEK (May 19, 2017, 12:00 AM), <http://www.newsweek.com/ukraine-shuts-down-putins-facebook-611809> (noting Ukrainian statements on the need for this ban as a movement toward cybersecurity).

interference with the French election and Russian propaganda, as reasons for the implementation of the ban.³⁶ After Poroshenko released the statement on his VK page, Poroshenko claimed that an organized Russian cyberattack hit his official website.³⁷

In the cyberwar with Russia, hackers have targeted Ukraine, with one report from Ukraine noting that, in a two month window in 2016, Ukrainian state institutions were hit approximately 6,500 times by hackers.³⁸ President Poroshenko released statements claiming the Russian government was either directly or indirectly involved in these cyberattacks; however, Russia denies any involvement.³⁹ While Ukraine may conceivably claim that Russia committed these cyberattacks, the Russian internet platform ban does not seem to be tied to protecting Ukraine from future attacks because the attacks against Ukraine did not occur through Russian-owned internet sites.⁴⁰

2. Potential Impacts of the Ban on Ukrainian Citizens

As mentioned above, VK, Odnoklassniki, Mail.ru, and Yandex are widely used throughout Ukraine.⁴¹ While social media options like Facebook are not banned from the country, there are concerns regarding the expression of opinions that particularly take place on

36. Bershidsky, *supra* note 25; *see also* Peterson, *supra* note 35 (noting that, in another statement, Poroshenko claimed that Russia employs “so-called ‘fake news,’ computer hacking, cyberattacks on critical infrastructure, snap drills, direct military interventions, and so on and so forth—to undermine the Western democracies and break the transatlantic unity”).

37. *Ukraine President’s Site ‘Attacked by Russia’*, BBC NEWS (May 16, 2017), <http://www.bbc.com/news/world-europe-39944158>.

38. Natalia Zinets, *Ukraine Hit by 6,500 Hack Attacks, Sees Russian ‘Cyberwar’*, REUTERS (Dec. 29, 2016, 1:14 PM), <http://www.reuters.com/article/us-ukraine-crisis-cyber-idUSKBN14I1QC> (explaining that these attacks harmed Kiev’s power grid leading to a blackout in part of the capital and stopped the State Treasury’s system, among other things).

39. *Id.*

40. *See* Bershidsky, *supra* note 25 (citing President Poroshenko’s statements blaming Russia for cyberattacks and indicating that Russia’s general attacks against Ukraine and other nations, rather than attacks through Russian-owned social media and internet platforms, warranted the ban).

41. *See* Koshiw, *supra* note 4 (remarking on the millions of people with accounts on the banned social media sites); Luhn, *supra* note 2 (explaining that all four banned sites are in the list of the top ten most popular internet sites in Ukraine); Roth, *supra* note 5 (noting the popularity of Mail.ru).

VK and Odnoklassniki.⁴² Freedom House analyst Matthew Schaaf explained that, while Kiev-based Ukrainians may use other social media platforms, “fellow Ukrainians in other parts of the country depend disproportionately on Russian-made platforms such as Odnoklassniki.”⁴³ Regardless of access to alternative sites, people have less access to discussion, news, and information on varied and important political and social issues.⁴⁴ While these sites can attract pro-Russia users who are self-selected into pro-Russia information bubbles, these actions are still a form of freedom of expression and opinion which should be respected in Ukraine.⁴⁵

The ban could also be considered dangerous with consequences in eastern Ukraine. According to journalist Aric Toler, “residents and authorities rely on V Kontakte posts to disseminate the latest reports on the fighting.”⁴⁶ Furthermore, concern for small businesses that cannot afford to develop social media software (or other software banned by decree) on their own has led to outcry from Ukrainian businesses.⁴⁷

B. THE INTERNATIONAL COVENANT ON

42. See Damien Sharkov, *Ukrainians Join Facebook by the Millions After Russian Social Media Ban*, NEWSWEEK (June 20, 2017, 7:11 AM), <http://www.newsweek.com/ukrainians-join-facebook-millions-russian-social-media-ban-627488> (explaining that two and a half million Ukrainian accounts have been created on Facebook since May 2017); see also *US Scrutinizes Ukraine Ban on Russian Websites*, VOA NEWS (May 19, 2017, 10:16 AM), <https://www.voanews.com/a/us-scrutinizes-ukraine-ban-on-russian-websites/3858894.html> (noting that Russian-made social media sites have better Russian-language platforms and can attract individuals critical of Ukraine’s government).

43. *US Scrutinizes Ukraine Ban on Russian Websites*, *supra* note 42.

44. *Id.*

45. See Bershidsky, *supra* note 25 (noting that VK is the preferred platform for eastern Ukrainian separatists who mistrust U.S.-owned social networks); see also Human Rights Committee General Comment No. 34, U.N. Doc. CCPR/C/GC/34, at 2 (Sept. 12, 2011) [hereinafter General Comment No. 34] (explaining that under ICCPR Article 19 all forms of opinion and the means of their dissemination are protected).

46. Koshiw, *supra* note 4.

47. See Luhn, *supra* note 2 (explaining that the decree also bans software important to Ukrainian businesses including blocking “the site of the Russian cybersecurity giant Kaspersky Labs . . . as well as the popular business software developer 1C”).

CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) was adopted and opened for signature and ratification by U.N. General Assembly resolution 2200A (XXI) on December 16, 1966 and entered force on March 23, 1976.⁴⁸ Under the ICCPR, each state commits to the enjoyment of civil and political freedom by all human beings and the creation of conditions in which all humans can enjoy civil, political, economic, social, and cultural rights.⁴⁹

Article 19 affirms that everyone has the right to “hold opinions without interference” and the right to “freedom of expression.”⁵⁰ Paragraph two of Article 19 establishes a right to expression, including the “freedom to seek, receive[,] and impart information and ideas of all kinds, regardless of frontiers.”⁵¹ However, under Article 19(3), states may restrict freedom of expression “[f]or respect of the rights or reputations of others,” and “[f]or the protection of national security or of public order (*ordre public*), or of public health or morals.”⁵²

1. Ukraine as a Party to the ICCPR

Ukraine signed the ICCPR on March 20, 1968 and ratified it on November 12, 1973.⁵³ Ukraine made its declaration recognizing the competence of the U.N. Human Rights Committee (HRC) under Article 41 on July 28, 1992.⁵⁴ Ukraine’s parliament has not yet

48. ICCPR, *supra* note 8, at 171.

49. *Id.* at 173.

50. *Id.*

51. *Id.* at 178; *see also* KATIE BRESNER, UNDERSTANDING THE RIGHT TO FREEDOM OF EXPRESSION: AN INTERNATIONAL LAW PRIMER FOR JOURNALISTS 28 (Renu Mandhane, Bonnie Allen & Naregh Galoustian eds., 2015), <http://www.jhr.ca/en/wp-content/uploads/2017/06/Understanding-Freedom-of-Expression-Primer-ENG-web.pdf> (defining “frontiers” to extend beyond national boundaries).

52. *See* ICCPR, *supra* note 8, at 178 (noting that freedom of expression carries special duties and responsibilities and is thus subject to restrictions); *see also* General Comment No. 34, *supra* note 45, ¶ 35 (explaining that the national security exception can only be claimed where an individualized and targeted restrictive action is taken as a response to a specified security threat).

