

COMBATING RUSSIAN DISINFORMATION IN UKRAINE: CASE STUDIES IN A MARKET FOR LOYALTIES

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I. INTRODUCTION

This essay takes an oblique approach to the discussion of “fake news.” The approach is oblique geographically because it is not a discourse about fake news that emerges from the more frequently invoked cases centered on the United States and Western Europe, but instead relates primarily to Ukraine. It concerns the geopolitics of propaganda and associated practices of manipulation, heightened persuasion, deception, and the use of available techniques. This essay is also oblique in its approach because it deviates from the largely definitional approach – what is and what is not fake news – to the structural approach. Here, we take a leaf from the work of the (not-so) “new institutionalists,” particularly those who have studied what might be called the sociology of decision-making concerning regulations.¹ This essay hypothesizes that studying modes of organizing social policy discourse ultimately can reveal or predict a great deal about the resulting policy outcomes, certainly supplementing a legal or similar analysis. Developing this form of analysis may be particularly important as societies seek to come to grips with the phenomena lumped together under the broad rubric of fake news. The process by which stakeholders assemble to determine a collective position will likely have major consequences for the

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1. See Julia Black, *New Institutionalism and Naturalism in Socio-Legal Analysis: Institutional Approaches to Regulatory Decision Making*, 19 L. & POL’Y 51, 51-93 (1997); see also Johan From, *Decision-Making in a Complex Environment: A Sociological Institutional Analysis of Competition Policy Decision-Making in the European Commission*, 9 J. EUROPEAN PUB. POL’Y. 219 (2002).

nature of debate on fake news, as it becomes an increasingly important subject.

Attempts at formulating definitional approaches to fake news often produce varying results and a succession of misleading traps.² As an example, a recent article provides a succinct categorical description of fake news, which is articulated as, “information that has been deliberately fabricated and disseminated with the intention to deceive and mislead others into believing falsehoods or doubting verifiable facts.”³ However, this definition, as is true of many, raises as many questions as it tries to answer: Does fake news have to be both deliberately fabricated *and* deliberately disseminated? Are there alternate scenarios in which fabrication itself becomes relative? Do large scale alternative gestalts – varying perceptions of the world at the root of some areas of deep concern – constitute “fakeness”? Can fake news be fake simply by presenting as important matters that are trivial? Must there be an intent both to deceive and mislead? Must the intended deception be for the specific purpose of persuading the target audience to believe a falsehood or doubt verifiable facts? Is government supported or government sponsored fake news especially egregious or harmful? Is propaganda by definition fake news, and when does propaganda, which is often protected speech, morph into “propaganda for war,” which is an area specifically subject to controls under international norms?

Taking a “new institutions” approach requires observing how particular communities (from tight-knit to regional to transnational) seek to cope with dramatically altered ethics of information distribution. Rather than add to the accumulating scholarship about what expressions are included in the definition of fake news, under what auspices, and with what intentions, this essay seeks to explore the relationship between the nature of the inquiry and the process by which the relevant parties negotiate and arrive at a definitional outcome. This is a kind of stakeholder analysis: Who is in the room when public interest groups, governments or societies determine what is and is not fake news and under what auspices? How is the discussion framed and with what results? What is the interaction between great global powers and a nation’s sovereign interest in controlling decision-making within its borders? As a way of grounding this essay, we focus on Ukraine, to gain a

2. See Tarlach McGonagle, “Fake News”: *False Fears or Real Concerns?*, 35 NETH. Q. HUM. RTS. 203, 203-04 (2017).

3. See *id.* at 203-09; see also *The Real Story of ‘Fake News,’* MERRIAM-WEBSTER ONLINE: WHAT WE’RE WATCHING, <https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news> (last visited Oct. 15, 2018); Callum Borchers, ‘Fake News’ has Now Lost all Meaning, WASH. POST THE FIX (Feb. 9, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/09/fake-news-has-now-lost-all-meaning/?utm_term=.93197785e442.

glimpse of how actors and stakeholders – states, civil society, scholars and others – interact when faced with the broad, real and significant instance of fake news and seek to develop a set of policies to respond to it. This essay samples both the environment in which discussions occurred and in which the contours of a controversial term are forged and shaped.

Ukraine has become a virulent laboratory for consideration of such issues. To begin to comprehend how fake news as a subject becomes a major preoccupation, it is necessary to have some background on the conflict there. And it is necessary to acknowledge how European and American stakeholder perspectives emerged specifically addressing how the Ukrainian state and media apparatus, as it engaged its civil society, should respond to dramatic Russian initiatives. Russia's recent intervention in Ukraine is a massive subject, so to contextualize the query, we turn to two virtually simultaneous projects relating to fake news and propaganda in Ukraine, projects with differing structures and different recommendations as to ways for stakeholders within Ukraine to respond. Russia and Ukraine have been fighting an information war for years, and there have been many efforts by many stakeholders to recommend that Ukraine take, or not take, specific actions. Many of those efforts could have been selected for a study similar to ours. The projects selected for this essay involve foreign support, citizen involvement, and ambitious efforts to affect public responses to Russian direct information interventions. One of these projects yielded a book called *Words and Wars: Ukraine Facing Kremlin Propaganda*,⁴ and was produced primarily in Ukraine and by Ukrainians, and under predominantly European sponsorship. The other project, called *Promoting and Advancing Media Freedom in Ukraine*, featured more European and American expertise, though in conjunction with global experts.⁵ The existence of these two projects allows the opportunity to examine somewhat diverging modes of “preparing” Ukraine to respond to the Russian interventions; the two projects provide an opportunity to search out significant variations that arguably influence policy outcomes, variations including the nature of the sponsoring organization, the sources of funding, the participants' professional backgrounds, and the relationship of participants to conflict and war.

There are limitations to this approach. It is far too soon to know whether either of these interventions will influence Ukrainian responses to Russian

4. ARTEM BABAK ET AL., WORDS AND WARS (2017), https://issuu.com/internews-ukraine/docs/words_and_wars.

5. INTERNEWS UKR., PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES (2018), http://cedem.org.ua/wp-content/uploads/2018/01/Internews_FreeMedia_2017_eng_final.pdf. The ancillary documents to the Guidelines, such as the Frequently Asked Questions, are on file with the authors and hereafter shall be referred to as “The Guidelines Materials.”

propaganda or fake news or related issues as reflected in the Ukrainian public sphere. It is also impossible, at this point, to attribute any outcome specifically to structural differences in shaping outputs. Yet there are benefits to asking questions about the sociology of decision-making and the significant range of mechanisms by which stakeholders are assembled to produce significantly different outcomes. The interventions demonstrate how groups or individuals parse the instruments of law, at the national and international levels, to provide a framework for organizing and shaping a national response. And they show that institutions, unsurprisingly, compete for influence by making sparring claims to legitimacy, emphasizing different realities, critiquing existing initiatives and engaging in a process designed to influence the relevant power groups in Ukraine.

As an additional point, this approach is also what might be called a “participatory case study.” Under the auspices of the international non-governmental organization (“NGO”) *Internews*,⁶ the authors were part of the international team that worked with local actors and stakeholders in Ukraine on the *Promoting and Advancing Media Freedom in Ukraine* project, as is described in greater detail below. As a result, we are particularly sensitive to labeling because of the similarity of the two programs. This essay will distinguish between what will hereafter be called the “Guidelines Project” (i.e., the *Promoting and Advancing Media Freedom in Ukraine* project) and what will be called the “Words and Wars Project.” Moreover, because of the authors’ involvement with the Guidelines Project, the authors know much more about how that project, as opposed to the Words and Wars Project, was conceptualized and implemented.⁷ Nonetheless, we believe that our comparison of the two projects is still valuable in understanding the decision-making that leads to proposals to combat fake news or disinformation.

Each of the two efforts sought to bring public attention to the cauldron of propaganda in which Ukraine currently finds itself. The Guidelines Project’s goal was to build consensus among stakeholders concerning how government, journalists, distributors and media institutions could promote and advance freedom of expression in the midst of the ongoing armed conflict

6. Founded in the 1980s, Internews is “an international non-profit media development organization with administrative centers in California, Washington DC, and London. [Its] mission is to empower local media worldwide to give people the news and information they need, the ability to connect, and means to make their voices heard.” For the structure of Internews, see PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5; *see also About Us, INTERNEWS*, <https://www.internews.org/about-us> (last viewed October 27, 2018); Ross Howard, *Conflict-Sensitive Journalism: (R)evolution in Media Peacebuilding*, in COMMUNICATION AND PEACE: MAPPING AN EMERGING FIELD 62 (Julia Hoffmann & Virgil Hawkins eds., 2015).

