

Explanatory note on the draft law “On the Temporarily Occupied Territory of Ukraine” jointly developed by UNHCR, Right to Protection, Crimea SOS, Vostok-SOS, and Danish Refugee Council

24 October 2016

On 19 July 2016, 29 deputies registered a draft law “*On the Temporarily Occupied Territories of Ukraine*” (draft no. 3593-d)¹. This draft law is another attempt of the Parliament of Ukraine to regulate by legislative means the status of the territories that are not under the direct control of the Government of Ukraine, as well as citizens of Ukraine residing in those territories. The explanatory note to the draft law identifies the following aims: (i) to realize State policy regarding the temporarily occupied territory (TOT) and to protect the rights and freedoms of citizens of Ukraine residing in the TOT; (ii) to restore the sovereignty of Ukraine within its internationally recognized borders; (iii) to adapt residents of the TOT to peaceful living, to restore justice and to reconcile society after de-occupation of the TOT. However, the text of the draft itself does not serve the declared aims. For the international community and civil society organizations, many provisions of the draft law raise serious concerns, including serious risks of disrupting humanitarian access, violating of human rights and freedoms before and after de-occupation. In its current version, the draft law also undermines the principles of reconciliation and post-conflict settlement.

Temporarily occupied territories are defined in the draft law as the territory of the Crimean Peninsula, including territorial waters as of 20 February 2014; territories of some parts of the Donetsk region (administrative region or oblast) as of 7 April 2014; and territories of some parts of the Luhansk region (administrative region or oblast) as of 27 April 2014². The list of the occupied parts of Donetsk and Luhansk regions (administrative regions or oblast) is detailed in a separate resolution of the Cabinet of Ministers of Ukraine³. A common approach to Crimea and separate parts of Donetsk and Luhansk regions may result in deterioration of the humanitarian situation in the east of the country, where resources are depleted by hostilities, large portions of the population are displaced and access to basic supplies is disrupted.

Disrupted humanitarian supply

The draft law introduces a de facto international border regime at the contact line in Donetsk and Luhansk regions and at the administrative border with Crimea⁴ with public and cargo transport (including road, rail, air, river and maritime transport) being prohibited, with the exception of mail delivery and the provision of humanitarian aid. The draft law specifies that the latter may be delivered “as stipulated by Article 23 of Geneva Convention IV and under the control of the national representation of the ICRC in Ukraine”. Supply of fuel and energy resources, as well as centralized water supply to the TOT will also be prohibited under the new regime⁵. It is expected that these restrictions will cause severe deterioration of

¹ This draft law is a revision of an earlier version registered by 14 MPs under no. 3593 on 8 December 2015 (available in Ukrainian on the Parliament website: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57317). The initial draft was withdrawn on 12 July 2016 and replaced with the presently analyzed version and registered under no. 3593-d on 19 July 2016 (available in Ukrainian: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59833).

² The present draft law will replace the following laws: (the law) “*On Ensuring Civil Rights and Freedoms and the Legal Regime on Temporarily Occupied Territory of Ukraine*”, (the law) “*On Establishment of the “Crimea” Free Economic Zone*”, (the law) “*On the Special Procedure for Local Self-Government in Certain Areas of Donetsk and Luhansk Regions*”, and (the law) “*On Temporary Measures Introduced for the Period of the Anti-Terrorist Operation*”.

³ Cabinet of Ministers of Ukraine Resolution no. 1085 “*On Approving the List of Settlements where State Authorities Temporarily do Not Fulfil Their Functions*”, adopted on 7 November 2014 with respective amendments of 5 May 2015.

⁴ Articles 12 and 13 of the draft law “*On temporarily occupied territory of Ukraine*”.

⁵ Article 15 of the draft law “*On temporarily occupied territory of Ukraine*”.

the humanitarian situation both in the non-government controlled areas (NGCAs) in the east of Ukraine and the Crimean Peninsula and will constitute a violation of Ukraine's responsibilities under international law, which oblige the Government to ensure a supply of minimum essential services and goods to the civilian population⁶.

Regarding humanitarian assistance and collaboration or cooperation between humanitarian actors and the State, no specific framework is envisaged by the draft law. As humanitarian actors will not benefit from any special status, their security and safety cannot be guaranteed.