53. ICCPR Signatories, Reservations, and Objections, *supra* note 7.

54. *Id.*

passed legislation that would allow for victims of violations of the ICCPR to seek remedy.⁵⁵ While the Ukrainian Parliament registered draft legislation in May 2015, it was largely unsupported by the government.⁵⁶ However, ICCPR enforcement in Ukraine could occur through the First Optional Protocol of the ICCPR, which Ukraine ratified in 1991.⁵⁷ The First Optional Protocol allows the HRC to receive and review communications from individuals claiming to be victims of a violation by a state party.⁵⁸

2. *Scope of the ICCPR*

The ICCPR's scope is outlined in Article 2 which requires that each state party adopt the laws necessary to give effect to the rights recognized in the ICCPR.⁵⁹ Furthermore, state parties are expected to provide a private right of action for any individuals whose rights are violated under the ICCPR.⁶⁰

The HRC monitors state party implementation of the ICCPR.⁶¹ State parties must submit reports regarding compliance roughly every four years.⁶² Once reports are examined, the HRC issues

55. HUMAN RIGHTS HOUSE FOUNDATION, UKRAINE: FOLLOW-UP REPORT TO THE REVIEW UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 4 (May 2016), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/UKR/INT_CCPR_NGS_UKR_24405_E.pdf.

56. *Id.*

57. *Chapter IV Human Rights: 5. Optional Protocol to the International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION [hereinafter *First Optional Protocol Ratification*], https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&lang=en (last visited June 18, 2017).

58. *See* *Optional Protocol to the International Covenant on Civil and Political Rights* art. 1, Dec. 16, 1966, 999 U.N.T.S. 302, 302 [hereinafter *First Optional Protocol of the ICCPR*].

59. ICCPR, *supra* note 8, at 173-74.

60. *See id.*; *see also* OFFICE HIGH COMM'R HUMAN RIGHTS, COMPILATION OF UNITED NATIONS HUMAN RIGHTS RECOMMENDATIONS ADDRESSED TO UKRAINE I (2017), http://www.ohchr.org/Documents/Countries/UA/UN_recommendations_Ukraine.pdf.

61. *See International Covenant on Civil and Political Rights*, EQUAL. & HUMAN RIGHTS COMM'N, <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/international-covenant-civil-and> (last visited June 23, 2017) (noting that the HRC is an eighteen-member committee made up of independent experts from around the world).

62. *Id.*

observations on the state party's implementation of the ICCPR.⁶³ The HRC may make recommendations on any remedial actions necessary to correct deficiencies in implementation.⁶⁴ The HRC also issues general comments extensively analyzing ICCPR issues with the aim of clarifying the ICCPR's provisions.⁶⁵ Under the First Optional Protocol of the ICCPR, the HRC may directly consider communications with those claiming to be victims of ICCPR violations.⁶⁶ The HRC reviews all information received then issues a finding on whether a state party violated the ICCPR.⁶⁷

3. *Complying with Article 19 of the ICCPR*

Article 19 establishes rights to opinion and expression, including the right to “seek, receive[,] and impart information and ideas of all kinds” through any form of media.⁶⁸ The interpretation of “media” has been expanded to encompass the internet by HRC General Comment No. 34.⁶⁹ The HRC explained that state parties “should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.”⁷⁰ Freedom of expression on the internet is, therefore, necessary to realize the transparency and accountability essential to the promotion of human rights.⁷¹

Furthermore, Comment No. 34 elaborates on permitted national security restrictions, stating that restrictions must not suppress information of legitimate public interest and must be legal,

63. *International Covenant on Civil and Political Rights*, WORLD HEALTH ORG., http://www.who.int/hhr/Civil_political_rights.pdf (last visited June 23, 2017).

64. *Id.*

65. *Id.*

66. First Optional Protocol of the ICCPR, *supra* note 58, at 302 (noting that a citizen's state must be a party to the Protocol to invoke this privilege).

67. *International Covenant on Civil and Political Rights*, WORLD HEALTH ORG., *supra* note 63, at 3.

68. ICCPR, *supra* note 8, at 178.

69. General Comment No. 34, *supra* note 45, ¶ 12.

70. *See id.* ¶ 15 (explaining that development of the internet has changed communication practices leading to “a global network for exchanging ideas and opinions”).

71. *Id.* ¶ 3.

necessary, and proportional.⁷² In order to meet the proportionality requirement, a state party's restrictive measures must be "appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; [and] they must be proportionate to the interest to be protected."⁷³

To demonstrate that a restriction is necessary, a state party must show that protection achieved through its restrictive measure could not be achieved in other ways that do not restrict freedom of expression.⁷⁴ Altogether, a state party claiming a national security justification must "demonstrate in [a] specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."⁷⁵ The HRC maintains the ability to assess for itself the circumstances of restrictions of freedoms under Article 19's national security exception.⁷⁶

a. Human Rights Council Resolution 32/13 and Internet Access as Important to Freedom of Expression and Opinion

On July 1, 2016, the Human Rights Council adopted Resolution 32/13, which condemned internet disruption and recognized the internet as a facet of the right to freedom of expression.⁷⁷ The Resolution recognized that parties to the ICCPR must address national security concerns in accordance with the ICCPR's obligations and condemned state measures intended to "prevent or

72. *See id.* ¶¶ 25, 27, 34 (explaining that, for a restriction to be legal and characterized as a law under the ICCPR, it must not "confer unfettered discretion for the restriction of freedom of expression on those charged with its execution," and the ICCPR requires that state parties show sufficient legal basis for any restrictions by providing "details of the law and of actions that fall within the scope of the law").

73. *Id.* ¶ 34 (quoting Human Rights Committee General Comment No. 27, U.N. Doc. CCPR/C/Rev.1/Add.9, ¶ 14 (Nov. 2, 1999)).

74. *Id.* ¶ 33.

75. General Comment No. 34, *supra* note 45, ¶ 35.

76. *Id.* ¶ 36.

77. Human Rights Council Res. 32/13, U.N. Doc. A/HRC/32/L.20, ¶¶ 8, 10 (June 27, 2016).

disrupt access to or dissemination of information online, in violation of international human rights law.”⁷⁸

The internet has become an important tool for expression in the modern age as it allows people to communicate freely and globally.⁷⁹ With many people relying on it daily, the internet provides individuals with an unprecedented number of resources, opening up countless opportunities for new expression.⁸⁰ Through social media, information is processed and disseminated around the world in seconds, and citizens are better able to hold their governments accountable.⁸¹ Resolution 32/13 understood the importance of internet access in protecting the rights of expression and opinion as established under the ICCPR.⁸²

i. Requirements of Parties to Human Rights Council Res. 32/13

Under Resolution 32/13, state parties are encouraged to adopt “national Internet-related public policies that have the objective of universal access.”⁸³ While Resolution 32/13 is technically nonbinding, it informs the Human Rights Council’s understanding of “expression” under the ICCPR and is considered useful in encouraging certain actions through public pressure.⁸⁴ Importantly, Ukraine is a signatory to Resolution 32/13.⁸⁵

ii. Examples of Nations Condemned under ICCPR and Res. 32/13

78. *Id.* ¶ 10.

