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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

UKRAINE

DRAFT JOINT OPINION

**ON THE DRAFT LAW "ON IMPROVING THE PROCEDURE FOR
ESTABLISHING THE IMPOSSIBILITY OF HOLDING NATIONAL AND
LOCAL ELECTIONS, ALL-UKRAINIAN AND LOCAL REFERENDUMS
IN CERTAIN TERRITORIES AND POLLING STATIONS"**

on the basis of comments by

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I. Introduction

1. By letter of 24 September 2021, Mr Andrii Klochko, Chairman of the Committee on the Organisation of State Power, Local Self-Government, Regional Development and Urban Planning of the Parliament of Ukraine, requested an opinion of the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) on the draft law “On Improving the Procedure for Establishing the Impossibility of Holding National and Local Elections, All-Ukrainian And Local Referendums in Certain Territories and Polling Stations” (hereinafter “the draft amendments”, CDL-REF(2021)077). According to the established practice, the opinion was prepared jointly by ODIHR and the European Commission for Democracy through Law of the Council of Europe (hereinafter “Venice Commission”).
2. Mr Barrett and Ms Biglino Campos acted as rapporteurs for this opinion. Ms Marla Morry was appointed as expert for the ODIHR.
3. On 16-17 November 2021, a joint delegation composed of Mr Barrett on behalf of the Venice Commission and of Ms Morry on behalf of the ODIHR, as well as Mr Michael Janssen from the Secretariat of the Venice Commission and Ms Keara Castaldo from the Secretariat of ODIHR, travelled to Kyiv and had meetings with the Central Election Commission, the Committee on the Organisation of State Power, Local Self-Government, Regional Development and Urban Planning of the Parliament of Ukraine, the Administrative Cassation Court, and with representatives of international and non-governmental organisations (NGOs). The Commission and ODIHR are grateful to the Ukrainian authorities for the support to this visit.
4. This opinion was prepared in reliance on the English translation of the law. The translation may not accurately reflect the original version on all points.
5. *This opinion was drafted on the basis of comments by the rapporteurs and expert and the results of the meetings. It was adopted by the Venice Commission at its ... Plenary Session (Venice and online, ...).*

II. Scope of the Joint Opinion

6. The present Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing elections in Ukraine. It confines itself to examining the draft law “On Improving the Procedure for Establishing the Impossibility of Holding National and Local Elections, All-Ukrainian and Local Referendums in Certain Territories and Polling Stations” as officially submitted for review. The draft law includes proposed amendments to the Election Code (Articles 20 and 205), the Law “On the National Security and Defence Council of Ukraine” (Article 4), the Law “On the Central Election Commission” (Article 17), the Law “On Civil-Military Administrations” (Articles 3, 4, and 7) and the Law “On the All-Ukrainian Referendum” (Article 22). While the draft amendments cover various provisions in several legislative acts, they concern only one specific issue: revising the established authority and process for deciding on the impossibility of holding a national or local election or referendum within “certain territories” on which civil-military administrations have been established.
7. This Joint Opinion focuses on the conformity of the draft amendments with international standards, norms and practices, as for example set out in the [United Nations’ International Covenant on Civil and Political Rights](#) (ICCPR), the [European Convention on Human Rights](#) (ECHR) and its additional protocols, the [European Charter of Local Self-Government](#) (ECLSG), the Council of Europe Code of Good Practice in Electoral Matters, drafted by the Venice

Commission,¹ the revised Guidelines on the holding of referendums adopted by the Venice Commission in October 2020,² as well as relevant OSCE human dimension commitments. Where appropriate, it will also refer to other reference documents and sources, including the Constitution of Ukraine, as well as to relevant recommendations made in previous legal opinions and election observation reports published by the Venice Commission and/or ODIHR.

III. Executive summary

8. The Venice Commission and ODIHR welcome the initiative of Ukrainian legislators to draft amendments to the legal framework regarding the issue of holding or not holding elections in certain territories and polling stations, in response to public and international criticism of the applicable legislation and the decision not to hold the 2020 local elections in 18 territorial communities. The approach of the draft law to extend the legal framework to include elections at the national in addition to the local level, as well as referendums, and thus to aim for a comprehensive and consistent legal framework, is a positive initiative.