Rejection of human rights protection responsibilities in the TOT

Another major concern is the fact that with the adoption of this law, Ukraine refuses to endorse any responsibility for the protection of life, health, dignity and property of its citizens residing in the "temporary occupied territories"⁷ and considers that the responsibility for any human rights violation is embedded with the Russian Federation.⁸ These provisions are in contradiction with the Constitution of Ukraine⁹ as well as with international obligations of the country¹⁰ and may lead to a significant deterioration of the human rights situation of its citizens.¹¹ Additionally, the National Human Rights Protection Strategy adopted on 25 August 2015¹² does not differentiate between controlled and non-controlled areas. It calls for coordinated balance between the issues of national security and human rights protection. In particular, it underlines Ukraine's responsibility to seek ways to ensure right to life, right to

⁶ Article 23 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, available at: <https://ihl-databases.icrc.org/ihl/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5>. Additionally, this is ensured under international human rights law, in particular by the UN convention on Economic, Social and Cultural rights (para. 1 of Article 2) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

⁷ Part 2 of Article 5 of the draft law "On temporarily occupied territory of Ukraine".

⁸ Article 6 of the draft law "On temporarily occupied territory of Ukraine".

⁹ Article 3 of the Constitution of Ukraine stipulates that "The human being, his or her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State." Under its article 24, the Constitution guarantees that "Citizens have equal constitutional rights and freedoms and are equal before the law. There shall be no privileges or restrictions based on race, color of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics." Constitution of Ukraine [Ukraine], 28 June 1996, available at: <http://www.refworld.org/docid/44a280124.html> [accessed 18 October 2016].

¹⁰ Under Article 1 of the European Convention on Human Rights and Fundamental Freedoms a state has a positive obligation to ensure human rights protection all its territory. The scope of the responsibility to seek human rights observation in non-government controlled areas may vary depending on the circumstances. This has been elaborated in the case law of the European Court for Human Rights, including: *Ilascu and others v. Moldova and Russia* (8 July 2004), *Catan and others v Moldova and Russia* (19 October 2012). In particular, it states: "the fact that the region is recognized under public international law as part of Moldova's territory gives rise to an obligation, under Article 1 of the Convention, to use all legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there".

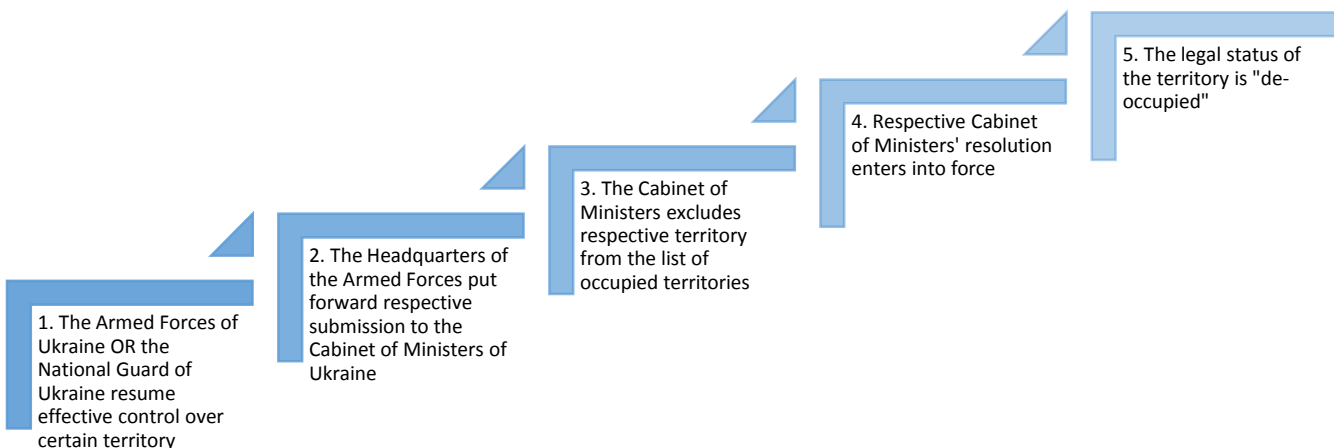
¹¹ For instance, in terms of access to education, article 7 of the draft law hampers the possibility to pursue their education for students of higher educational institutions that have been evacuated and relocated from TOT to the government-controlled areas, and contravenes, among others, article 53 of the Constitution of Ukraine. The right to enjoyment of property guaranteed by article 41 of the Constitution of Ukraine is also hindered by the draft law in that it envisages, in its article 9, that the acquisition of a right to property and other rights related to real estate on the TOT solely by means of inheritance. Other ways of acquisition of right to property and other rights related to real estate, such as purchase-sale and donation according to the registration procedure envisaged in the existing legislation of Ukraine, remain impossible.