79. See Kitsuron Sangsuvan, *Balancing Freedom of Speech on the Internet Under International Law*, 39 N.C.J. INT’L L. & COM. REG. 701, 754 (2014) (discussing the growth of the internet and internet governance under current international human rights law and the development of online information-sharing communities).

80. *Id.* at 722.

81. *Id.* at 725.

82. See Human Rights Council Res. 32/13, *supra* note 77, ¶ 1 (reaffirming the internet’s role in exercising human rights and the need for protecting internet access as recognized under the ICCPR).

83. *Id.* ¶ 12.

84. *Id.*; see also Mario Trujillo, *UN Rights Council Condemns Internet Blocking*, HILL (July 1, 2016, 9:21 AM), <http://thehill.com/policy/technology/286236-un-rights-council-condemns-internet-blocking> (celebrating the resolution for condemning countries that disrupt access to the internet).

85. Human Rights Council Res. 32/13, *supra* note 77.

for Internet Restrictions Despite Article 19(3) Claims

The U.N. has released reports and statements condemning Turkey, India, and Cameroon due to their internet restriction practices.⁸⁶ In Turkey, through amendments to its Constitution and decrees issued by the Council of Ministers, the government has the ability to shut down internet networks and social media as it sees fit for national security.⁸⁷ Turkey claims that its refugee crisis, recent attempted coup, and fight against terrorism justify its actions under Article 19(3).⁸⁸

In particular, Turkey has implemented media and internet blocks in regions impacted by the Islamic State of Iraq and Syria (ISIS) and the Kurdistan Workers' Party (PKK).⁸⁹ The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression preliminarily concluded that Turkey could justify restrictions under Article 19(3), but the expansiveness of the

86. See *Preliminary Conclusions and Observations by the UN Special Rapporteur on the Right to Freedom of Opinion and Expression to His Visit to Turkey, 14-18 November 2016*, UNITED NATIONS HUMAN RIGHTS OFFICE HIGH COMM'R (Nov. 18, 2016) [hereinafter *Preliminary Conclusions and Observations on Turkey*], <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20891&LangID=E>; *India Must Restore Internet and Social Media Networks in Jammu and Kashmir, Say UN Rights Experts*, UNITED NATIONS HUMAN RIGHTS OFFICE HIGH COMM'R (May 11, 2017) [hereinafter *U.N. Condemnation of India Internet Restrictions*], <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21604&LangID=E>; *UN Expert Urges Cameroon to Restore Internet Services Cut Off in Rights Violation*, UNITED NATIONS HUMAN RIGHTS OFFICE HIGH COMM'R (Feb. 10, 2017) [hereinafter *U.N. Condemnation of Cameroon Internet Restrictions*], <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21165&LangID=E>.

87. See *Preliminary Conclusions and Observations on Turkey*, *supra* note 86 (noting that government officials emphasized threats faced by Turkey, including a July 15, 2016 coup attempt, as reasoning for internet restrictions); see also UN Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression on His Mission to Turkey, ¶¶ 5, 14, U.N. Doc. A/HRC/35/22/Add.3 (June 7, 2017) [hereinafter Report of the Special Rapporteur on Turkey] (discussing the application of the right to freedom of expression online and citing the example of Turkey's shutdowns as not meeting the Turkish government's stated national security purposes).

88. *Preliminary Conclusions and Observations on Turkey*, *supra* note 86.

89. *Id.*

restrictions moved Turkey away from consideration as a “genuinely democratic society” and did not meet the requirements of “legality, necessity, and proportionality.”⁹⁰ In the Special Rapporteur’s final report on Turkey, released on June 7, 2017, the HRC determined that Turkey had blocked over 100,000 websites as of March 2017.⁹¹ This, among other factors, led to the determination that Turkey is dealing with a freedom of information crisis.⁹² While Turkey could meet the requirement of necessity, the Turkish policy did not meet the proportionality requirement as established under Comment No. 34.⁹³

The U.N. has also released statements urging India and Cameroon, both of which are parties to the ICCPR, to stop their restrictive internet practices.⁹⁴ India imposed widespread bans on social media and mobile internet services in Kashmir and Jammu following widespread student protests on April 17, 2017.⁹⁵ United Nations human rights experts said in a statement that the ban was characteristic of punishment and failed “to meet the standards required under international human rights law to limit freedom of expression” under a valid exception.⁹⁶ According to the experts, “[t]he scope of these restrictions has a significantly disproportionate impact on the fundamental rights of everyone in Kashmir, undermining the Government’s stated aim of preventing dissemination of information that could lead to violence.”⁹⁷

In Cameroon, the government reportedly cut off internet access to

90. *Id.*

91. Report of the Special Rapporteur on Turkey, *supra* note 87, ¶¶ 49, 75.

92. *Id.* ¶¶ 49, 75, 80.

93. *See generally* General Comment No. 34, *supra* note 45, ¶ 34 (explaining the requirement of proportionality for an Article 19(3) national security exception).

94. *U.N. Condemnation of India Internet Restrictions*, *supra* note 86; *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86; *see also* ICCPR Signatories, Reservations, and Objections, *supra* note 7 (showing that India became party to the ICCPR by ascension in 1979, and Cameroon became party by ascension in 1984).

95. *U.N. Condemnation of India Internet Restrictions*, *supra* note 86 (noting that the Indian government “blocked access to 22 websites and applications, including WhatsApp, Facebook, and Twitter,” as well as mobile phone data services).

96. *Id.*

97. *Id.*

its northwest and southwest regions in January 2017.⁹⁸ This internet shutdown followed widespread protests regarding the government's poor treatment of its English-speaking population.⁹⁹ David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, explained that the scale of the network shutdown violated international law because "it not only suppress[ed] public debate, but also deprive[d] Cameroonians of access to essential services and basic resources."¹⁰⁰ Both statements urging India and Cameroon to cease their internet and social media shutdowns cited the importance of Resolution 32/13 in condemning online disruptions.¹⁰¹

These three nations, as parties to the ICCPR, were publicly condemned by the U.N. for their restrictive practices in violation of the ICCPR.¹⁰² While India and Turkey continue their restrictive internet practices, Cameroon did lift its internet restrictions in its English-speaking northwest and southwest regions following the HRC's press release and subsequent international pressure condemning the restrictions.¹⁰³ The international community continues to pressure India and Turkey by using the U.N.'s public statements as evidence of these nations' unlawful actions.¹⁰⁴

98. *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86 (noting that "English speakers have long reported that they face discrimination and marginalization," and the internet shutdown occurred in predominantly English-speaking regions).

99. *Id.*

100. *Id.*

101. *U.N. Condemnation of India Internet Restrictions*, *supra* note 86; *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86.

102. ICCPR Signatories, Reservations, and Objections, *supra* note 7 (listing these states as ICCPR members).

103. Yomi Kazeem, *The Internet Shutdown in English-Speaking Parts of Cameroon Is Finally Over*, QUARTZ AFR. (Apr. 20, 2017), <https://qz.com/964927/caemroons-internet-shutdown-is-over-after-93-days/>; see also *India: 20 Internet Shutdowns in 2017*, HUM. RTS. WATCH (June 15, 2017, 10:15 PM), <https://www.hrw.org/news/2017/06/15/india-20-internet-shutdowns-2017> (criticizing India for continued internet shutdowns through June 2017).