9. Both the current and the proposed legal framework allow for adopting a decision not to hold an election – local elections under the current law, also national elections and referendums under the draft law – in certain territories in which civil-military administrations have been established and thereby interfere with the right to vote and to be elected. The right to participate in universal, free and fair elections is one of the most important political human rights, which is enshrined in all major human rights instruments.

10. In the view of the Venice Commission and ODIHR, a state can have the power to decide the temporary suspension of elections for security reasons. However, the protracted suspension or cancellation of elections or voting in certain territories would risk unduly infringing the right to vote and to be elected, in particular in the absence of a formal derogation from international human rights guarantees. In any case, be it about cancellation or temporary suspension of elections/voting, the relevant legal framework must retain the overarching principles of the rule of law and meet the criteria of proportionality and non-arbitrariness. It needs to be made clear that the protection of electoral rights is of the utmost importance and that in principle, elections/referendums should take place in the whole of the territories under consideration as in the other parts of the country; any exceptions to this principle must be well justified and subject to effective judicial review. The draft amendments need to be revised in order to comply with these requirements.

11. While the proposed amendments offer some positive features, they also contain provisions which deviate from international standards and even raise possible questions of constitutionality. Further, some gaps and ambiguities in the proposed provisions risk undermining legal certainty and the coherence of the applicable legal framework. It is necessary to bring the draft amendments further in line with international standards, to respond to the shortcomings exposed at earlier elections, and to establish a comprehensive, coherent and inclusive legal mechanism which preserves the independence and objectivity of key election-related decisions. In the end, sufficient inclusivity, transparency and accountability for any decisions not to hold elections/voting in certain territories will serve to reinforce public confidence in the electoral process and results, a key component to any democratic election process.

¹ Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report.

² Venice Commission, [CDL-AD\(2020\)031](#), Revised guidelines on the holding of referendums.

12. The Venice Commission and ODIHR make the following key recommendations:
- A. Explicitly proclaiming in the law that any measures restricting the right to vote and to be elected must be proportional and temporary, and stating in the law that in making the decision on the (im)possibility to hold elections/referendums/voting, the use of alternative measures to facilitate preserving these rights must be fully explored.
 - B. Ensuring adequate involvement of the CEC in the decision-making process, whether it retains its decision-making authority or if the decision is taken by the NSDC and the President, as well as interagency collaboration, involvement of relevant experts and public consultation.
 - C. Any decision on not holding elections, referendums or voting in certain territories should be comprehensively and coherently reasoned, in written form, and timely published to ensure transparency and public confidence in the decision.
 - D. The main assessment criteria (for decisions on the impossibility to hold elections/voting or referendums in certain territories) should be determined by parliament after consultation of both the CEC and the NSDC, as well as civil society and should be introduced in the law.
 - E. Including in the law a non-exhaustive list of authorities competent to assess the security situation regarding the possibility of holding an election or referendum in certain territories, involving the CEC and regional authorities in the assessment process and regulating the manner of collaboration of the bodies involved in this process.
 - F. Providing electoral stakeholders' access to an effective system of judicial appeal against decisions on not holding elections/referendums in certain territories, ensuring timely, substantive and independent consideration of complaints and appeals.
13. These and additional recommendations are included throughout the text of this Joint Opinion.
14. The Venice Commission and ODIHR remain at the disposal of the Ukrainian authorities for further assistance.

IV. Background

15. The territories affected by the concerned legal framework ("certain territories") are within the Donetsk and Luhansk oblasts (regions) in eastern Ukraine, in close proximity to the parts of these oblasts which are under ongoing armed conflict and other hostilities and which have been declared by the Ukrainian Parliament as temporarily occupied territories. As ODIHR and the Parliamentary Assembly of the Council of Europe (PACE) have noted in recent election observation reports, "although a nominal ceasefire has been in effect for five years, the situation in conflict-affected parts of eastern Ukraine remains tense and volatile and is characterised by persistent attacks on fundamental freedoms and a deteriorating humanitarian situation."³ National and local elections have not been held in those parts of the Donetsk and Luhansk oblasts declared by the Ukrainian Parliament as temporarily occupied territories. With very limited exception, the 2019 national elections were conducted in the government-controlled areas affected by the conflict. However, this significantly changed during the conduct of the 2020 local elections as discussed below.