¹² National Human Rights Protection Strategy available here: <http://zakon5.rada.gov.ua/laws/show/501/2015/print1443605441805437>.

safety and security. The Strategy also clearly indicates the need to protect rights and freedoms of citizens of Ukraine residing in TOT.

De-occupation and martial law regime

The following scheme presents steps necessary for the de-occupation to be acknowledged as a matter of fact and law (as per Article 20 of the draft law):



Following de-occupation, the draft law envisages a martial law regime to be installed for any de-occupied territory with a population of over 50,000 inhabitants prior to the occupation. Military administrations (MA), established by the decision of the President of Ukraine, will possess full authority in all matters in the de-occupied territories.

The draft law, in its article 21, introduces severe restrictions for entry to and exit from the de-occupied territories:

- for citizens who have not resided permanently and continuously in the territory, foreigners and stateless persons: entering the territories is possible with prior permission from the respective MA;
- for persons (including foreigners and humanitarian personnel who do not constitute an exception) who permanently resided in the TOT at the time of de-occupation: they will not be able to leave the TOT without a prior permission from the respective MA.

Although justified by security needs, these provisions contradict basic human rights such as the right of everyone to freedom of movement and residence within the border of a state¹³.

The limitations on freedom of movement will not favor the improvement of the humanitarian situation in the returned territories and may slow the process of re-integration and recovery of the de-occupied regions.

Reduced civil and political rights

13 Article 13 of Universal Declaration of Human Right and article 12 of International Covenant on Civil and Political Rights.

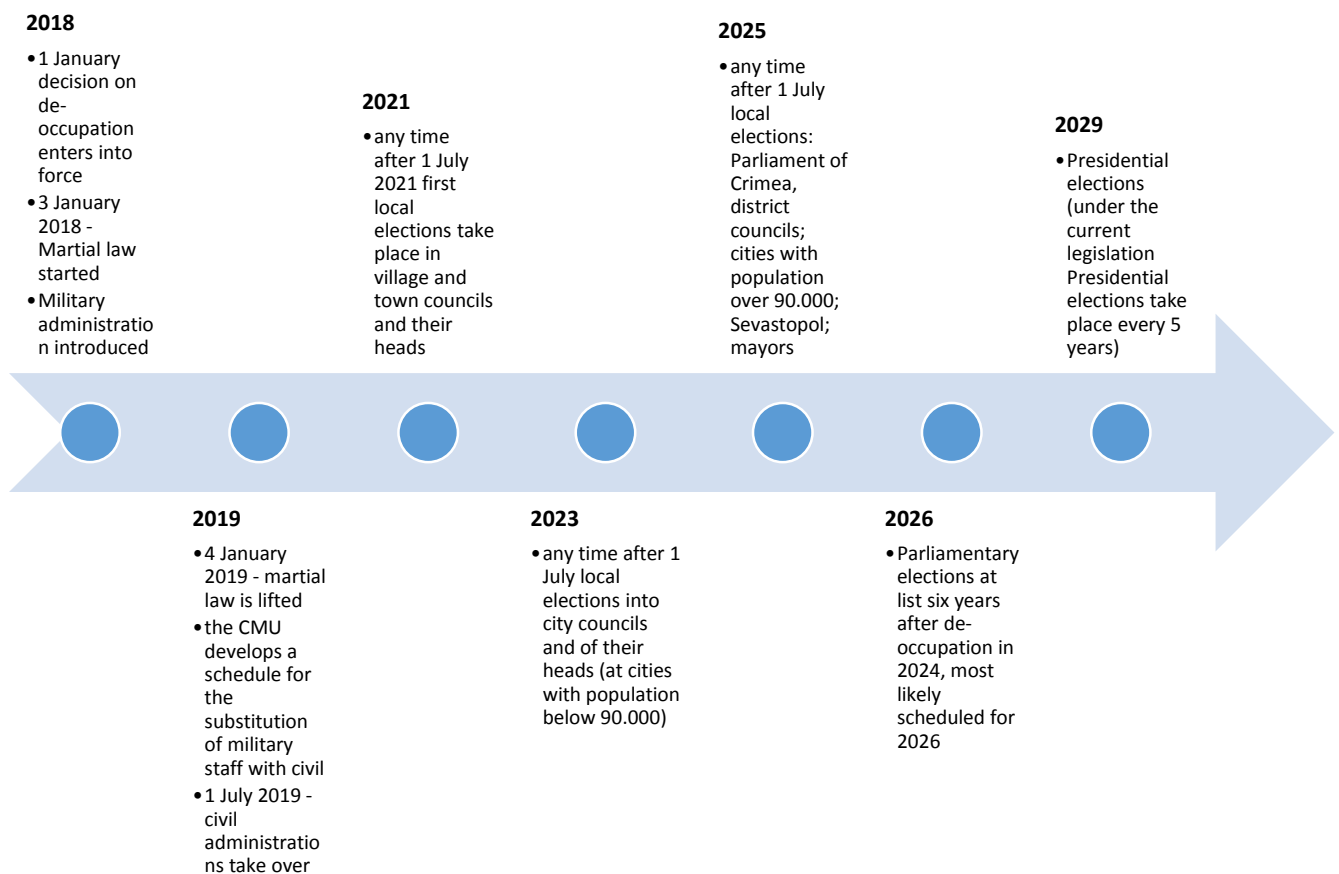
According to the draft law, a prolonged period after the liberation of any TOT will be followed by serious restrictions on civil and political civil rights, including on the freedom of thought and the freedom of expression with infringements on the functioning of an independent media.