104. See *India: 20 Internet Shutdowns in 2017*, *supra* note 103 (listing India's restrictive practices and citing to U.N. Special Rapporteur David Kaye's statements on India's actions as violative).

III. ANALYSIS

Freedom of speech and expression is a fundamental human right understood in international human rights law through the ICCPR.¹⁰⁵ The internet is a platform for global communication in which information is “exchanged, collected, aggregated, and disseminated in a split second” across the world and citizens are able to “hold their own government accountable, generate new ideas, and encourage creativity and entrepreneurship.”¹⁰⁶ Furthermore, Comment No. 34 and Resolution 32/13 understand freedom of expression on the internet to be necessary for the realization of governmental transparency and accountability.¹⁰⁷

In the case of Ukraine, the restriction on citizens’ rights to freedom of expression and access to information on Russian-owned platforms violates the ICCPR and Resolution 32/13 because Ukraine cannot establish a legitimate state interest that would allow exception to these rights.¹⁰⁸ The restrictions also risk the safety of its citizenry with little evidence of proportionality or legality under its own legal system.¹⁰⁹

A. UKRAINE’S SANCTIONS DECREE VIOLATES ARTICLE 19 OF THE ICCPR BECAUSE IT LIMITS INTERNATIONALLY PROTECTED FREEDOM OF EXPRESSION

As articulated above, ICCPR Article 19, Comment No. 34, and Resolution 32/13 have established the U.N.’s disapproval of state measures intended to disrupt freedom of expression and information access.¹¹⁰ Ukraine’s Russian Internet site ban is a limitation of its citizens’ ability to express themselves and seek, impart, and consume information on VK, Odnoklassniki, Mail.ru, and Yandex.¹¹¹ While citizens may still access sites like Facebook and Twitter, the Russian-owned sites feature different Russian-language friendly

105. See ICCPR, *supra* note 8, at 178.

106. Sangsuvan, *supra* note 79, at 725.

107. See General Comment No. 34, *supra* note 45, ¶ 3.

108. See discussion *infra* Part III.B-D.

109. See discussion *infra* Part III.B-D.

110. See ICCPR, *supra* note 8, at 178; General Comment No. 34, *supra* note 45, ¶ 12; Human Rights Council Res. 32/13, *supra* note 77.

111. Luhn, *supra* note 2.

platforms with different online communities.¹¹² These communities may express sentiments that are contrary to the preferences of Ukraine's government, but within the ICCPR's language, Ukraine cannot censor simply because it disagrees with the information being shared on these widely popular platforms.¹¹³ Ukraine is preventing access to and dissemination of information online in violation of the ICCPR, HRC General Comment No. 34, and Human Rights Council Resolution 32/13.¹¹⁴

Ukraine claims that this access restriction is a national security action and would thus be excepted under Article 19(3)'s national security provision.¹¹⁵ However, Ukraine fails to meet the established standard of legality, necessity, and proportionality for the national security exception.¹¹⁶ The nations of Turkey, India, and Cameroon similarly tried to claim the exception and similarly failed to demonstrate that their restrictions met the standard.¹¹⁷

112. Bershidsky, *supra* note 25; see also Peter Dickinson, *Russian language in Ukraine*, BUS. UKR. (May 30, 2017), <http://bunews.com.ua/society/item/the-russian-language-in-ukraine> (interviewing Julia Kazdobina, analyst at the Ukrainian Center for Independent Political Research, noting that most of Ukraine's population can communicate in Russian and Ukrainian, but many of Ukraine's largest cities are predominantly Russian-speaking).

113. ICCPR, *supra* note 8, at 178; see also Bershidsky, *supra* note 25 (showing how social media sites are used by Ukrainians to express pro-Russian views); Dickinson, *supra* note 112 (“[M]any of Ukraine's Russian speakers live in the conflict zone and some of them do indeed embrace . . . messages that Russians and Ukrainians are one people and Ukrainian independence is an aberration. Many welcomed the Russian aggression in Crimea and eastern Ukraine.”).

114. ICCPR, *supra* note 8, at 178; General Comment No. 34, *supra* note 45; Human Rights Council Res. 32/13, *supra* note 77.

115. See Valentin Petrov: *Some Russian Services Pose a Direct Threat to the National Security of Ukraine, and This is Why the State Limits Their Operation*, NAT'L SECURITY & DEF. COUNCIL OF UKR. (May 19, 2017), <http://www.rnbo.gov.ua/en/news/2773.html> (“Restrictive measures (sanctions) were imposed not against services or software but against legal entities or individuals that threaten the national security of Ukraine.”).

116. See General Comment No. 34, *supra* note 45, ¶¶ 33-35.

117. See discussion *infra* Part III.C.

B. UKRAINE'S SOCIAL MEDIA AND INTERNET RESTRICTIONS
VIOLATE ICCPR ARTICLE 19 IN COMPARISON TO CONDEMNED
RESTRICTIONS IN TURKEY, INDIA, AND CAMEROON

Ukraine's internet and social media ban shares similarities with the Turkish, Indian, and Cameroonian bans criticized by the U.N. and other international actors.¹¹⁸ The Turkey report discussed an Article 19 violation while the HRC's press releases discussing Cameroon and India cited Resolution 32/12.¹¹⁹ All of these references to Article 19 affirm the obligation to respect freedom of expression in ICCPR signatory countries.¹²⁰ Turkey faced a threat from outside actors in implementing portions of its bans, whereas Cameroon's ban targeted a domestic group that spoke a particular language.¹²¹ India, on the other hand, directed internet restrictions toward Jammu and Kashmir following student protests and political unrest in the regions.¹²² Regardless of the target group, all three countries clearly implemented bans against those who challenged the government.¹²³

118. *Ukraine: Revoke Ban on Dozens of Russian Web Companies*, *supra* note 7; *Preliminary Conclusions and Observations on Turkey*, *supra* note 86; *U.N. Condemnation of India Internet Restrictions*, *supra* note 86; *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86.

119. *Preliminary Conclusions and Observations on Turkey*, *supra* note 86; *U.N. Condemnation of India Internet Restrictions*, *supra* note 86; *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86.

120. *Preliminary Conclusions and Observations on Turkey*, *supra* note 86; *U.N. Condemnation of India Internet Restrictions*, *supra* note 86; *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86.

121. See *Preliminary Conclusions and Observations on Turkey*, *supra* note 86 (detailing the UN Special Rapporteur's findings regarding the freedoms of Turkish journalists); *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86.

122. See *U.N. Condemnation of India Internet Restrictions*, *supra* note 86 (calling on the Indian government to promptly end the ban and restore the guarantee of freedom of expression).