16. The current legal framework empowers the Central Election Commission (CEC) to adopt a decision not to hold elections to local self-government bodies in certain territories in case of establishing the impossibility to ensure preparations and conduct of local elections in accordance

³ ODIHR, Ukraine Local Elections 2020, ODIHR Limited Election Observation Final Report, 29 January 2021; ODIHR, Ukraine Presidential Election 2019, ODIHR Election Observation Final Report, 20 November 2019; PACE, Observation of the presidential election in Ukraine (31 March and 21 April 2019), [Doc. 14896 of 23 May 2019](#).

with the law in those territories (Article 205(1) of the Election Code). The civil-military administrations are authorised to provide opinions to the CEC on the above-noted issue (Article 4(3) of the Law “on Civil-Military Administrations”). The applicable legislation does not include other provisions elaborating on the assessment and determination of the impossibility of holding local elections, such as established criteria and methodology, interagency collaboration,⁴ or public consultation. This leaves the process largely unregulated, subject to the discretion of the above-noted responsible bodies. In addition, it should be noted that under the current legal framework, the mechanism described above only applies to local elections, whereas national elections and referendums are not addressed. In cases where the CEC decides on the impossibility to hold local elections, the Law “On Civil-Military Administrations”, as amended in December 2020, provides for the establishment of civil-military administrations in those territorial communities. Those administrations are temporary state bodies set up by decision of the President of Ukraine.⁵

17. For the 2020 local elections, based on information and opinions received from the regional civil-military administrations in the government-controlled regions affected by the conflict (Donetsk and Luhansk oblasts), on 8 August 2020, the CEC decided not to hold the elections in 18 territorial communities within those two regions. The decision effectively disenfranchised some 500,000 voters.⁶ As the CEC had essentially subscribed to the conclusions of the civil-military administrations in making its decision on not holding elections in the concerned territorial communities, the decision was *de facto* taken by the civil-military administrations. Nevertheless, public criticism that the decision was unsubstantiated and driven by political factors was deflected to the CEC, which holds the final decision-making authority on the matter.⁷ The CEC Resolution No. 161 of 8 August 2020 on the impossibility of holding local elections in certain territories was challenged before the administrative courts and was overturned by the Sixth Administrative Court of Appeals, by decision of 11 May 2021; the Court stated that Article 205(1) of the Election Code authorised the CEC to restrict the conduct of elections, but only on the condition that the impossibility of holding elections was established in accordance with a clear procedure set by law. That decision has been appealed to the Supreme Court which on 12 August opened cassation proceedings but has not decided on the substance of the appeal to date.

18. ODIHR noted in its election observation findings for the 2020 local elections that the legal framework for the CEC’s decision not to hold elections in the 18 territorial communities lacked transparent criteria and the resolution itself lacked transparency, which undermined public trust in the process.⁸ It highlighted that the decision included territorial communities where national

⁴ The drafters of the amendments use these terms in the Explanatory Note and stress that the current legislation does not provide for an inclusive process; the civil-military administrations are not obliged to consult with local communities and other relevant bodies during the preparation of their conclusions.

⁵ See Articles 1 and 3 of the Law “On Civil-Military Administrations”.

⁶ The CEC’s resolution on impossibility of holding local elections directly impacted 475,855 citizens whose voting addresses referred to 10 territorial communities of Donetsk oblast and 8 territorial communities of Luhansk oblast. To date, local elections have not been held in those territorial communities, leaving residents without newly elected local representatives and under the charge of either a civil-military administration or previously elected local council.

⁷ According to the domestic election observer group, OPORA, in consideration of citizen petitions against the decision, the CEC addressed the civil-military administrations with repeat requests for revision of their conclusions on the impossibility of holding elections, but to no avail.

⁸ ODIHR, Ukraine Local Elections 2020, ODIHR Limited Election Observation Final Report, 29 January 2021. The reports of the regional civil-military administrations did not contain the criteria and methodology under which the security situation was assessed, or its dynamics since the 2019 elections. The conduct of local elections is contingent on the implementation of conditions stipulated in the Law “on Interim Local Self-Government Order in Certain Areas of Donetsk and Luhansk Regions”, including non-interference of military groups in the electoral process and consultations with representatives of these communities; for the 2020 local elections, such consultations were, in practice, substituted by the assessments of the regional civil-military administrations.

elections had been conducted the previous year.⁹ ODIHR concluded that the legal framework, and its implementation, did not provide sufficient safeguards for suffrage rights, and that constitutional limitations on derogation were not adhered to, which had raised public concerns about the legitimacy of the decisions.