7. Despite our involvement in the Guidelines Project, we attempt to analyze both projects from as objective a perspective as possible, all the while recognizing that our own biases may unconsciously inject themselves.

with Russia. Crucially, the Guidelines Project sought to build consensus in a way that was in accord with international norms concerning freedom of expression during times of conflict. The second project—yielding the taut and pointed *Words and Wars* book—arose from members of the media in Ukraine, Moldova, Belarus, Georgia, Armenia and Azerbaijan who were witnessing firsthand the deleterious effects of Russian's information war in post-Soviet countries. Rather than emphasize consensus grounded in international principles, the Words and Wars Project “endeavoured to describe the elements of the Kremlin's propaganda mechanism and the way it works . . . , to describe the lessons learned by Ukraine, and [to] formulate[] recommendations that would help stakeholders to take the punch [out] of information warfare.”⁸ To understand the differences, it also is necessary to clarify the related, but subtly disparate nature of each project's sponsoring organization. Internews (formerly Internews Network) and Internews Ukraine are related, but separate, organizations.⁹ Internews Ukraine was created when Internews spun off some of its country offices to localize them and make them less dependent on decisions made from the United States. Thus, whereas the Guidelines Project was sponsored with a substantially American umbrella, the Words and Wars Project was sponsored and driven from the area of conflict.

8. WORDS AND WARS, *supra* note 4, at 11.

9. The two projects are examples of distinctive differences in sponsorship with implications for output. The Guidelines Project was sponsored by Internews, formerly Internews Network, the global organization based in Arcata, CA, Washington D.C., London, and Paris. *About Us*, INTERNEWS, *supra* note 6. The Words and Wars Project was sponsored by Internews Ukraine, an independent Ukrainian, wholly separate organization with a separate board of directors and separate staff. *About Us*, INTERNEWS UKR., <http://internews.ua/about/history> (last visited October 27, 2018). Internews Ukraine was created in the 1990s when Internews, in the wake of post-Soviet independence, considered it strategically wise to have local autonomous entities in some of the newly independent states. *Id.* Several of these offshoots have changed their names and lost the Internews titular association. Armenia is an example, where the formerly known Internews Armenia is now known as *Media Initiatives Center*. *About Us*, MEDIA INITIATIVES CTR., <http://mediainitiatives.am/en/home> (last visited November 28, 2018). Internews Ukraine often functions as a sub-grantee for Internews, but it also gains funding directly from various sources in Europe and the U.S. *Donors and Partners*, INTERNEWS UKR., <http://internews.ua/about/donors-and-partners> (last visited October 27, 2018). Internews Ukraine is under the direction of Ukrainian nationals while Internews itself has an international staff running its Ukrainian efforts and a Ukrainian team. *Our Team*, INTERNEWS UKR., <http://internews.ua/about/team> (last visited October 27, 2018). *But see Key Staff*, INTERNEWS UKR., <https://www.internews.org/key-staff> (last visited October 27, 2018). As a result, Internews Ukraine could be said to reflect Ukrainian popular positions somewhat more closely than Internews—which functions in an international discourse of human rights and media development.

I. UKRAINE, PROPAGANDA AND FAKE NEWS

A. *The Current Conflict in Ukraine*

It is necessary to begin with some context in terms of Ukraine's recent history. An abundance of academic articles and a stream of journalistic coverage seek to explicate the background circumstances against which the discussions of "fake news," including propaganda, in Ukraine took place during the late Soviet and post-Soviet periods.¹⁰ The status of Ukraine as an independent country and its geopolitical history and relationship with its neighbors have sparked heated debates and wars for decades, if not centuries.¹¹ Indeed, some linguists believe that even the name "Ukraine" derives from Slavic words that essentially translate to "the borderlands" in English.¹² While the oft-told history of Ukraine is contained in many volumes, for the purposes of this essay, the country's history after the dissolution of the Soviet Union is the most relevant.

Ukraine gained independence in 1991 after the collapse of the Soviet Union and has since been pulled between Russia to the East and Europe to the West. This tension, extensive and pervasive, boiled over in 2013 when then-President Viktor Yanukovich refused to sign an association agreement with the European Union, sparking hundreds of thousands of pro-European Ukrainians to take to the streets in protest.¹³ The protests – which became known as the Euromaidan Revolution or Revolution of Dignity – spread

10. See, e.g., Ailsa Chang, 'Rough Translation': What Americans Can Learn From Fake News In Ukraine, NPR (Aug. 21, 2017, 4:57 AM), <https://www.npr.org/2017/08/21/544952989/rough-translation-what-americans-can-learn-from-fake-news-in-ukraine>; Daniel Bruce, Editorial, *How Ukraine Is Tackling Its Huge Fake News Problem*, INEWS ESSENTIAL DAILY BRIEFING (July 10, 2017), <https://inews.co.uk/opinion/ukraine-tackling-huge-fake-news-problem>; Nolan Peterson, *How Putin Uses Fake News to Wage War on Ukraine*, NEWSWEEK (Apr. 3, 2017, 12:50 AM), <http://www.newsweek.com/how-putin-uses-fake-news-wage-war-ukraine-577430>; Vijai Maheshwari, *Ukraine's Fight Against Fake News Goes Global*, POLITICO (Mar. 12, 2017, 10:30 PM), <https://www.politico.eu/article/on-the-fake-news-frontline>; Andrei Soshnikov, *Inside a Pro-Russia Propaganda Machine in Ukraine*, BBC NEWS (Nov. 13, 2017), <http://www.bbc.com/news/blogs-trending-41915295>; Maria Zhdanova & Dariya Orlova, *Computational Propaganda in Ukraine: Caught Between External Threats and Internal Challenges*, (Computational Propaganda Research Project, Working Paper No. 2017.9, 2017) (Samuel Woolley & Philip N. Howard eds.), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/06/Comprop-Ukraine.pdf>.

11. See generally ANNA REID, *BORDERLAND: A JOURNEY THROUGH THE HISTORY OF UKRAINE* (2015).

12. Katie Zezima, 'Ukraine' or 'the Ukraine'? It's More Controversial Than You Think, WASH. POST (Mar. 25, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/25/ukraine-or-the-ukraine-its-more-controversial-than-you-think/?utm_term=.af5c2f238aab.

13. Jonas Grätz, *Revolution on Euromaidan: Yanukovich Seals His Fate – And Ukraine's?*, FOREIGN AFF. (Dec. 9, 2013), <https://www.foreignaffairs.com/articles/ukraine/2013-12-09/revolution-euromaidan>.

across Ukraine, turned violent, and eventually led to the ouster of President Yanukovich.¹⁴ From the beginning, Russia contended that the events were encouraged and financed by European and American interests, including specific engagement of governments. Propaganda or strategic narratives sprouted everywhere.

Almost immediately after President Yanukovich was ousted and fled Ukraine, pro-Russian militants seized key buildings and the parliament of Crimea, a Ukrainian peninsula in the Black Sea with a Russian-speaking majority.¹⁵ Thereafter, military personnel without insignia (but presumed to be Russian or Russian-supported forces) occupied Crimea and a dubious public vote for independence from Ukraine took place. The vote was not internationally recognized as legitimate, but brought pro-secession results, and was followed by Russia's formal annexation of Crimea in March 2014.¹⁶ Around the same time, protests by pro-Russian and anti-Ukrainian government groups erupted in the industrial east of Ukraine in the Donetsk and Luhansk oblasts, with Russian-supported militants seizing government buildings and announcing the independence of the so-called Donetsk and Luhansk People's Republics in May 2014.¹⁷ The unrest in the east became an armed conflict that had by the beginning of 2018 claimed more than 10,000 lives, including 3,000 civilians, and displaced more than 1.7 million people.¹⁸ Although the warring parties have repeatedly entered into ceasefires, daily fighting continues.¹⁹

In response to Russia's annexation of Crimea and support of the separatists in Donetsk and Luhansk, Ukraine's allies in the West employed a variety of efforts to support the Ukrainian government and alter Russia's behavior in the conflict. Very quickly after the annexation of Crimea, the United States, the European Union, Canada, Japan and many other countries imposed economic sanctions against individuals, businesses and officials from Russia and Ukraine who were involved in the annexation and/or conflicts in eastern Ukraine.²⁰ The North Atlantic Treaty Organization, of

14. Zhdanova & Orlova, *supra* note 10; see also Yuriy Shveda & Joung Ho Park, *Ukraine's Revolution of Dignity: The Dynamics of Euromaidan*, 7 J. EURASIAN STUD. 85 (2016).

15. Zhdanova & Orlova, *supra* note 10.

16. Matt Smith & Alla Eshchenko, *Ukraine Cries 'Robbery' as Russia Annexes Crimea*, CNN WORLD (Mar. 18, 2014, 6:20 PM), <http://www.cnn.com/2014/03/18/world/europe/ukraine-crisis/index.html>.

17. Zhdanova & Orlova, *supra* note 10.

18. *Ukraine and Russia Are Both Trapped by the War in Donbas*, ECONOMIST, May 27, 2017, at 45.