123. See *Preliminary Conclusions and Observations on Turkey*, *supra* note 86 (contextualizing conditions in Turkey leading to Internet restrictions including the July 15, 2016 coup attempt, attacks by ISIS and the PKK, and refugee crisis); see also *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86 (explaining that the shutdown occurred "against a background of widespread protests against government policies which have reportedly marginalized the country's English-speaking population"); *U.N. Condemnation of India Internet Restrictions*, *supra* note 86 (noting that the shutdowns followed protests in impacted regions and explaining that there has been approximately 31 cases of

Ukraine's ban is most similar to Turkey's ban because it is being enforced during a period of active violent conflict with an external entity. The conflict context could justify a valid national security exception.¹²⁴ Following investigations into Turkey's internet restrictions, the U.N. Special Rapporteur on the right to freedom of opinion and expression determined that some of the controls were justified under Article 19(3): attacks in Turkey by ISIS and the PKK, coupled with an attempted coup in 2016 qualified Turkey to apply the Article 19(3) national security exception.¹²⁵ However, Turkey's ban on over 100,000 websites was not considered proportional or necessary in combating the external security threat.¹²⁶

Ukraine claims that its ban is necessary to combat the force of Russia and its "hybrid war."¹²⁷ However, neither Turkey nor Ukraine's bans are aimed at addressing the underlying threat, but simply target the symptoms of the threat.¹²⁸ Turkey's internet shutdowns suppress government critique and freedom of expression on media platforms fundamental to democratic life, not the potential threat posed by terrorism or violent coup.¹²⁹

Similarly, Ukraine has been the target of alleged Russian hacking through a number of cyber platforms unrelated to Russian-owned social media and Internet platforms.¹³⁰ The Russian-owned platforms banned by Ukraine contribute to pro-Russian dialogue and

social media or Internet bans in Kashmir and Jammu since 2012).

124. See Luhn, *supra* note 2 (citing President Poroshenko's statement is saying that Ukraine's social media and internet ban is a product of the "hybrid war" with Russia); see also *Preliminary Conclusions and Observations on Turkey*, *supra* note 86 (citing attacks by ISIS and PKK as reasoning for shutdowns and explaining that Turkey has good reason for national security concerns but its actions are not proportional to those concerns).

125. *Preliminary Conclusions and Observations on Turkey*, *supra* note 86.

126. Report of the Special Rapporteur on Turkey, *supra* note 87, ¶¶ 49, 75.

127. Luhn, *supra* note 2 (quoting President Poroshenko as describing Russia's armed aggression and cyberattacks as "hybrid war").

128. See Zinets, *supra* note 38 (worsening relations between Kiev and Moscow); see also *Preliminary Conclusions and Observations on Turkey*, *supra* note 86 (discussing how Turkey's restrictions overwhelmingly and disproportionately touch "every aspect of public and private life in the country").

129. Report of the Special Rapporteur on Turkey, *supra* note 87, ¶ 7.

130. See Zinets, *supra* note 38 (involving hack attacks against the Ukrainian defense and finance ministries).

sentiments among Ukrainian citizens.¹³¹ Ukraine's suppression of this dialogue is similar to the censorship in Turkey that the U.N. determined to be undemocratic and violative of ICCPR Article 19.¹³²

Turning to Cameroon, both Cameroon and Ukraine targeted speakers of particular languages.¹³³ Cameroon's internet shutdown following protests over the treatment of English-speaking citizens limited the freedom of expression of specifically English-speakers.¹³⁴ Similarly, Ukraine's ban limits the expression of Russian-language speakers, who may be considered as more likely to speak out against the Ukrainian government and in support of the Russian government.¹³⁵ The U.N. condemned Cameroon for targeting English-speaking citizens, and Cameroon accordingly ended its internet shutdown in its northwest and southwest regions.

Finally, India, like Cameroon, targeted specific regions within the country to shutdown internet access.¹³⁶ India's internet restrictions also took place following widespread government protests in Jammu and Kashmir.¹³⁷ While Ukraine's ban does not target specific regions, eastern Ukrainians are disproportionately affected because they are more likely to choose Russian-language platforms, to speak out against Ukraine on social media, and rely on the VK and other banned social media platforms to communicate about the ongoing

131. See Bershidsky, *supra* note 25 (explaining that Russian-owned platforms are preferred by eastern Ukraine separatists and individuals with pro-Russian views).

132. See Report of the Special Rapporteur on Turkey, *supra* note 87, ¶ 7 (explaining that Turkey's restrictions lead it away from being a democratic nation as these restrictions lead to censorship of criticism of the government).

133. Compare Bershidsky, *supra* note 25 (detailing how sites banned by Ukraine feature Russian-language friendly settings and communities that may not be found on Facebook and Twitter), with *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86 (noting that the Internet shutdown occurred in predominantly English-speaking regions where protests regarding the treatment of English-speakers took place).

134. *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86.

135. See Dickinson, *supra* note 112 (remarking that some Russian-speaking Ukrainians embraced Russian occupation in the conflict zones).

136. See *U.N. Condemnation of India Internet Restrictions*, *supra* note 86 (targeting Kashmir and Jammu since 2012); see also *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86 (targeting the northwest and southwest regions).

137. *U.N. Condemnation of India Internet Restrictions*, *supra* note 86.

Russian-Ukrainian conflict.¹³⁸

While Ukraine's internet restrictions share similarities with these other condemned nations, Ukraine's ban is different in that it applies only to Russian-owned internet platforms and still allows Ukrainians in all regions to access Facebook, Twitter, and other social media alternatives.¹³⁹ Turkey, India, and Cameroon all implemented sweeping internet shutdowns that go beyond the scope of Ukraine's Russian-owned social media ban because their bans quashed any online freedom of expression in impacted areas, whereas Ukraine's ban applies only to particular websites.¹⁴⁰ The United Nations condemned Turkey, India, and Cameroon for their violations of Resolution 32/13, and ICCPR Article 19 because their actions were not necessary or proportional to any national security need.¹⁴¹ While Ukraine's ban is less expansive, it is still not proportional or necessary as required by Article 19, and clearly violates Article 19.¹⁴²

C. UKRAINE CANNOT CLAIM EXCEPTION UNDER ICCPR ARTICLE 19(3)

To meet the established requirements of Article 19(3)'s national security exception, Ukraine must demonstrate the necessity and proportionality of Ukraine's Internet ban as a response to a specified

138. See Koshiw, *supra* note 4 (explaining that eastern Ukrainians use banned social media to communicate about fighting).

139. See Luhn, *supra* note 2 (explaining the scope of Internet platforms banned by decree); see also Sharkov, *supra* note 42 (noting increased Ukrainian use of Facebook following ban).

140. See Bershidsky, *supra* note 25 (arguing alternatively that Ukrainians can still speak on other platforms like Facebook, Twitter, Instagram, and YouTube); see also Report of the Special Rapporteur on Turkey, *supra* note 87 (banning access to over 100,000 websites); *U.N. Condemnation of India Internet Restrictions*, *supra* note 86 (banning complete Internet access to particular regions); *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86 (banning complete Internet access to particular regions).

141. *Preliminary Conclusions and Observations on Turkey*, *supra* note 86 (citing the ICCPR in explaining that Turkey does not qualify for a national security exception); *U.N. Condemnation of India Internet Restrictions*, *supra* note 86 (citing U.N. Human Rights Council Res. 32/13 in urging India to cease infringing on citizen rights to freedom of expression); *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86 (citing U.N. Human Rights Council Res. 32/13 in condemning Cameroon).