19. Other international actors and civil society organisations, including a leading citizen election observation group, OPORA, raised similar concerns and criticism.¹⁰ The national authorities were called on to respect the voting rights of the affected citizens and in particular to establish clear, objective and politically impartial criteria and methodology for addressing and taking into account security challenges during elections, to strengthen transparency in the decision-making process, and to involve relevant experts and conduct public consultations for decisions to hold or not the election/vote in the concerned territories. The UN Office of the High Commissioner for Human Rights, in response to the failure to hold the elections in some districts, encouraged the Ukrainian authorities to “ensure the constitutional right of local residents to participate in public affairs by holding local elections in the 18 territorial communities in October 2021.”¹¹ To date, these elections have not been held.¹²

V. Analysis and recommendations

A. General remarks and overview of the draft amendments

20. As a preliminary remark, it should be noted that, according to established principles, any successful changes to electoral and political party legislation should be built on at least the following three essential elements: 1) a clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and 3) the political commitment to fully implement such legislation in good faith. An open and transparent process of consultation and preparation of such amendments increases confidence and trust in the adopted legislation and in the state institutions in general. The recommendations and outcomes of such consultations should be meaningfully attended by the parliament when formulating the legislation.

21. In principle, it is a welcome development that the Ukrainian legislature took the initiative to draft amendments to the legal framework regarding the issue of holding or not holding elections in certain territories, in response to public and international criticism of the applicable legislation and the decision not to hold the 2020 local elections in 18 territorial communities. The approach of the draft law to extend the legal framework on this issue to include elections both at the national and local levels, as well as referendums, and thus to aim for a comprehensive and consistent legal framework, is a positive development. The Explanatory Note to the draft amendments recognises certain shortcomings in the current legislation, which “negatively affect the ensuring of voting rights for citizens”. It further states that the overall purpose of the reform is to “provide a

⁹ All 18 territorial communities that were affected by the CEC’s resolution on impossibility of holding local elections in 2020 were effectively included in the 2019 national elections (except for certain voting precincts).

¹⁰ Civil Network OPORA, First Observation Report for the Preparation Process to the Local Elections 2020, 4 September 2020. In April 2021, OPORA published a Concept Paper on the issue in which it proposed a list of concrete criteria for the assessment of the possibility to hold elections in certain territories.

¹¹ UN Office of the High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine, 1 August 2020 – 31 January 2021, paragraphs 87-89.

¹² According to the Election Code, the first elections of newly amalgamated communities must be held in March or October of a calendar year. In March 2021 and October 2021, the CEC decided, in line with the opinions of the respective civil-military administrations, not to hold first elections in the same 18 communities.

comprehensive and objective procedure for analysing the security situation when deciding on the impossibility of holding national and local elections in certain territories or polling stations which would preclude unjustified restrictions on the voting rights of citizens and the right of territorial communities to local self-government”.

22. The various concerns raised by international actors and domestic stakeholders in their 2020 reporting, particularly those raised by OPORA, are systematically presented in the Explanatory Note as the parliament’s rationale for the draft amendments. The rationale includes:

1. the lack of a transparent procedure and of clear criteria/conditions for making a reasonable assessment of the security situation in certain territories as the basis for decisions on the impossibility of holding national and local elections;¹³
2. the lack of guarantees and mandatory mechanisms for interagency cooperation, public consultation with local communities, and involvement of experts in the determination of the impossibility of holding elections in certain territories;
3. the potential conflict of interest between the regional civil-military administrations and their leadership, who present their conclusions on the impossibility of holding elections in certain territories, and the concerned local communities;¹⁴
4. the lack of competence and technical capacity of the CEC to verify the information provided by the civil-military administrations about public safety in certain territories that forms the basis of the latter’s conclusions on the impossibility of holding elections in those areas;
5. a need to shift the level of responsible bodies from regional to national authorities.

23. The Explanatory Note highlights that the non-collaborative and non-transparent manner in which the regional civil-military administrations produced their conclusions on the impossibility of holding the 2020 local elections in certain territories “negatively affected the voters’ trust levels for government decisions that directly affect their constitutional rights.” In this respect, the need to enhance public legitimacy of decisions on security issues in relation to the holding of elections in the certain territories is explicitly acknowledged in the Explanatory Note.