19. Andrew E. Kramer, *Ukraine War Flares Again After a Lull*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/world/europe/ukraine-war-russia.html>.

20. See generally Alison Smale & Michael Shear, *Russia is Ousted From Group of 8 by U.S. and Allies*, N.Y. TIMES (Mar. 24, 2014),

which Ukraine is not a member, also provided financial support to Ukraine, establishing five trust funds designed to build Ukraine's capacity in areas such as Command, Control, Communications and Computers, Cyber Defense and Military Career Management.²¹ Moreover, in March 2014 the Organization for Security and Co-operation in Europe ("OSCE") deployed a special monitoring mission of almost 700 unarmed civilian monitors to Ukraine to "gather information and report on the security situation and report on the facts."²² The United States and European Union also provided Ukraine with billions of dollars in foreign aid.²³ And in December 2017, the United States approved a plan to provide lethal weapons, including anti-tank missiles, to Ukraine.²⁴

The West's intervention in Ukraine became a major theme for Russian structuring of the information space. In response to the West's economic sanctions, Russia imposed counter sanctions that banned the "import of

<https://www.nytimes.com/2014/03/25/world/europe/obama-russia-crimea.html>; For information on U.S. sanctions, see Mark Landler, Anne Lowrey & Steven Lee Myers, *Obama Steps Up Russia Sanctions in Ukraine Crisis*, N.Y. TIMES (Mar. 20, 2014), <https://www.nytimes.com/2014/03/21/us/politics/us-expanding-sanctions-against-russia-over-ukraine.html>. For European Union sanctions, see Bruno Waterfield & Colin Freeman, *EU Leaders Divided Over New Sanctions To Punish Russia for Annexing Crimea*, TELEGRAPH (Mar. 20, 2014, 8:30 AM), <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/10710268/EU-leaders-divided-over-new-sanctions-to-punish-Russia-for-annexing-Crimea.html>. For Canadian sanctions, see Gloria Galloway, *Canada to Impose More Economic Sanctions, Travel Bans Against Russians*, GLOBE & MAIL (last updated Mar. 25, 2017), <https://www.theglobeandmail.com/news/politics/canada-to-impose-more-sanctions-travel-bans-against-russians/article22162907>. Australia's sanctions are explained in *Australia Imposes Sanctions on Russians After Annexation of Crimea from Ukraine*, ABC NEWS (Mar. 19, 2014, 12:33 AM), <http://www.abc.net.au/news/2014-03-19/australia-sanctions-russia-ukraine/5331826>. Norway sanctions: *Norway to Sign Up to EU Sanctions Against Russia*, REUTERS (July 30, 2014), <https://www.reuters.com/article/ukraine-crisis-sanctions-norway/norway-to-sign-up-to-eu-sanctions-against-russia-idUSL6N0Q54OY20140730>; Press Release, Norway Ministry of Foreign Affairs, Norway to Implement New Restrictive Measures Against Russia (Aug. 22, 2014), <https://www.regjeringen.no/en/aktuelt/Norway-to-implement-new-restrictive-measures-against-Russia/id765675>. For Japan's sanctions, see Reuters Staff, *Japan to Impose Sanctions on Russia for Crimea Move*, REUTERS (Mar. 17, 2014, 6:14 PM). Switzerland Sanctions – *Switzerland Steps Up Sanctions Against Russia Over Ukraine*, UNIAN (Mar. 2015, 11:59 PM), <https://www.unian.info/politics/1052853-switzerland-steps-up-sanctions-against-russia-over-ukraine.html>.

21. NORTH ATLANTIC TREATY ORG., FACT SHEET ON NATO'S SUPPORT TO UKRAINE (2016), https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_07/20160627_1607-factsheet-nato-ukraine-support-eng.pdf.

22. ORG. FOR SECURITY AND CO-OPERATION IN EUR., SPECIAL MONITORING MISSION TO UKRAINE (2016), <http://www.osce.org/ukraine-smm/116879?download=true>.

23. THE WHITE HOUSE OFFICE OF THE PRESS SEC'Y, FACT SHEET: U.S. ASSISTANCE TO UKRAINE SINCE FEBRUARY 2014 (2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/15/fact-sheet-us-assistance-ukraine-february-2014>.

24. Josh Lederman, *Officials: US Agrees to Provide Lethal Weapons to Ukraine*, AP (Dec. 23, 2017), <https://www.apnews.com/e2d29e7cc9b84b808a928f49875d2bca/Officials:-US-agrees-to-provide-lethal-weapons-to-Ukraine>.

particular kinds of agricultural produce, raw materials and foodstuffs originating in countries that have decided to impose economic sanctions on Russia, Russian businesses or individuals.²⁵ Russia also imposed a travel ban on dozens of European citizens—many of whom are outspoken critics of the Kremlin.²⁶

But barley and bullets were not the only weapons of war in the Ukrainian conflict. Russia has also made information a deliberate and powerful weapon of destabilization in Ukraine, utilizing traditional and emerging forms of media to wage a hybrid war involving deliberate disinformation campaigns to further strategic and military objectives.²⁷ Russia's tactics vary from creating and distributing false news stories to manufacturing public debates on the internet using false personas.²⁸ To effectuate Russia's cyberwar in Ukraine the government has adopted tactics that include exploiting "news media and social networking websites to disseminate fake news as well as cyberattacks on governmental agencies and Ukraine's critical infrastructure."²⁹ In one of the most notorious examples of disinformation, Russian state television Channel One promoted a story detailing how in eastern Ukraine the Ukrainian military "had nailed a 3-year-old, clad in just his underwear, to a wooden board 'just like Jesus,' right before his mother's eye's" for a crime his mother allegedly committed.³⁰ This crucifixion story was exposed as false, but it continued to be used as a form of blood libel to recruit military personnel by Russia.³¹

25. David M. Herszenhorn, *Putin Extends Counter Sanctions Against EU*, POLITICO (June 30, 2017 9:29 PM), <https://www.politico.eu/article/putin-extends-counter-sanctions-against-eu>.

26. *European Union Anger at Russian Travel Blacklist*, BBC NEWS (May 31, 2015), <http://www.bbc.com/news/world-europe-32949236>.

27. Marie Snegovaya, *Putin's Information Warfare in Ukraine: Soviet Origins of Russia's Hybrid Warfare*, RUSS. REP. I, 9 (Sept. 2015), <http://www.understandingwar.org/report/putins-information-warfare-ukraine-soviet-origins-russias-hybrid-warfare>.

28. See, e.g., Ellen Nakashima, *Inside a Russian Disinformation Campaign in Ukraine in 2014*, WASH. POST (Dec. 25, 2017), https://www.washingtonpost.com/world/national-security/inside-a-russian-disinformation-campaign-in-ukraine-in-2014/2017/12/25/f55b0408-e71d-11e7-ab50-621fe0588340_story.html?utm_term=.477ec9328bb7.

29. Julia Summers, *Countering Disinformation: Russia's Infowar in Ukraine*, HENRY M. JACKSON SCH. OF INT'L STUD. (Oct. 25, 2017), https://jsis.washington.edu/news/russia-disinformation-ukraine/#_ftnref4.

30. Anna Nemtsova, *There's no Evidence the Ukrainian Army Crucified a Child in Slovyansk*, DAILY BEAST (July 15, 2014, 5:45 AM), <https://www.thedailybeast.com/theres-no-evidence-the-ukrainian-army-crucified-a-child-in-slovyansk>.

31. *Id.*; *Fake: Crucifixion in Slovyansk*, STOPFAKE.ORG (July 15, 2014, 9:44 PM), <https://www.stopfake.org/en/lies-crucifixion-on-channel-one/>; *State-Run News Station Accused of Making Up Child Crucifixion*, MOSCOW TIMES (July 24, 2014), <https://themoscowtimes.com/news/state-run-news-station-accused-of-making-up-child-crucifixion-37289>.

Russia's use of disinformation as another means of war is not a new phenomenon. Indeed, "Russia's modern information warfare adopts Soviet reflexive control to the contemporary geopolitical context."³² Reflexive control is defined as "a means of conveying to a partner or an opponent specially prepared information to incline him to voluntarily make the predetermined decision desired by the initiator of the action."³³ One of the main differences between Soviet reflexive control and modern Russian disinformation warfare, however, is Russia's use of new technologies that increase the speed, distribution and effectiveness of disinformation campaigns.