142. See discussion *infra* Part III.D.

threat and show the action taken is legal under Ukrainian law.¹⁴³ The Ukrainian ban fails to meet this standard. While the Russian cyberwarfare threat is well-founded, the Russian threat through social media platforms is not proportional to the impacts of the ban because the cyberattacks are not actually connected to the banned platforms.¹⁴⁴ Furthermore, Ukraine's ban is unnecessary because it does not address the problems facing Ukraine and it is potentially harmful to Ukrainian citizens.¹⁴⁵ Justifications for the ban would also need to overcome the fact that Ukraine's ban has placed Ukrainians in the conflict zones in more danger, as it removes citizens' principle mechanism for communication.¹⁴⁶

1. Necessity and Proportionality in Relation to Russian Cyberattacks

The most prominent Russian hacking incidents have not occurred through social media and Internet platforms in a way that would merit implementation of the social media ban.¹⁴⁷ Russia has attacked Ukraine through its state institutions including the regional power grid, its finance and defense ministries, and its State Treasury.¹⁴⁸ In announcing the internet ban, President Poroshenko cited Russia's hybrid form of warfare, in which Russia engages in both cyber and physical conflict, and Russia's meddling in the French election as justification.¹⁴⁹ Neither of these Russian actions connect to the ban

143. General Comment No. 34, *supra* note 45, ¶ 34.

144. See Luhn, *supra* note 2 (explaining the widespread use of sites banned by Ukraine); see also Zinets, *supra* note 38 (remarking on the many times Russia has allegedly cyberattacked Ukraine's infrastructure in a two-month span and showing the many outlets through which Ukraine is attacked).

145. See Zinets, *supra* note 38 (showing that cyberattacks on Ukraine are not connected with Russian social media and search engines); see also Koshiw, *supra* note 4 (highlighting the importance of VK use in conflict zones).

146. See Koshiw, *supra* note 4 (explaining that "both residents and the authorities rely on V Kontakte posts to disseminate the latest reports on the fighting.").

147. See Zinets, *supra* note 38 (noting that Ukraine has been the target of alleged Russian hacking throughout their cyberwar with one report from Ukraine stating that Ukrainian institutions had been hacked approximately 6,500 times in a two-month span of time).

148. *Id.*

149. See Bershidsky, *supra* note 25 (quoting Poroshenko's VK post in which he referenced hybrid war and the French election campaign interference).

on Russian-owned websites.¹⁵⁰

Ukraine cannot claim a national security exception on the basis of necessity under the hybrid war rationale because cyberattacks have not occurred through Russian-owned social media.¹⁵¹

Ukraine's national security argument is similar to Turkey's rationale (ultimately rejected by the U.N.) in claiming that external attacks from ISIS or PKK can somehow be tied to large-scale social media shutdowns.¹⁵² However, Turkey's expansive actions were disproportionate to the interest allegedly being protected because they involved complete Internet and media shutdowns designed to end government criticism rather than fight terrorism.¹⁵³ Similarly, while Ukraine may have a legitimate national security concern regarding cyberattacks, the protective action taken is over-intrusive since it is clear social media sites are not Russia's primary mechanism for cyberattack.¹⁵⁴

Ukraine fails to demonstrate a connection between the internet platforms and Russian cyberattacks.¹⁵⁵ Therefore, Ukraine cannot meet the necessity and proportionality requirements of ICCPR Article 19(3) with regard to its national security cyberattack rationale.¹⁵⁶

2. *Proportionality and Intrusive Government Restrictions in Relation to Data Collection*

Ukraine cannot claim that data collected by the Russian government through these Russian-owned internet platforms is a

150. See Zinets, *supra* note 38 (showing how Russian cyberattacks occur through a variety of mechanisms without reference to social media platforms).

151. *Id.*

152. See *Preliminary Conclusions and Observations on Turkey*, *supra* note 86 (explaining that while Turkey does face threats from ISIS and PKK and it can take these threats into account when protecting public order and national security, its Internet and social media shutdowns are not necessary to preventing terrorism).

153. *Id.*

154. See Zinets, *supra* note 38 (noting the systems through which Russia has attacked Ukraine); see also *Condemnation of India Internet Restrictions*, *supra* note 86 (stressing that a ban that is characteristic of collective punishment against citizens violates freedom of expression under the ICCPR).

155. Zinets, *supra* note 38.

156. ICCPR, *supra* note 8, at 178.

security threat because most users have data of little value to the Russian government.¹⁵⁷ Even where VK has collected data for the Russian government, the data was simply public information.¹⁵⁸ Some Ukrainian politicians cite the collection of information on soldiers and government employees as reason for supporting the ban.¹⁵⁹ However, given the large number of Ukrainian citizens who use the banned sites, concern regarding a small number of people who might potentially have valuable information is not a sufficiently valid justification for such a widespread ban.¹⁶⁰

Article 19(3) requires that actions be specifically constructed to achieve the state's protective function and be the least intrusive function for protective achievement.¹⁶¹ The Special Rapporteur expanded on the definition of intrusiveness in Turkey's case by stating that Turkey's actions could be considered least intrusive if requests for removal of internet content were restricted to "actual cases of incitement" that threaten national security.¹⁶²

Ukraine claims it is trying to protect against the acquisition of data that can lead to national security risks, but broadly banning all citizens from using these websites is an overly intrusive and unnecessary action for protecting national security.¹⁶³

3. *Necessity and Proportionality in Relation to Propaganda*

Ukraine's concern regarding Russian utilization of internet platforms to spread propaganda does not prevail over a citizen's right to freely seek and impart information on the Internet. While evidence does show that the Russian-owned platforms disseminate or

157. See Luhn, *supra* note 2 (explaining that VK is intrusive and cooperative with the Russian government, but not a security threat because most data that can be collected is public information).

158. *Id.*

159. *Id.*

160. See *id.* (showing the popularity of banned sites in Ukraine with millions of Ukrainians using them).

161. General Comment No. 34, *supra* note 45, ¶ 34.

162. Report of the Special Rapporteur on Turkey, *supra* note 87, ¶ 80.

163. See Luhn, *supra* note 2; see also General Comment No. 34, *supra* note 45, ¶ 34 (defining the requirements for proportionality, including the requirement that restrictions enacted for national security be the least restrictive possible for achieving the state's security goal).

restrict content to present more favorable information on Russia, these actions do not serve a sufficient national security justification for banning the websites.¹⁶⁴

Firstly, social media and internet users already tend to self-select what information they will view and often join online communities with similar views.¹⁶⁵ Individuals on VK may have pro-Russia sentiments and may tend to rely more on information supporting those sentiments, but these views are part of their right to freedom of opinion and not likely to change with a ban on VK.¹⁶⁶

Secondly, a government cannot ban websites for expressing unfavorable views of that government.¹⁶⁷ Turkey, India, and Cameroon all shutdown social media and internet access following political unrest.¹⁶⁸ The U.N. condemned each of these actions seeing them as violations of rights to opinion, expression, and information without justification under the ICCPR.¹⁶⁹ Ukraine's ban is similar in its attempt to quiet the expression of pro-Russian views.¹⁷⁰ Expression or receipt of disagreeable information is not a national security risk, and banning Russian-owned social media sites for such

164. Bershidsky, *supra* note 25 (explaining that the Yandex algorithm seemingly hides unfavorable news regarding the Russian government).

165. Burnside, *supra* note 29 (supporting how information silos develop as individuals select what information they want to receive).

166. See UKR. CONST. art. 34, para. 1 (“To each a right to freedom is guaranteed thoughts and words, on free expression of the looks and persuasions.”); see also ICCPR, *supra* note 8, at 178 (“Everyone shall have the right to hold opinions without interference.”); Bershidsky, *supra* note 25 (writing that VK’s audiences has historically been “a younger, more pro-Russian audience than other social networks”).