24. In brief, the draft amendments include the following substantive changes:

1. The CEC’s authority to decide on the impossibility of holding local elections in certain territories would be revoked and the NSDC¹⁵ would be granted the competence to make such decisions (with respect to the holding of national and local elections and

¹³ The Explanatory Note states that, due to the lack of established criteria for assessing the security situation in relation to the possibility to hold elections in certain territories, since 2015, the assessments of the civil-military administrations regularly refer to the “difficult socio-political situation” as a basis for recommending not to hold the vote/elections. The Explanatory Note further acknowledges that the lack of established criteria has led to inconsistent conclusions concerning the possibility to hold elections in the various territorial communities, in particular in consideration of their geographic remoteness to the contact line. The Explanatory Note also refers to the failure of the civil-military administrations to consider in their assessments the other functioning spheres of public life in those territorial communities, such as administrative services, education and mass public events, as well as the experience of administering the vote in past elections in those areas (in the absence of reliable information on the escalation of security challenges). In this respect, the note acknowledges that the “universality of measures to ensure the security of citizens in various spheres of public life [in the certain territories] is a safeguard against potential political abuses of election procedures”.

¹⁴ The potential conflict of interest between the civil-military administrations and the respective communities is in reference to “the functioning of local governments and resource management of local communities”.

¹⁵ In accordance with Article 107 of the Constitution of Ukraine, the NSDC is the co-ordinating body to the President of Ukraine on issues of national security and defence.

referendums for each polling station individually) in certain territories.¹⁶ The decision of the NSDC would be put into effect by a Decree of the President of Ukraine.¹⁷

2. The NSDC would be mandated to establish the assessment criteria to be followed by the national security and defence authorities in determining the security situation with regard to the possibility or impossibility of holding national and local elections and referendums in certain territories.¹⁸
3. The NSDC would be mandated to determine the list of national security and defence authorities (bodies) responsible to undertake (according to the criteria to be established by the NSDC) the assessment of the security situation with regard to the possibility of holding national or local elections and referendums in certain territories.¹⁹
4. The current power of the regional civil-military administrations to provide the CEC their opinions on the possibility to ensure preparations and conduct of (local) elections in certain territories would be changed to the power to submit to the NSDC information (according to the criteria to be established by the NSDC) on the possibility to prepare and conduct national or local elections and referendums in certain territories.²⁰
5. The CEC, if necessary, shall request the NSDC to decide on the possibility to ensure the preparation and conduct of elections and referendums in certain territories.²¹

B. Specific issues

1. Decisions on the (im)possibility to hold elections and referendums as a restriction of suffrage rights

25. First and foremost, both the current and proposed legal framework allow for the adoption of a decision not to hold an election/voting – local elections under the current law, and also national elections and referendums under the draft law – in certain territories and thereby interfere with the right to vote and to be elected. These rights are guaranteed by international standards, in particular by the provisions of Article 25(a) and (b) of the ICCPR and Article 3 of Protocol No. 1 to the ECHR. While the latter provision is in principle not applicable to elections for local authorities,²² Article 1(4.1) of the Additional Protocol to the European Charter of Local Self-Government guarantees the right of nationals “to participate, as voters or candidates, in the election of members of the council or assembly of the local authority in which they reside”. The

¹⁶ Article 205(1) of the Election Code and Article 4(1) of the Law “On the National Security and Defence Council of Ukraine”. In addition to the change of decision-making body, two other revisions appear in the aforementioned articles with respect to the making of the decision on the impossibility to hold elections: 1) broadening the scope of the decision-making from the possibility to hold local elections to the possibility to hold national and local elections and referendums; and 2) specifying that the decision on impossibility to hold elections is with regard to each polling station individually rather than with regard to the territories. These two changes are not highlighted in the Explanatory Note.

¹⁷ Article 20(7) of the Election Code, Article 17(12.7) of the Law “On the Central Election Commission”, Articles 3(2) and 7(2) of the Law on “On Civil-Military Administrations”, and Article 22(5) of the Law “On the All-Ukrainian Referendum”.

¹⁸ Article 4(9) of the Law “On the National Security and Defence Council of Ukraine”.

¹⁹ Article 4(9) of the Law “On the National Security and Defence Council of Ukraine”.

²⁰ Article 4(3) of the Law “On Civil-Military Administrations”. In practice, this would not be a major change.