B. *Ukraine's Response to Russian Propaganda and Fake News*

In the last few years, Ukraine has struggled to balance freedom of expression and national security in combating Russia's "hybrid war" strategy and increasing "weaponization of information." For example, in 2014 Ukraine banned fourteen Russian television channels from distributing their content through Ukrainian networks for allegedly "broadcasting propaganda of war and violence."³⁴ Most of the banned channels were either directly controlled by the Russian state or owned by companies with close links to the Kremlin.³⁵ However, as the war with Russia has progressed, Ukraine's restrictions on freedom of expression have expanded beyond those organizations and individuals with direct links to the Russian state. In 2017, for example, Ukraine expanded its ban to the independent Russian television station Dozhd (Rain).³⁶ According to some reports, Dozhd was banned because it "had infringed on Ukraine's sovereignty and territorial integrity when it aired an image showing the boundary with Crimea as the state border, suggesting that Crimea is part of Russia."³⁷ Dozhd also apparently "violated Ukrainian law by sending reporters to Crimea via Moscow instead of through the Ukrainian-controlled crossing point at the peninsula's northern end."³⁸ Ukraine has also blacklisted many Russian books and films that are perceived as "glorify[ing] the work of [Russian] government bodies,"

32. Snegovaya, *supra* note 27, at 10.

33. *Id.*

34. *Ukraine Bans Russian TV Channels for Airing War 'Propaganda'*, REUTERS (Aug. 19, 2014, 10:06AM), <https://www.reuters.com/article/us-ukraine-crisis-television/ukraine-bans-russian-tv-channels-for-airing-war-propaganda-idUSKBN0GJ1QM20140819>.

35. *Id.*

36. Christopher Miller, *Ukraine Bans Broadcasts of Independent Russian TV Station Dozhd*, RADIOFREEEUROPERADIOLIBERTY (Jan. 12, 2017, 3:55 PM), <https://www.rferl.org/a/ukraine-bans-russia-tv-rain-dozhd/28228049.html>.

37. *Id.*

38. *Id.*

positively portraying Russian's security forces or promoting Russian nationalistic messages.³⁹ Moreover, in April 2017, Ukraine banned Ukrainians' access to several popular Russian websites, including the social networking sites Vkontakte and Odnoklassniki, the search engine Yandex and the email service Mail.ru, all of which, prior to being banned, were among the top ten most popular websites in Ukraine.⁴⁰ The Ukrainian government also took the controversial step in 2014 of creating a Ministry of Information Policy for the purported purpose of combating Russian propaganda through affirmative messaging.⁴¹ According to the Ukrainian government, these actions were a response to an avalanche of false and damaging propaganda from Russian government-controlled channels portraying Ukraine as a fascist-controlled disaster zone.⁴²

Ukrainian state reactions to Russian disinformation have also targeted individual journalists. In 2015, it was revealed that the Ukrainian government had a sanctions list which banned numerous Russian and Western journalists from entering Ukraine, including highly regarded correspondents from the BBC and Die Zeit, because they had allegedly "commit[ed] criminal offenses against Ukraine" and "creat[ed] real and/or potential threats to Ukraine's national interest."⁴³ Although some of the journalists were removed from the list after international condemnation,⁴⁴ Ukraine has continued to restrict individual journalists' access to Ukraine through deportation and re-entry bans.⁴⁵

Some organizations that are alleged to be affiliated with the Ukrainian government have even gone a step further by threatening the physical safety of journalists with whom they disagree. For example, in 2016, the Ukrainian

39. *Ukraine Bans Russian Films in Media War*, BBC NEWS (Apr. 21, 2016), <http://www.bbc.com/news/world-europe-36099885>.

40. Alec Luhn, *Ukraine Blocks Popular Social Networks as Part of Sanctions on Russia*, GUARDIAN (May 15, 2017, 12:40 AM), <https://www.theguardian.com/world/2017/may/16/ukraine-blocks-popular-russian-websites-kremlin-role-war>.

41. Maksim Vikhrov, *Ukraine Forms 'Ministry of Truth' to Regulate the Media*, GUARDIAN (Dec. 19, 2014, 12:00 AM), <https://www.theguardian.com/world/2014/dec/19/sp-ukraine-new-ministry-truth-undermines-battle-for-democracy>.

42. *Id.*; Alan Yuhas, *Russian Propaganda Over Crimea the and Ukraine: how does it work?*, GUARDIAN (Mar. 17, 2014, 2:21 PM), <https://www.theguardian.com/world/2014/mar/17/crimea-crisis-russia-propaganda-media>.

43. Liuda Kornievich, *Why Two Spanish Journalists Were Expelled from Ukraine*, HROMADSKIE INT'L (Sept. 1, 2017), <https://en.hromadske.ua/posts/why-two-spanish-journalists-were-expelled-from-ukraine>.

44. *Id.*

45. Natalia Zinets & Dmitry Solovyov, *Ukraine Preparing to Deport Russian Journalist for 'Propaganda'*, REUTERS (Aug. 30, 2017, 5:46 AM), <https://www.reuters.com/article/us-ukraine-crisis-russia-journalist/ukraine-preparing-to-deport-russian-journalist-for-propaganda-idUSKCN1BA1L1>.

website Myrotvorets (which purports to reveal personal information of people who are considered “enemies of Ukraine”) leaked online the hacked personal information of journalists from over 30 international media outlets—including CNN, the BBC and Al Jazeera—who were covering the conflict in eastern Ukraine from territory controlled by the Russian-backed separatists.⁴⁶ According to Myrotvorets, these journalists were being punished for “cooperation with terrorists” because they had received their press accreditations from the anti-Ukrainian side of the conflict in eastern Ukraine.⁴⁷ Myrotvorets is allegedly “curated” by Ukraine’s security services and “praised” by Ukraine’s Interior Ministry.⁴⁸

A number of other troubling attacks on freedom of expression have occurred in Ukraine since the Russian conflict erupted, including an arson attack on a pro-Kremlin Ukrainian national TV channel Inter,⁴⁹ the imprisonment of a journalist who supported defiance of the compulsory draft,⁵⁰ the ban of American action film actor Steven Seagal from entering Ukraine for five years based on national security concerns⁵¹ and calls for Ukrainian comedians who mocked President Poroshenko to be banned from performing.⁵² Such attacks on the press and free expression have led to a general sense that Ukrainian state officials “have waged a deliberate campaign against the freedom of press, inspired public hate against journalists, and jeopardized the security of reporters working in

46. Anna Nemtsova, *Malicious Leaks Make Journalists Targets in Ukraine*, DAILY BEAST (Aug. 8, 2016, 1:00 AM), <https://www.thedailybeast.com/malicious-leaks-make-journalists-targets-in-ukraine>.

47. *Id.*

48. India Ashok, *Ukrainian Hackers Leak Personal Information of Thousands of Journalists*, INT’L BUS. TIMES (May 13, 2016, 4:20 PM), <http://www.ibtimes.co.uk/ukrainian-hackers-leak-personal-information-thousands-journalists-1559923>.

49. *Pro-Russia TV Station in Kiev Evacuated After Fire*, GUARDIAN (Sept. 5, 2016, 6:55 AM), <https://www.theguardian.com/world/2016/sep/05/pro-russia-tv-inter-kiev-evacuated-fire-ukraine>.

50. Dan Peleschuk, *Free Speech or Treason? Welcome to Ukraine’s Information War*, PUB. RADIO INT’L (Feb. 11, 2015, 6:15 AM), <https://www.pri.org/stories/2015-02-11/free-speech-or-treason-welcome-ukraine-s-information-war>.

51. *Ukraine Bans Steven Segal as National Security Threat*, CBS NEWS (May 8, 2017, 1:38 PM), <https://www.cbsnews.com/news/ukraine-bans-steven-seagal-as-national-security-threat>.

52. *Sardonic Laughter of Ukraine’s Comedy Actor Zelensky*, 112.INTERNATIONAL (Sept. 13, 2016, 12:45 AM), <https://112.international/article/sardonic-laughter-of-ukraines-comedy-actor-zelensky-9466.html>; *Oleh Lyashko Banning Ukrainian Comedy Actor for a Bad Joke*, 112.INTERNATIONAL (Sept. 12, 2016, 1:22 PM), <https://112.international/society/mp-suggests-banning-ukrainian-comedy-actor-zelensky-9449.html>.

Ukraine.”⁵³ In some rare instances, journalists perceived as being pro-Russian or anti-Ukrainian have been murdered.⁵⁴

In the midst of the Ukrainian government’s restrictions, many non-governmental or intergovernmental organizations sought to assure that even in difficult and sensitive situations such as the one in Ukraine, media freedom and plurality of opinions would be maintained.⁵⁵ For example, when Ukraine first began blacklisting Russian media outlets, the OSCE’s then-Representative on the Freedom of the Media, Dunja Mijatović, called on Ukraine not to ban Russian channels “as it endangers media pluralism and goes against international principles and OSCE commitments.”⁵⁶ The OSCE representative criticized Ukraine’s government again in 2015 after Ukraine revoked the accreditation of twelve Russian media outlets and deported a number of Russian journalists, calling the measures to limit Russian media activity in Ukraine “excessive.”⁵⁷ Moreover, when Ukrainian President Poroshenko banned a further seventeen journalists from entering Ukraine in June 2016, the NGO Human Rights Watch issued the following statement: “Targeting journalists in this way inevitably encourages censorship.”⁵⁸

Many NGOs criticized Ukraine’s measures restricting freedom of expression by emphasizing Ukraine’s international legal obligations. Ukraine is signatory to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”) and the European Convention on Human Rights.⁵⁹ Additionally, Ukraine’s Constitution enshrines the right to freedom of expression.⁶⁰ While

53. Anna Nemtsova, *Malicious Leaks Make Journalists Targets in Ukraine*, DAILY BEAST (Aug. 8, 2016, 1:00 AM), <https://www.thedailybeast.com/malicious-leaks-make-journalists-targets-in-ukraine>.