167. See General Comment No. 34, *supra* note 45, ¶ 9 (“All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature.”).

168. *Preliminary Conclusions and Observations on Turkey*, *supra* note 86 (noting that shutdowns took place following attempted coup and aggression from external threats); *U.N. Condemnation of India Internet Restrictions*, *supra* note 86 (explaining that shutdowns occurring after political protests); *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86 (explaining that shutdowns followed political protests).

169. See, e.g., *Preliminary Conclusions and Observations on Turkey*, *supra* note 86; *U.N. Condemnation of India Internet Restrictions*, *supra* note 86; *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86.

170. See Luhn, *supra* note 2 (noting that websites ban by Ukraine are popular with individuals holding anti-Ukraine views).

a reason is not acceptable under ICCPR Article 19.¹⁷¹

4. Decree Implementation as a Violation of Ukrainian Law

The implementation of Ukraine's decree is a violation of Ukraine's own laws making it an unlawful act inside the country.¹⁷² Ukrainian law holds that internet restrictions cannot be implemented without a court decision.¹⁷³ General Comment No. 34 explains that "[r]estrictions must be provided by law."¹⁷⁴ However, "[a] law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."¹⁷⁵ The Presidential Decree enacting the social media and Internet ban grants expansive power in the implementation of the widespread ban, and ignores existing Ukrainian law regarding internet restrictions.¹⁷⁶

IV. RECOMMENDATIONS

A. UKRAINE SHOULD CEASE IMPLEMENTATION OF RUSSIAN-OWNED WEBSITE BAN

Ukraine's internet site ban is in violation of ICCPR Article 19; therefore, Ukraine should cease implementation of the ban immediately.¹⁷⁷ Under ICCPR Article 19, Ukraine is expected to maintain rights to freedom of expression, opinion, and information regardless of frontiers.¹⁷⁸ The Russian-owned internet platform ban limits Ukrainian access to different outlets of expression and targets websites that may express pro-Russian sentiments.¹⁷⁹ Russian-

171. See General Comment No. 34, *supra* note 45, ¶ 21.

172. See Luhn, *supra* note 2 (expressing need for a court decision for implementation of Internet access restrictions); General Comment No. 34, *supra* note 45, ¶ 22.

173. Luhn, *supra* note 2.

174. General Comment No. 34, *supra* note 45, ¶ 22.

175. *Id.*

176. Luhn, *supra* note 2; *The Decree of the President of Ukraine No. 133/2017*, INT'L MASSMEDIA AGENCY (May 18, 2017), <https://intmassmedia.com/2017/05/18/the-decree-of-the-president-of-ukraine-№1332017/> (listing decrees rendered invalid by this presidential decree and listing institutions impacted by the ban).

177. ICCPR, *supra* note 8, at 178.

178. *Id.*

179. Bershidsky, *supra* note 25 (explaining what websites are banned by the

speaking Ukrainian citizens who prefer the Russian-language friendly social media sites and Ukrainians living in conflict zones who use these social media sites to update people about the conflict are disproportionately harmed by this ban.¹⁸⁰ Furthermore, the large-scale nature of the ban and the absence of a legal mechanism in Ukraine to implement the ban using principles of due process, demonstrate that Ukraine has not met the standard explained under General Comment No. 34.¹⁸¹

Should the Ukrainian government insist on restricting certain portions of the internet, this must be done through Ukraine's courts.¹⁸² Given that blocking website access can only be done through court decision in Ukraine, the Ukrainian government should go to its court system to determine on a legal and proportional level whether and how access restrictions may be implemented to be in compliance with the ICCPR.¹⁸³

Proportionality should look similar to suggestions made by the Special Rapporteur regarding Turkey's internet shutdowns in which the Special Rapporteur recommended that internet content takedowns be limited to actual cases of incitement.¹⁸⁴ In Ukraine's case, this would mean limiting access restriction where individuals (or content) inciting actual violence, or limiting access for individuals who hold sensitive information. Until the Ukrainian government complies with its own legal mechanisms for implementing the ban, it should cease implementation and conform to the ICCPR.¹⁸⁵

Ukraine and how these sites attract pro-Russian views holders).

180. *Id.*

181. Luhn, *supra* note 2 (noting the application of the decree to VK, Odnoklassniki, Mail.ru, and Yandex, among other Russian services, and referencing Mykhailo Chaplyga's comment regarding the requirement of a court decision for Internet access restrictions); General Comment No. 34, *supra* note 45, ¶ 22 (requiring restrictions of freedom of expression under Article 19(3) national security exception be legal, proportional, and necessary).

182. Luhn, *supra* note 2 (quoting Mykhailo Chaplyga's comment regarding the requirement of a court decision for Internet access restrictions).

183. *Id.*

184. Report of the Special Rapporteur on Turkey, *supra* note 87, ¶ 80.

185. *Id.*

B. THE UNITED NATIONS HUMAN RIGHTS COMMITTEE SHOULD CLARIFY THE TERMS OF ARTICLE 19 AND CONDEMN UKRAINE'S INTERNET RESTRICTIONS THROUGH GENERAL COMMENT, FIRST OPTIONAL PROTOCOL POWERS, OR PRESS RELEASE

As a party to the ICCPR and the First Optional Protocol to the ICCPR, the HRC may reprimand Ukraine for its actions.¹⁸⁶ Ukraine may also face reprimand from the Human Rights Council or through Reports filed by a Special Rapporteur as seen with Turkey, India, and Cameroon. However, the HRC specifically enforces the ICCPR while the Human Rights Council and Special Rapporteur more broadly assess human rights around the globe.¹⁸⁷

Accordingly, the HRC should exercise its monitoring and reviewing powers to issue a general comment clarifying the proper application of the Article 19(3) national security exception.¹⁸⁸ While General Comment No. 34 does explain the standard for the national security exception, a general comment addressing Internet access bans during cyber-conflict would further the international community's understanding of the interaction between modern conflict and international law.¹⁸⁹ As cyberwarfare continues to evolve and become increasingly part of international conflicts, it is important that the HRC address how rights to information should be protected in instances of cyberwarfare, which is closely connected with the dissemination and collection of information.

Furthermore, a general comment related to Ukraine's ban could potentially create the pressure necessary from the international community to push Ukraine into reversing the ban.¹⁹⁰ The United

186. First Optional Protocol of the ICCPR, *supra* note 58.

187. See U.N. Human Rights Council, U.N. HUMAN RIGHTS: OFFICE OF THE HIGH COMM'R, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx> (explaining that the U.N. Human Rights Council bears responsibility for protecting all human rights around the world); see also Human Rights Comm., U.N. HUMAN RIGHTS: OFFICE OF THE HIGH COMM'R, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (explaining that the Human Rights Committee specifically monitors implementation of the ICCPR).

188. *International Covenant on Civil and Political Rights*, *supra* note 63.

189. See General Comment No. 34, *supra* note 45.

190. See Kazeem, *supra* note 103 (explaining how the U.N.'s statement on Cameroon's Internet shutdown created the pressure needed for Cameroon to end the shutdown).