As per Article 33 of the draft law, the first local elections in the liberated territories may be conducted:

- not earlier than three years after liberation for election of members of village and town councils and village heads;
- not earlier than five years after liberation for election of members of city councils and mayors of cities where the number of voters is less than 90,000;
- and not earlier than seven years after the liberation of election of deputies to the Parliament of Crimea, the regional, district, and city councils, and the district councils in cities, as well as for Sevastopol City Council.

Nationwide elections are conditioned by census on the liberated territories and no presidential or parliamentary elections may be held within six years after the reorganization of the Military Administrations.

Modeling of an optimistic scenario of elections after de-occupation (based on Crimea):



These provisions are in contradiction with Article 21 of the Universal Declaration of Human Rights, Article 24 of the International Covenant on Civil and Political Rights and a number of other international treaties¹⁴. Implementation of such restrictions will prevent the participation in political life of residents of the “temporarily occupied territories” and as such will pose a threat to the reconciliation process, which should be put in place immediately after liberation of the territories.

Lack of transitional justice elements and narrowed reconciliation measures

International best practice identifies reconciliation as the process of building a mutually accepted understanding of past events and establishment of a foundation for future peaceful coexistence that is not envisaged in the draft law. At minima, dealing with post-conflict situations call for transitional justice as a set of judicial and non-judicial measures to be implemented by the country in order to redress the legacies of human rights abuses, which cannot be attained by peacetime legislation and procedures.

With this draft law, not only Ukraine derogates its responsibility for human rights violations in the TOT, it also signals a lack of systematic approach to the reparation process after regaining control over the territories. The redress mechanism stipulated in Articles 22 and 30 includes only the assessment of material damage to all forms of property by State authorities and secondary legal aid to population in order to launch applications to the European Court of Human Rights against the Russian Federation. Apart from being entered into force at a very late stage after de-occupation, this mechanism does not include any assessment of non-pecuniary damages and does not set standards of evidence for cases concerning damages in conflict settings. It will not provide restitution for military occupation of the civilian property, secondary occupation or any possible human rights violations that cannot be attributed to the Russian Federation, leaving the conflict-affected population in limbo without any chance for redress.

The draft law identifies reconciliation measures as measures aimed at “identification of individuals involved in the armed aggression of the Russian Federation against Ukraine, in activities of occupying administrations and facilitating the temporary occupation of Ukraine”¹⁵. The law further sets out reconciliation measures (the nature of which is administrative restrictions) and categories of people to whom reconciliation measures shall be applied.¹⁶ The reconciliation commission established by the draft law with the Ministry of Justice, a collegial body of six individuals, does not foresee the mandatory presence of at least one Internally Displaced Person or of any person who would have resided or was present in the TOT. The commission is expected to cover Crimea and Donetsk and Luhansk regions with no distinction to factual circumstances in these territories. This organ is also entrusted/empowered with quasi-judicial functions and the authority to take decisions on individual cases and decisions, which may be contested in court. It is expected that the amount of work will not be proportionate to the number of people who will be working in the Commission. The draft law also does not provide for any additional or subsidiary body to assist the Commission in collecting information and producing well-grounded decisions.

¹⁴ Under the mentioned treaties, Ukraine takes an obligation to guarantee the right and the opportunity to vote and to be elected in genuine periodic elections and to take part in the conduct of public affairs, directly or through freely chosen representatives.

¹⁵ Article 34

¹⁶ Articles 33 and 34