54. Katya Gorchinskaya & Shaun Walker, *Pro-Russia Journalists Shot Dead in Kiev*, GUARDIAN (Apr. 16, 2015, 9:48 AM), <https://www.theguardian.com/world/2015/apr/16/pro-russia-journalist-shot-killed-ukraine-kiev-oles-buzyna>.

55. To buttress the ability of civil society within Ukraine to think through these questions of deliberation and response, governments and foundations sought ways to be of assistance. *See, e.g., Promoting Freedom of Expression in Ukraine*, RES. FUNDING (Jan. 24, 2018), <https://researchfunding.duke.edu/promoting-freedom-expression-ukraine>.

56. *Banning TV, Radio Broadcasts Poses Threat to Media Freedom in Ukraine*, OSCE Representative Says, OSCE (Feb. 26, 2014), <http://www.osce.org/fom/115832>.

57. *OSCE Denounces Ukrainian Measures Toward Russian Journalists*, RADIOFREEEUROPERADIOLIBERTY (Feb. 26, 2015, 3:23 PM), www.rferl.org/a/osce-ukraine-media-mijatovic-criticism/26871234.html.

58. *Ukraine: 17 Russian Journalists Banned*, HUM. RTS. WATCH (June 1, 2016, 12:00 AM), <https://www.hrw.org/news/2016/06/01/ukraine-17-russian-journalists-banned>.

59. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

60. Article 34 (Ukraine, Dec. 8, 2004).

recognizing that the current conflict with Russia is “very complex” and that in certain circumstances, such as a state of emergency, states can temporarily derogate from certain protections enshrined in international treaties, NGOs like Human Rights Watch and Internews have expressed concern that the Ukrainian government has imposed severe restrictions on the right to freedom of expression, but not claimed derogation to that right under any of the respective treaties.⁶¹

Europe and the U.S. have also expressed concern over some of Ukraine’s more restrictive measures to combat Russian disinformation. The Council of Europe’s Secretary General stated that, “[b]locking of social networks, search engines, mail services and news web sites goes against our common understanding of freedom of expression and freedom of the media. Moreover, such blanket bans are out of line with the principle of proportionality.”⁶² Similarly, a representative of the U.S. Commission on Security and Cooperation in Europe (“U.S. Helsinki Commission”) expressed concern about the safety of journalists in Ukraine and “call[ed] on Ukraine to find a way to protect itself [from Russian aggression] that does not undermine its international obligations and commitments or its constitutional principles.”⁶³

III. THE TWO UKRAINE PROJECTS: GUIDELINES AND WORDS AND WARS

This discussion will now turn to the two projects that are the subject of this essay first adding a few words to the description above. These two projects were efforts by interested parties – stakeholders – to affect the propaganda environment. Each of the projects represented an intervention; the analytical task is to determine an intervention by whom, how structured and with what objectives. Each involved funding by stakeholders external to Ukraine, each involved Ukrainian civil society and each existed in a complex environment of expectations and constraints. As mentioned, the Guidelines Project aspired to form consensus among civil society organizations, but an additional, and explicit objective was important, namely that the consensus guidelines should render repressive actions by Ukraine less likely and actions more consistent with European norms more likely. The title of the project, namely “Promoting and Advancing Media Freedom in Ukraine,” captured

61. *Ukraine: 17 Russian Journalists Banned*, *supra* note 58; Jeanna Bourgault, Opinion, *The Fight for Free Expression is More Important than Ever*, INTERNEWS (Nov. 21, 2016), <https://www.internews.org/opinion/fight-free-expression-more-important-ever>.

62. *Ukraine: Secretary General Jagland Voices Concern Over Blocking Social Networks and Websites*, COUNCIL EUR. (May 17, 2017), <https://www.coe.int/en/web/secretary-general/-/secretary-general-voices-concern-over-blocking-social-networks-websites-in-ukraine>.

63. ORG. FOR SECURITY AND CO-OPERATION IN EUROPE, COMPILATION OF WRITTEN RECOMMENDATIONS (Sept. 11, 2017), <https://www.osce.org/odihr/342941>.

the notion that concepts of media freedom would be front and central. The initiative was designed to bring together experts with European human rights practices with practitioners from the Ukrainian media community. As mentioned in the Guidelines Project: “The initiative is based on a consensus-based approach that can lead to a recognized national strategy for coping with media freedoms and limits during a potential long-term, low-level conflict such as the one Ukraine is currently experiencing.”⁶⁴

It would be through the implementation process that interaction among stakeholders could be observed. The essence of the project was the collecting of information and the creation of discourse between international “experts” and civil society. One step was the selection of persons who were chosen for expertise in international law and human rights with particular expertise regarding the media. The sponsor, Internews, had picked a coordinator/manager Susan Abbott, who had one of the most extensive careers in supporting media development in the post-Soviet period and, among other tasks, recommended individuals for the project. These included an academic, a former expert at the OSCE Representative on Freedom of the Media and a practitioner who provides communications advice for societies in conflict and harsh transition.

The Guidelines Project contemplated an initial trip to Ukraine to meet with local Ukrainian partners and create a prioritized list of the local partners’ specific concerns with the current media environment. Given this sense of priorities, the experts would then draft guidelines to establish a framework, grounded in international human rights law, for balancing national security with freedom of expression rights. Those guidelines would be presented as a “living document” and discussed at a conference in Kyiv in the fall of 2017 with the hope that the draft guidelines would be revised in ways that would facilitate consensus.

The approach was designed to be a virtual conversation among actors, some specifically denominated, but others certainly affecting the direction of discussions. There was an institutional idealism: norms were to be unearthed and clarified and would be a starting point for consensus. A goal was to further a policy-oriented discussion of how a society—here Ukraine—might conceptualize a particular danger and develop a response. Within the narrow compass for this project, the Guidelines Project built on an intense and long-standing series of discussions, many involving international governmental and nongovernmental agencies. The structure of proceeding would juxtapose the tradition of European practices to the pragmatism of the daily punishing reality. The Guidelines Project also had a built-in tension, a

64. PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5, at 10.

tension between the articulation of abstract principle and the perceived necessities, in Ukraine, for effective techniques to affect the information environment. The invocation of international norms was designed to have its own impact on the actions of stakeholders.

By pointing to already-existing international norms and commitments, the project's designers sought an outcome that provided better protection to journalists (as well as other speech actors, like NGOs) operating in the territory. As the project evolved, it became apparent that this desired outcome conflicted with some of the local partners' more immediate interests in designing guidelines to combat, or at least dampen the effectiveness of, Russian disinformation techniques, and to counter Russian military aggression in Ukrainian territory. This tension had many manifestations. One particularly sensitive issue was the establishment of guidelines for media professionals performing their duties in conflict areas, like Crimea or eastern Ukraine, "where the risks, challenges and implications require a very specific and tailored normative approach."⁶⁵

The Guidelines Project assumptions included that state authorities had the responsibility to protect national security while respecting international standards. At the same time, states also had the responsibility "to preserve and promote a media environment that properly guarantees pluralism, diversity of opinions, open public debate and prevents undue concentration and control of media organizations either by private actors or the state."⁶⁶ In setting up the project, Internews illustrated the tension as follows:

[Media actors] have a special responsibility to perform their activities following the highest professional and legal requirements within a context where militancy impregnates any activity. War is a time when patriotism becomes the currency of engaged citizenship and love of country is a significant feature of the day. Journalists, like their fellow citizens, share this feeling. Personal patriotism, however, can be betrayed when journalists are required to manifest their loyalties by misleading viewers and readers as to battlefield events or by being pressured to modify their watchdog function. Intense partisanship at home is softened during conflict and neutrality becomes under siege. However, the citizenry suffers when it is not receiving a truthful and accurate state of events. A celebration of patriotism can devolve into a claim for unalloyed support and a suppression of necessary criticism.⁶⁷

Not surprisingly, a significant effort of the project was the framing of the international norms. One of the experts, Joan Barata Mir,⁶⁸ had long been in

65. *Id.* at 7.

66. *Id.*

67. *Id.* at 7-8.