States and the Council of Europe have spoken out against Ukraine's actions. Particularly, Council of Europe Secretary-General Thorbjorn Jagland said, in response to Ukraine's actions, that "blanket bans are out of line with the principle of proportionality."¹⁹¹ However, condemnation from the United Nations would lend legitimacy to criticisms of the ban.

Additionally, the HRC may review individual complaints under its First Optional Protocol powers.¹⁹² Upon review of complaints, the HRC may issue views finding Ukraine in violation of the ICCPR similar to the views issued by the Special Rapporteur regarding Turkey's Article 19 ICCPR violations.¹⁹³ The HRC could then monitor Ukraine to determine how Ukraine will implement changes based on its recommendations.¹⁹⁴ The HRC can choose to increase its field presence in Ukraine and engagement with Ukraine to encourage change.¹⁹⁵

The United Nations may also distribute a press release urging Ukraine to cease implementation of the ban, similar to the U.N.'s reaction to internet shutdowns in India and Cameroon.¹⁹⁶ Such an action could lead to pressure on Ukraine without having to go through the general comment procedure. While a general comment can be effective in encouraging change in Ukraine and clarifying

191. See *Council of Europe: Sanctions on Russian Sites Violate Freedom Principles*, KYIV POST, *supra* note 7 (explaining that Europe Secretary-General Thorbjorn Jagland found that this ban goes against freedom of expression); *US Scrutinizes Ukraine Ban on Russian Websites*, VOA NEWS, *supra* note 42 (quoting a U.S. State Department official saying, "We call on the Ukrainian government to find a way to protect its national interests that does not undermine its constitutional principles").

192. See *International Covenant on Civil and Political Rights*, *supra* note 63 (listing the options that the Human Rights Committee has for enforcing the ICCPR).

193. *Id.*; Report of the Special Rapporteur on Turkey, *supra* note 87.

194. See *What We Do*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx> (noting that field offices in member states help in "developing responses to human rights challenges").

195. See *id.* (explaining that field offices are prepared to implement technical trainings and can support member states in "administration of justice, legislative reform, human rights treaty ratification, and human rights education").

196. See *Condemnation of India Internet Restrictions*, *supra* note 86; *U.N. Condemnation of Cameroon Internet Restrictions*, *supra* note 86.

Article 19(3) in the future, a press release may have an immediate effect of bringing more public notice to the issue. While condemnations of India and Turkey have not led to policy changes, Cameroon did lift its internet restrictions in its English-speaking northwest and southwest regions following the U.N.'s press release and subsequent international pressure condemning the restrictions.¹⁹⁷ Under the HRC's powers, it should condemn Ukraine and encourage pressure similar to that which led Cameroon to end its internet shutdown.¹⁹⁸

C. UKRAINE SHOULD ENCOURAGE THE USE AND DEVELOPMENT OF NON-RUSSIAN INTERNET OPTIONS

Ukraine should respect the ICCPR in giving its citizens the freedom to express themselves and seek and impart information on Russian internet platforms; however, this does not mean that Ukraine cannot encourage and incentivize use of alternative options.¹⁹⁹ Since the announcement of the ban on the social media sites, approximately two and a half million Ukrainians have created Facebook profiles, showing that some Ukrainians are willing to change platforms.²⁰⁰ Now, the government needs to encourage this trend rather than force it. However, some Ukrainians cannot or will not switch to a platform like Facebook. Where this is the case, Ukraine should allow continued use of the Russian-owned sites until Ukrainians have had the time to develop comparable replacements, or until Ukrainian businesses have had the time to rebuild their profile popularity on alternative sites.²⁰¹

197. See Kazeem, *supra* note 103 (remarking that Cameroon ended its Internet shutdown following condemnation by the U.N.).

198. See *International Covenant on Civil and Political Rights*, *supra* note 63 (outlining how the HRC may make statements when a nation violates the ICCPR); Kazeem, *supra* note 103.

199. See Sharkov, *supra* note 42 (demonstrating that Ukrainian citizens can access other social media options); see also *Valentin Petrov: If Domestic Enterprises Start Operating on the Domestic Software Product, Ukraine's Added Value Will Be Increased*, NAT'L SECURITY & DEF. COUNCIL UKR. (May 17, 2017), <http://www.rnbo.gov.ua/en/news/2766.html> (stating that private sector development of domestic software products would stimulate the economy).

200. Sharkov, *supra* note 42 (reporting on the increase in Ukrainian Facebook accounts resulting from the ban).

201. Bershidsky, *supra* note 25 (explaining that some Ukrainians prefer that

There has already been interest from the National Security and Defense Council (NSDC) regarding the economic benefits of private Ukrainian businesses developing and utilizing domestic software.²⁰² After the implementation of the decree, the Head of Service on Issues of Information Security of the NSDC Staff, Valentin Petrov, stated, “[i]f our private sector understands that it is better to work with the domestic software product, this will stimulate our economy, increase our added value. . . .”²⁰³ This statement indicates government interest in private Ukrainian development of domestic products, which could include the development of software for business operations and social media platforms.²⁰⁴ If the Ukrainian government were to incentivize private development of domestic platforms for expression through legislation that creates financial support for domestic private sector startups, it may have more success in having citizens migrate away from Russian-owned sites while maintaining legitimacy and legality.

Furthermore, the internet ban distracts from governmental legitimacy in Ukraine, whereas as campaign encouraging development of domestic platforms would not create as many questions of legitimacy.²⁰⁵ Those who have criticized the ban have compared Ukraine to Russia, noting that Ukraine has taken to “emulating Russia’s repression.”²⁰⁶ While others have discussed Ukraine’s initiation into “a nice club,” joining “Russia, Myanmar, Vietnam, Tunisia, Syria, Iran, Saudi Arabia, China, North Korea” in blocking access to social media networks.²⁰⁷ Allowing access the these sites, but engaging use and development of alternative platforms may help to legitimize the government as the European

Russian-language platform of VK and would not like to switch to another platform).

202. Valentin Petrov: *If Domestic Enterprises Start Operating on the Domestic Software Product, Ukraine’s Added Value Will Be Increased*, *supra* note 199.

203. *Id.*

204. *Id.*

205. *Ukraine: Revoke Ban on Dozens of Russian Web Companies*, *supra* note 7 (claiming that President Poroshenko is attempting to control public discourse).

206. Koshiw, *supra* note 4 (quoting from Kenneth Roth of the Human Rights Watch in a Twitter post).

207. Bershidsky, *supra* note 25 (quoting Sevgil Musaeva, editor of Ukraine’s *Ukrainskaya Pravda*).

democracy it claims to be.

V. CONCLUSION

Ukraine's ban of the social media sites VK and Odnoklassniki, the email service Mail.ru, and the search engine Yandex, is a violation of its obligation under ICCPR Article 19. The ban does not meet the requirements of Article 19(3)'s national security exception because it is not necessary, proportional, or legal in relation to the rights of Ukraine's citizens and Ukraine's cybersecurity objective. Ukraine should cease implementation of this ban, consider alternative options for combatting Russia's cyberwarfare, and the HRC should condemn the ban. Ukraine's Internet platform ban demonstrates a failure to respect its citizens' rights to freedom of expression and access to information; however, through a reversal of the current ban, there is still an opportunity for Ukraine to ensure the security of its citizens and their rights.