²¹ Article 17(12.6) of the Law “On the Central Election Commission”. Additional draft amendments stipulate that in case the NSDC decides on the impossibility of holding elections or referendums, but the electoral/voting or referendum process has already been launched, the CEC would have to set the rules to complete the procedures launched, individually for each polling station concerned (Article 20(7) of the Election Code, Article 22(5) of the Law “On the All-Ukrainian Referendum” and Article 17(12.7) of the Law “On the Central Election Commission”).

²² According to the case-law of the European Court on Human Rights (ECtHR). See e.g. ECtHR, *Xuereb v. Malta*, 15 June 2000, no. 52492/99; *Malarde v. France*, 5 September 2000, no. 46813/99.

right to participate in referendums is covered by Article 25(b) of the ICCPR.²³ Moreover, the 1990 OSCE Copenhagen Document and the Venice Commission's Code of Good Practice in Electoral Matters and revised Guidelines on the holding of referendums include the principles of universal and equal suffrage and the holding of elections at regular intervals.²⁴ These principles are at stake when part or the whole of the electorate is deprived of the right to take part in certain elections or referendums.

26. In its 2019 report concerning the inclusion of a not internationally recognised territory into a nationwide constituency, the Venice Commission recalled that “the right to participate in universal, free and fair elections is also one of the most important political human rights, which is enshrined in all major human rights instruments”.²⁵ At the same time, the Venice Commission²⁶ recalled that the right to elections was “not an absolute right. Although Article 3 of Protocol 1 does not contain an express limitation clause, the ECtHR has repeatedly held that there is room for ‘implied limitations’. Generally speaking, all ‘implied’ limitations to the fundamental right to participate actively or passively (by voting or standing as a candidate) in elections must satisfy a three-prong test: The measure must pursue a legitimate objective, it must not be disproportionate, and it may not impair the essence of the right.”²⁷ The Court also made clear that any interference with the right to vote: a) must meet the criteria of non-arbitrariness and proportionality; and b) must not interfere with the free expression of the opinion of the people.²⁸

27. In the view of the Venice Commission and ODIHR, a state can have the power to temporarily suspend the elections for security reasons, i.e. in order to safeguard the life and safety of voters. In such an event, the relevant provisions must meet the above-mentioned criteria of non-arbitrariness and proportionality. In principle, the draft law is aimed to fulfil these requirements to some extent. According to its Explanatory Note, the need to adopt the new legislation comes from the lack of transparent procedures and criteria, sufficient guarantees of interagency cooperation and prevention of conflict of interest.

28. That said, the principle of proportionality also implies that a decision on suspension or cancellation may only be taken when there are no alternative, less intrusive electoral options such as transferring voters or moving polling stations to less volatile places or using more postal voting or electronic options. Interestingly, the draft law of Ukraine # 5844 “On the Principles of State Policy of the Transition Period” of 4 August 2021²⁹ – which was subject to an opinion adopted by the Venice Commission in October 2021³⁰ – provided that during national elections and referendums “Ukrainian nationals residing in the temporarily occupied territories shall be enabled to cast their votes in the Ukrainian territory other than the temporarily occupied territories” (draft Article 15(2)). In contrast, the present draft law does not foresee any similar regulations for

²³ See UN Committee on Human Rights, General Comment 25, paragraph 6.

²⁴ See OSCE Copenhagen Document, paras. 6 and 7.3; Venice Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, sections I.1, I.2 and I.6; Venice Commission, CDL-AD(2020)031, Revised guidelines on the holding of referendums, sections I.1 and I.2.

²⁵ Venice Commission, CDL-AD(2019)030, Report on the compliance with Council of Europe and other international standards of the inclusion of a not internationally recognised territory into a nationwide constituency for Parliamentary elections, paragraph 18. See also Venice Commission, CDL-AD(2020)040, Kyrgyzstan - Urgent amicus curiae brief relating to the postponement of elections motivated by constitutional reform, paragraph 44.

²⁶ Venice Commission, CDL-AD(2019)030, Report on the compliance with Council of Europe and other international standards of the inclusion of a not internationally recognised territory into a nationwide constituency for Parliamentary elections, paragraph 24.

²⁷ ECtHR, *Ždanoka v. Latvia* (Application no. 58278/00), Grand Chamber judgment of 16 March 2006, para. 104.