68. *Id.* at 29-30.

the position of explaining the architecture of international norms. He contextualized how the exercise of drafting a series of guidelines regarding responses to propaganda and other aspects of fake news needed to take place within the framework and directives already established by a wide range of international standards.⁶⁹ In terms of the structure of the project, the emphasis would be on norms morphing into guidelines.⁷⁰ Invocation of international documents would bring a brace of institutions and norms to the table.⁷¹ Also important in Barata Mir's drafting of the guidelines were international legal decisions and guidance that established a legal framework within which to discuss Ukrainian responses to Russian disinformation.⁷²

The range of stakeholders involved in the Guidelines Project can be seen in outputs that were designed to help achieve project goals. For example, one output consisted of using or identifying recurring questions that arose in meetings between the international experts and the Ukrainian media actors.⁷³ Asking and approaching these questions could deflect criticisms that the project was merely reasserting international norms that limited national sovereignty; it also allowed the project to reflect local priorities concerning substantive guidelines, marking issues insistently raised by civil society. We focus on these questions and answers here because they deal with the main themes that arose during the Guidelines Project. Examples of such Frequently Asked Questions ("FAQ") are "*What are the current rules regarding the treatment of foreign journalists and foreign press institutions,*"⁷⁴ or "*What steps has the European community taken to counter propaganda by foreign journalists.*"⁷⁵ A third FAQ pursued the latter question in greater depth: "*How have other countries regulated foreign journalists who promote harmful anti-government propaganda?*"⁷⁶ Through this form of posing issues, the project emphasized the connected context in which Ukraine was acting and how significant it would be to consider alternate responses and international practice. In one posed question and answer to the action of other countries, the project identified, as an example of a more comprehensive approach, actions of the 2014 Baltic to Black Sea Alliance ("BBSA"), a regional security alliance founded in 2008 in the wake

69. *Id.* at 8.

70. *Id.* at 23.

71. *Id.* at 12.

72. See The Guidelines Materials, *supra* note 5.

73. *Id.*

74. *Id.* at 1.

75. *Id.*

76. See The Guidelines Materials, *supra* note 5 at 2-3.

of the Georgia-Russia war.⁷⁷ The BBSA had made a series of recommendations to policymakers in the Baltic States, Ukraine, Georgia and Moldova to combat Russian disinformation.⁷⁸ The recommendations emphasized the need of member states to promote their own narratives and messages to national and international audiences, and promoted the concept of regional cooperation and joint responses.⁷⁹ Specifically, the BBSA recommended:

1. The creation of an alternative Russian-language broadcasting presence;
2. The promotion of alternative voices in Russia;
3. The self-regulation of journalists;
4. The creation of a European Fund for Professional Journalism;
5. The development of strategies to address internet trolling;
6. Regional cooperation to explore regulatory remedies;
7. Regional cooperation to empower media watchdogs; and
8. Regional cooperation to resurrect analytical capacity in understanding Russian policy.⁸⁰

The project explicitly took on the issue of fake news again by looking at it in a comparative context. It pointed out that in 2016, the European Parliament passed a resolution titled “EU strategic communication to counteract propaganda against it by third parties.”⁸¹ The resolution highlighted the hostile propaganda of Russia and non-state actors like ISIS and suggested that member countries invest in awareness raising, education, online and local media, investigative journalism and information literacy.⁸² But even here, while noting that individual countries had also taken national measures to counteract propaganda promoted by foreign journalists, these measures might have arguably contravened international protections of freedom of expression. The project noted that in the 2017 French presidential election, for example, Emmanuel Macron’s campaign denied press access and passes to Russian media outlets RT and Sputnik, accusing

77. BALTIC TO BLACK SEA ALLIANCE, RESPONDING TO RUSSIA’S WEAPONIZING OF INFORMATION, (Sept. 12, 2014), http://bbsa.lv/wp-content/uploads/2015/10/Recommendations_BBSA_final.pdf.

78. *Id.*

79. *Id.* at 2.

80. *Id.* at 5-8.

81. Anna Elzbieta Fotyga (Rapporteur), Committee on Foreign Affairs, *Report on EU Strategic Communication to Counteract Propaganda Against It by Third Parties*, EUR. PARL. DOC. A8-0290/2016 (Nov. 23, 2016).

82. *Id.*

them of spreading “propaganda” and “misleading information.”⁸³ The project pointed out that social media companies had also recently begun reevaluating their advertising policies concerning RT and Sputnik in light of alleged Russian interference in the 2016 U.S. presidential election.⁸⁴ For example, on October 26, 2017, Twitter announced that it would block all paid advertisement posts by RT and Sputnik.⁸⁵

The Guidelines Project also noted that Ukraine is hardly the first country to face an onslaught of foreign propaganda from within and outside of its borders.⁸⁶ The U.S., for example, had employed a variety of countermeasures in the 20th century to counter foreign propaganda, such as the Foreign Agent Registration Act (“FARA”) enacted in 1938 to counter German propaganda in the U.S. before the Second World War.⁸⁷ Resuscitated in 2017, FARA was meant to identify any individual or organization that engaged in political or quasi-political activities on behalf of a foreign government or organization.⁸⁸ Organizations or individuals that meet the Act’s criteria are required to register as a foreign agent with the U.S. Department of Justice.⁸⁹ Penalties for failing to comply with the Act can include a \$10,000 fine or up to five years in prison.⁹⁰ FARA recently reemerged in the public spotlight after U.S. commentators began discussing whether Sputnik and RT should be required to register under the Act.⁹¹ The U.S. Congress has also recently debated whether to resurrect a presidentially-appointed Cold War era group designed to counter Russia’s active measures (i.e., political warfare) against foreign countries.⁹²

83. See The Guidelines Materials, *supra* note 5 at 1; see also Benoit Morenne, *Macron Denies Access to 2 Russian Media Outlets in French Campaign*, N.Y. TIMES (Apr. 28, 2017), <https://www.nytimes.com/2017/04/28/world/europe/france-macron-russia-sputnik-rt.html>.

84. See The Guidelines Materials, *supra* note 5 at 1-3.

85. Twitter Public Policy (@policy), *Announcement: RT and Sputnik Advertising*, TWITTER (Oct. 26, 2017), https://blog.twitter.com/official/en_us/topics/company/2017/Announcement-RT-and-Sputnik-Advertising.html.

86. See The Guidelines Materials, *supra* note 5 at 3-4.

87. Foreign Agent Registration Act of 1938, 22 U.S.C. §§ 601-619 (2012).

88. *Id.* at § 612.

89. *Id.* at § 611.

90. *Id.* at § 618.

91. Edward Delman, *When Is a TV Channel a Foreign Agent*, ATLANTIC (Apr. 22, 2015), <https://www.theatlantic.com/international/archive/2015/04/rt-lobbyist-russia-putin-media/390621>; James Kirchick, *RT Wants to Spread Moscow’s Propaganda Here. Let’s Treat It That Way*, WASH. POST (Sept. 20, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/09/20/rt-wants-to-spread-moscows-propaganda-here-lets-treat-it-that-way/?utm_term=.8d035777922b.

92. See, e.g., H.R. REP. NO. 115-251, at 10 (2018); see also Kalyeena Makortoff, *US Lawmakers Want to Revive Spy-Catching Agency Amid Renewed Russian Threats*, CNBC (June 23, 2016, 8:26 AM), <https://www.cnbc.com/2016/06/23/us-lawmakers-want-to-revive-spy-catching-agency-amid-renewed-russian-threats.html>.

One controversial aspect of the Guidelines Project was the experts' refusal to recommend excluding individuals working for organizations supported by Russia, entities like RT, from the protections that journalists receive and instead deeming such individuals "propagandists." Here, the question was the status of one obvious and superficially appealing way to curb fake news: to require accurate and fair reporting,⁹³ and to strip those media outlets and press personnel under government direction as not entitled to the full bore of free expression rights.⁹⁴ This approach was favored by some members of Ukrainian civil society, including Ukrainian media outlets and NGOs. To refocus the discussion towards international standards, the project pointed out that Ukraine had a variety of more clearly expression-friendly remedies available to it.

As the U.S. had recently asserted by requesting that RT and Sputnik register as foreign agents under FARA, Ukraine could use public registration to disclose media outlets that were effectively operating as political advocacy groups on behalf of a foreign government.⁹⁵ This would still permit such media outlets to operate while ensuring that the public was aware of the outlet's sponsors and potential biases.⁹⁶ Additionally, Ukraine could restrict expression on the grounds of national security so long as such restrictions were clearly defined, subject to independent review and proportional to the threat faced.⁹⁷ While this is a case-by-case analysis, restrictions on content simply because such content is unpopular or politically disfavored should be discouraged.⁹⁸

Because Russian disinformation campaigns have targeted many other post-Soviet countries aside from Ukraine, the Guidelines Project looked to other countries formerly controlled by the Soviet Union to identify what efforts they had taken to specifically counter Russian disinformation and "fake news." Latvia, Lithuania and Estonia are examples of countries that were especially proactive in adopting measures to counter Russian

93. PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5, at 16.

94. *Id.* at 19-20.