²⁸ ECtHR, *Ždanoka v. Latvia*, para. 115 lit. c).

²⁹ See CDL-REF(2021)055.

³⁰ Venice Commission, CDL-AD(2021)038, Opinion on the draft law “On the Principles of State Policy of the Transition Period”.

citizens living in the zones close to the occupied territories, who may thus continue to be deprived of their right to vote, even in national elections.

29. Proportionality also involves a temporal aspect: the special provision should focus on temporary delay or suspension, whereas the draft law merely foresees that elections/voting will not take place in certain territories. As the Venice Commission has stated on previous occasions, any suspension of the elections should be for the shortest time possible, in line with the fundamental premise that any action should not undermine and should not be seen as undermining the electoral process.³¹ Consequently, the Venice Commission and ODIHR recommend explicitly proclaiming in the law that any measures restricting the right to vote and to be elected must be proportional³² and temporary and elaborating these principles in specific regulations. In particular, when an assessment concludes that elections or referendums organised and conducted in the standard manner cannot be held in some areas due to security concerns then the use of alternative measures to facilitate preserving the right to vote and to be elected must be fully explored.

30. The fact that the current and draft regulations are motivated by security threats raises the question whether this is a case of public emergency. To date, Ukraine has not declared a state of emergency – which would, according to Ukrainian law, only be possible for a very limited period of time and would exclude the holding of elections during that period.³³ The Venice Commission³⁴ has recognised that states have a wide margin of discretion to assess if there is a public emergency threatening the existence of the nation and if a state of emergency needs to be declared to combat it, and to decide on the nature and extent of the derogations from international human rights guarantees which are needed to overcome the emergency. However, states' powers are not unlimited, and the European Court of Human Rights exercises some supervision over these powers. Moreover, the Venice Commission and ODIHR take the view that the protracted suspension or complete cancellation of elections in an area or the disenfranchisement of part of an electorate, even for reasons of security, would risk unduly infringing the right to vote and to be elected, in light of the Ukrainian Constitution and international standards, in particular in the absence of a declared state of emergency and formal derogation from international human rights guarantees.³⁵

³¹ Venice Commission, CDL-AD(2020)040, Kyrgyzstan - Urgent amicus curiae brief relating to the postponement of elections motivated by constitutional reform, paragraph 38. See also Venice Commission, CDL-AD(2021)037, Albania - Amicus Curiae Brief on the competence of the Constitutional Court regarding the validity of the local elections held on 30 June 2019, paragraph 47, according to which Parliament has a wide margin of appreciation to decide on providing a legal basis for postponing elections but such interference with periodicity must be proportionate.

³² See the case-law of the ECtHR, e.g. the case of *Ždanoka v. Latvia*, para. 115 lit. c).

³³ See Articles 7 and 21 of the Law "On Legal Regime of the State of Emergency". According to Article 7, a state of emergency in Ukraine may be imposed for a period of not more than 30 days and not more than 60 days in certain localities, and if necessary, it may be extended for not more than 30 days. See also Article 20(3) of the Election Code.

³⁴ Venice Commission, CDL-AD(2020)014, Report - Respect for democracy, human rights and the rule of law during states of emergency: reflections, paragraph 43. See also Venice Commission, CDL-AD(2020)018, Interim Report on the measures taken in the EU member States as a result of the Covid-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights.

³⁵ Cf. Article 4(1) of the ICCPR allows for derogation from human rights "[in] time of public emergency [...] the existence of which is officially proclaimed [...] to the extent strictly required by the exigencies of the situation". Article 4(3) further provides: "Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated." See also Article 15 of the ECHR. Paragraph 25.1 of the 1990 OSCE Copenhagen Document requires that "measures derogating from [international human rights] obligations must be taken in strict conformity with the procedural requirements laid down in those instruments", see also paragraph 25.2. Article 64 of the Constitution of Ukraine stipulates that

2. The decision-making body

31. The key amendment consists in transferring the power to make a decision on the impossibility to hold an election/voting in certain territories from the CEC to the NSDC, whose decisions are put into effect by decrees of the President of Ukraine. In other words, the decision-maker would be a national political body, while under the current law regional executive bodies are involved (civil-military administrations). The given rationale behind this move is the limited capacities of the CEC to assess the security situation, its reliance on the opinions of the regional civil-military administrations which might be subject to conflicts of interest, and the idea that the final assessment of such a fundamental question should be assigned to a political body at the national level.