95. Upon a threat of criminal prosecution, RT and Sputnik ultimately registered in November 2017 as foreign agents under FARA. See Nathan Layne, *U.S.-Based Russian News Outlet Registers as Foreign Agent*, REUTERS (Feb. 17, 2018, 7:07 PM), <https://www.reuters.com/article/us-usa-trump-russia-propaganda/u-s-based-russian-news-outlet-registers-as-foreign-agent-idUSKCN1G201H>; see also Megan R. Wilson, *Russian news outlet Sputnik registers with DOJ as foreign agent*, HILL (Nov. 17, 2017 1:15 PM), <https://thehill.com/business-a-lobbying/business-a-lobbying/360912-russian-news-outlet-sputnik-registers-with-doj-as>.

96. Layne, *supra* note 92.

97. PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5, at 18.

98. *Id.*

disinformation.⁹⁹ In Lithuania, for example, the Radio and Television Commission temporarily suspended Russian language television channels for, among other things, “inciting war, discord, and hatred towards nations.”¹⁰⁰ Latvia took similar actions against Russian television channels and websites.¹⁰¹ Estonia, however, adopted a slightly different approach and focused on limiting Russian journalists’ access to government events that might be used to foster disinformation.¹⁰² In some instances, Estonia refused to grant press credentials for government events to Russian journalists who were “promoting hostile subversive activities and propaganda under the cover of press freedom.”¹⁰³ This is similar to what the Macron Campaign did during the 2017 French presidential election.¹⁰⁴ While citing these examples from some of Russia’s other neighbors, the Guidelines Project cautioned that although temporary, these restrictions may have not been proportionate to the threats faced and may have run afoul of European freedom of expression protections.

Other comparative examples included multilateral efforts to coordinate and combat disinformation. The EU and the Council of Europe recently launched the Commission to Confront Propaganda, a consultative body for cross-border media complaints,¹⁰⁵ and participants from Armenia, Azerbaijan, Georgia, Moldova, Ukraine, Belarus and Russia attended the first meeting in Kyiv in September 2017.¹⁰⁶ The EU also launched a new website euvsdisinfo.eu to “better forecast, address and respond to pro-Kremlin disinformation.”¹⁰⁷ These issues had long been festering and certainly by 2015 the EU was discussing defensive and offensive options to react to the Kremlin’s disinformation campaigns. In particular, some members called for

99. See Guidelines Project, *supra* note 5 at 3.

100. U.S. Dep’t of State, Bureau of H.R., Country Reports on Human Rights Practice, Lithuania 2016 Human Rights Report 7 (2016); see also Chris Dziadul, *Lithuania Bans Russian Channel*, BROADBAND TV NEWS (Sept. 21, 2018, 8:28 AM), <https://www.broadbandtvnews.com/2017/09/21/lithuania-bans-russian-channel>.

101. U.S. Dep’t of State, Bureau of H.R., Country Reports on Human Rights Practice, Latvia 2016 Human Rights Report 7 (2016).

102. Andrew Rettman, *Estonia Defends Ban on Russian ‘Pseudo Media,’* EUOBSERVER (Aug. 29, 2017, 7:11 PM), <https://euobserver.com/foreign/138825>.

103. *Id.*

104. Thomas Samson, *French Presidential Hopeful Macron Bans Russian-State Media From Campaign Trail*, FRANCE 24 (Apr. 29, 2017), <http://www.france24.com/en/20170429-macron-campaign-drops-accreditation-kremlin-backed-media>.

105. *The First Meeting of the Commission to Confront Propaganda*, COUNCIL EUR. (Sept. 14, 2017), https://www.coe.int/en/web/freedom-expression/ukraine/-/asset_publisher/Mp0TAvzPYSPa/content/the-first-meeting-of-the-commission-to-confront-propaganda?inheritRedirect=false.

106. *Id.*

107. *About*, EU VS DISINFO, <https://euvsdisinfo.eu/about> (last visited Nov. 26, 2018).

EU aid for independent, Russian-language broadcasters to “provide competitive alternatives to the Russian production available in the EU television market.”¹⁰⁸ The U.S. adopted a similar approach in late 2016 after allegations of Russian interference in the U.S. presidential election by enacting the Countering Foreign Propaganda and Disinformation Act, which called for the creation of a Global Engagement Center to, among other things, “lead, synchronize, and coordinate efforts of the Federal Government to recognize, understand, expose, and counter foreign state and non-state propaganda and disinformation efforts aimed at undermining United States national security interests.”¹⁰⁹

Another contested topic during the Guidelines Project was whether to define the terms propaganda and disinformation. During the project, the international experts and Ukrainian partners struggled over whether to help define propaganda and disinformation, words that have often been used interchangeably to describe Russia’s information campaigns in Ukraine. The thirst for distinctions, for the unearthing of a category of production which could be defined and, therefore regulated, was quite strong. A contemporary European Parliament publication defined propaganda by distinguishing it from disinformation in ways that added a modest degree of clarity.¹¹⁰ Whereas propaganda is the “systematic dissemination of information, especially in a biased or misleading way, in order to promote a political cause or point of view,”¹¹¹ disinformation would be defined as the “dissemination of deliberately false information, especially when supplied by a government or its agent to a foreign power or to the media, with the intention of influencing the policies or opinions of those who receive it.”¹¹² Propaganda in this rather dominant definition need not be false to fall into this category. However, there has yet to be an agreed upon definition of propaganda (or hate speech for that matter) in international law,¹¹³ even though Article 20 of the ICCPR concerns “propaganda for war.”¹¹⁴

108. Andrew Rettman, *EU to Strike Back at Russian Propaganda*, EUOBSERVER (Mar. 19, 2015, 8:35 PM), <https://euobserver.com/foreign/128071>.

109. Note that the Countering Foreign Propaganda and Disinformation Act was passed as part of the National Defense Authorization Act for Fiscal Year 2017. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat 2000 § 1287; U.S. Dep’t of State, Global Engagement Center, <https://www.state.gov/r/gec/>.

110. *Understanding Propaganda and Disinformation*, EUR. PARL. GLANCE 1 (Nov. 2015), [http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/571332/EPRS_ATA\(2015\)571332_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/571332/EPRS_ATA(2015)571332_EN.pdf).

111. *Id.*

112. *Id.*

113. *Id.*

114. International Covenant on Civil and Political Rights, *supra* note 59.

Lastly, Internews' Guidelines Project was exclusively funded by resources raised by Internews, an organization with the stated policy of being committed to promoting access to trusted, quality information that empowers people to have a voice in their future and to live healthy, secure, and rewarding lives.¹¹⁵ In contrast, the Words and Wars Project was funded under the auspices of the Civic Synergy Project, which is co-funded by the European Union and the Ukrainian NGO the International Renaissance Foundation, "to strengthen public participation in the implementation of European integration reforms in Ukraine."¹¹⁶ The International Renaissance Foundation is an Open Society Foundation, funded by the philanthropist George Soros.¹¹⁷ The fact that the Words and Wars Project was part of a larger effort to integrate Ukrainian civil society into Europe may explain why its focus was primarily to describe Russian disinformation techniques to partner with an array of Baltic and other states with roots in the Soviet era and recommend policies to combat those techniques, with less emphasis and mention of international freedom of expression standards.¹¹⁸ In fact, the Words and Wars Project only mentions freedom of expression rights when criticizing Russia's domestic interest restrictions and the suppression of freedom of expression by Russian-backed separatists in eastern Ukraine.¹¹⁹

Moreover, the Words and Wars Project justifies the Ukrainian government's restrictions on freedom of expression by explaining that, "[w]ithout sufficient budget funds for counter-propaganda and no support from its own media outlets or cultural projects, Ukraine has been forced to impose restrictions on the broadcasting of Russian propaganda and disinformation on its territory from August 2014 onwards."¹²⁰ But, again, this is not surprising since the project was grounded in identifying and analyzing the Kremlin's information warfare tactics and developing counter-measures, rather than utilizing international freedom of expression standards to calibrate the balance between national security and freedom of expression rights, as was the Guidelines Project's goal. Again, the authors of the Words and Wars Project are Ukrainians living amidst the armed and informational conflicts with Russia, whereas the primary authors of the Guidelines Project were based in Europe and the U.S. and largely removed from the day-to-day

115. *About Us*, INTERNEWS, <https://www.internews.org/index.php/about-us> (last visited Dec. 3, 2018).

116. *About Us*, CIVIC SYNERGY, <https://www.civic-synergy.org.ua/en/civic-synergy-project/> (last visited Nov. 27, 2018).

117. *About Us*, INT'L RENAISSANCE FOUND., <http://www.irf.ua/en/about/irf/> (last visited Nov. 27, 2018).

118. WORDS AND WARS *supra* note 4.

119. *Id.* at 107-109.

120. *Id.* at 54.

hardship of the Ukrainian conflict. In short, the Words and Wars Project had a much more nationalistic tone than the Guidelines Project and appears to be driven by a desire to defeat Russia in what the authors consider an information war.

IV. COMPARATIVE ANALYSIS

This has been an effort to examine alternative approaches to shaping a national response to aggressive fake news and propaganda. This essay has suggested that the very structuring or organization of the institution formulating the response will, in large part, influence the outcome and the shape of recommendations. A framework developed in *Free Expression, Globalism and the New Strategic Communication*¹²¹ helps to clearly define this dynamic, where the premise is as follows: that each information context (like Ukraine) is composed of one or more “markets for loyalties” and that major stakeholders (sellers of allegiances) use available techniques to alter or stabilize their strengths within the markets. Governments use their power and authority to increase or decrease the sway of particular competitors. To function strategically, major “sellers of allegiances” engage in a sophisticated diagnostic of the market for loyalties to assess what vulnerabilities there are, what techniques can be most useful and how to orchestrate, camouflage or otherwise describe their efforts. Fake news and propaganda become ways introduced by various stakeholders to alter the information environment to their advantage.

Using this framework within Ukraine, and examining the structuring of the projects, what might be called a “diagnostic” of these markets for loyalties should be first considered, including, as indicated, who the stakeholders are, how they differed and how they differently deploy or characterize force, law, technology, subsidy and negotiation as aspects of a recipe for response.¹²² Such a diagnostic would show how each project was an exercise in influencing approaches towards either defensively resisting propaganda arising from Russia or otherwise intervening offensively. The projects each sought to affect attitudes in varying theaters of decision-making: Ukrainian publics or segments thereof; foreign, including even European and American, publics; and domestic and foreign elites and government officials. One can also see the tools that are available to the entities seeking to promote ways to

121. See MONROE E. PRICE, *FREE EXPRESSION, GLOBALISM AND THE NEW STRATEGIC COMMUNICATION* (Cambridge Univ. Press 2014); MONROE E. PRICE, *MEDIA AND SOVEREIGNTY: THE GLOBAL INFORMATION REVOLUTION AND ITS CHALLENGE TO STATE POWER* (Mass. Inst. of Tech. 2002).

122. Price, *supra* note 119, at 1-18.

engage in the defensive and offensive measures and how the mix of influences arises as a consequence of how the stakeholders utilize such techniques as are available to them to ensure that their perspective gains strength.

In particular, given the factors at play, these two projects demonstrate the comparative importance of invoking international human rights norms as a central aspect of mapping defensive or offensive responses. The diagnostic would indicate which stakeholders are engaged, what their strategies are and what techniques are available to them to counter fake news or propaganda. Here, for example, a diagnostic would indicate the role of NGOs, including the ever more examined histories of the NGOs and their linkages to larger networks. Identifying which stakeholders are represented, who takes the initiative, what interests and relationships lie beneath the more obvious ones – all this may have consequences for the programmatic outcome. The sponsors of the projects play a significant role in this exercise as well. It is generally the case that sponsors, at least sponsors in democratic societies, are at pains to be inclusive of stakeholders; but it is inevitable that they promote or strengthen one stakeholder or another. They deploy or encourage involved interests resulting in a complex matrix that is hardly ever transparent even for the principals themselves.

In the Ukrainian projects, the diagnostic question might be how significant adherence to human rights agenda would limit restrictive measures by the Ukrainian government or even the use of force. “Propaganda” could be reinterpreted as the unique combination of techniques to influence popular attitudes in a specified market for loyalties as used by offensively and possibly used in defense by the host state. To take the techniques identified above, the Russian government subsidized media outlets like RT to create and diffuse its messages through them; it used force to control terrain where it can also substantially control the information space. Ukraine used law to ban certain channels of communication or technology to regulate the use of the internet.¹²³ The quiver of techniques is crowded and dangerous.

A critical aspect, as has been asserted, is how stakeholders and sponsors address the problem and fashion their contribution. This essay has examined how two NGO-organized projects, both generally designed to confront Russia’s disinformation campaign, resulted in drastically different recommendations to Ukraine regarding how it should confront Russian disinformation. The Guidelines Project architecture was built to ensure

123. Sabra Ayres, *Ukraine Blocks Popular Russian-Owned Social Media Sites, Saying it's a Matter of National Security*, GUARDIAN (May 18, 2017, 3:45 PM), <https://www.latimes.com/world/europe/la-fg-ukraine-website-ban-20170518-story.html>.

consciousness of international norms as a framework for considering Ukraine's responses to an avalanche of disinformation. The Words and Wars Project was structured in a virtually inverse way to the Guidelines Project, focusing less on international norms as on an analysis of existing Russian initiatives, themes and structures. The Words and Wars Project described the narratives pushed by Russia and the internal structure for producing and diffusing them. It attempted to describe patterns of influence within Ukraine and modes of Ukrainian resistance. It specifically sought to describe the way in which Russian strategic communicators adapted to new technologies and exploited them to extend their influence. It was centrally a diagnostic of strategic communication leading to a set of strategic responses.

Structurally, the point can be made another way: Those involved in the Guidelines Project and the overlapping group of stakeholders in Words and Wars Project, were engaged in many intertwined networks of influence themselves. How they characterized the meaning of international human rights in Ukraine would carry over to other human rights contexts and have consequences widely for such institutions such as OSCE or the European Court of Human Rights. These externalities would affect those engaged in the Guidelines Project more than those engaged in Words and Wars Project, or at least that would be the structural likelihood. Picture a framework where actors, each with a material or political stake in an outcome, seek to influence the outcome. Each actor is subject to many influences and those influences have consequences. Not all actors or stakeholders have equal access to the effective use of the relevant tools.

In addition, the *stated goals of the two initiatives* were different. The Guidelines Project had as an explicit goal building consensus.¹²⁴ The Words and Wars Project, in contrast, was more militant and assumed that consensus was not as important as building a meaningful response to Russian disinformation, and doing so quickly and efficiently.¹²⁵ In addition, the Guidelines Project was far more centered on recognizing and applying international norms and, indeed, strengthening their relevance.¹²⁶ The Ukraine-based Words and Wars approach, in contrast, was more pragmatic about dealing with immediate self-defined crises and, as a consequence, would consider international norms more flexibly. Experts on international norms would be more likely to be keepers of the flame while the groups behind the Words and Wars Project would have a different focus. In this sense, the two approaches reflected different communities of interest. The

124. PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5, at 9.

125. WORDS AND WARS *supra*, note 4.

126. PROMOTING AND ADVANCING MEDIA FREEDOM IN UKRAINE GUIDELINES, *supra* note 5, at 23.

Guidelines Project was substantially transnational. It was to be a conversation that involved “international experts” and domestic actors, but it was one in which the international experts (hard as they may have worked to make it more dialogical) set the agenda and had a major say, through the guidelines and other outputs, in the vocabulary and framework of response.

One could also compare *outputs as keys to understanding* differences in approaches to fake news and propaganda. By focusing on guidelines, the U.S. initiated project stayed largely at the abstract level. It did so to help achieve consensus, but also because each case that involved a Ukrainian response that could be deemed restrictive (*e.g.*, relating to defining who is a journalist or policing representatives of RT) immediately raised challenges for those defining international norms. The Words and Wars book was designed to be mobilizing as opposed to consensus building. The Words and Wars Project presumed that Ukraine was in a state of emergency and that a zone of “propaganda for war”¹²⁷—a form of expression that can be restricted under international law—existed, whereas the group involved with the Guidelines Project was, for the most part, seeking to avoid characterizations that would more easily justify repressive speech actions by the Ukrainian government. As to the great categories of techniques, force, law, technology and subsidy, the two projects differed. The Words and Wars Project contained more of what has been called *militant democracy* which recognizes outcomes as highly significant and justifying preemptive restrictions, including restrictions on speech, where “necessary” to preserve a democratic society.

This essay’s framework also illuminates the structuring aspects of the two projects. International norms, as they have been most widely interpreted by the OSCE and others, celebrate the right to receive and impart information *regardless of frontiers*, and that has been interpreted as limiting the capacity of one state to restrict signals and information coming from another state. This approach always emphasizes the existence of exceptions—the grounds and processes for restriction—but within the overriding context of a freer flow of information. A project, like the Guidelines Project, pegged to international norms implies this structure for analysis. In contrast, somewhat more sovereignty-based studies, like the Words and Wars effort, are more open to the articulation of national security concerns and celebrate the nation. In summary, fake news and propaganda stand to be the constant

127. OSCE, THE REPRESENTATIVE ON FREEDOM OF THE MEDIA, PROPAGANDA AND FREEDOM OF THE MEDIA (2015), <https://www.osce.org/fom/203926?download=true>.

accompaniment of increasingly vulnerable political transitions; and the weaponized version of that will remain present in Ukraine. This essay has attempted to help explain how various sponsors and various stakeholders engage in processes that shape public attitudes and help reduce conflict.