32. During the meetings in Kyiv, the rapporteurs noted that this proposed change is widely supported by civil society actors as a means to place accountability for such a politically sensitive decision directly in the hands of the President of Ukraine. This transfer of authority is also seen as a way to protect the CEC from mislaid accusations of politicisation, to preserve its image as an independent body. At the same time, many interlocutors admitted that this might not be a perfect solution,³⁶ but better than the current scheme. That said, the question which body would be the most suitable to carry out that task is complex, all the more so as it involves both security and election-related aspects. It is of crucial importance as it directly impacts the exercise of electoral rights and may influence the outcome of the elections or referendums. The Venice Commission and ODIHR draw attention to the following parameters which should be taken into account in this context.

33. Firstly, it should be noted that according to Article 107 of the Constitution of Ukraine, the NSDC is the co-ordinating body to the President of Ukraine on issues of national security and defence, which “coordinates and controls the activity of bodies of executive power in the sphere of national security and defence”. The NSDC is presided by the President of the Republic and comprised of several competent ministers and the head of the security service³⁷ who would clearly have valuable input to the decision-making process. It also seems adequate to entrust a political body with such fundamental decisions as the significant postponement of elections in certain territories.³⁸ It might be questioned whether the proposed powers clearly fall within the NSDC’s and the President’s constitutional mandate, also taking into consideration the direct impact on electoral rights. This issue may eventually have to be examined by the Constitutional Court of Ukraine.

34. Secondly, the Law “On the Central Election Commission” provides that the CEC, an independent election body, is responsible to “ensure the implementation and protection of the

“constitutional human rights and citizen’s rights and freedoms shall not be restricted, except in cases envisaged by the Constitution of Ukraine. Under conditions of martial law or a state of emergency, specific restrictions on rights and freedoms may be established with the indication of the period of effectiveness of these restrictions.”

³⁶ Given *inter alia* some recent decisions – which have been commented by national and international observers as potentially violating the right to freedom of expression and which were appealed to the Supreme Court – and the ever-increasing powers of the NSDC.

³⁷ The President of Ukraine is the Chairperson of the NSDC and determines its personal composition. The Prime Minister, the Minister of Defence, the Head of the Security Service, the Minister of Internal Affairs and the Minister of Foreign Affairs are *ex officio* members. Decisions of the NSDC are put into effect by Decree of the President of Ukraine.

³⁸ The Venice Commission has stated that in emergency situations (whether declared or not), “if the postponement concerns only part of the country or if the elections are to be postponed only for a short period (less than two months), a decision can be made by the election administration or the government. Where, by contrast, a postponement is for more than six months, this should be decided by the legislative body.” See Venice Commission, CDL-AD(2020)014, Report - Respect for democracy, human rights and the rule of law during states of emergency: reflections, paragraph 118.

electoral rights of the citizens of Ukraine and their right to take part in referendums” and “ensure equal application of the legislation of Ukraine on elections and referendums on the whole territory of Ukraine”.³⁹ The fact that the draft amendments exclude the CEC from deciding on the possibility to hold elections or voting in certain territories in accordance with the election law or even providing input into the decision-making process, raises concerns. While the significant postponement of elections/referendums in certain territories can be characterised as having a political nature and could therefore be finally decided by a political body, decisions that would result in the absolute disenfranchisement of the whole or part of the electorate should involve the CEC, which has been designed as an independent and impartial election body mandated to protect electoral rights.

35. The decision on the impossibility to hold elections or referendums in certain territories entails both security and electoral considerations and it is therefore logical to involve both security and electoral bodies in this decision-making process. The CEC, if retaining decision-making authority on this matter, could decide on (or advise if not the ultimate decision) other steps short of suspension, in line with electoral legislation, while taking into account assessments from or compiled by the NSDC related to the safety and security of organizing elections in certain communities. In any case, the CEC should be given the opportunity to participate in the decision-making process by providing electoral expertise and proposing other less restrictive measures to ensure security, in line with the electoral legislation. The Venice Commission and ODIHR recommend revising the draft law in order to ensure adequate involvement of both the CEC and NSDC in the decision-making process.

36. Measures need to be taken to guarantee and establish mandated mechanisms for interagency collaboration and involvement of relevant experts. Moreover, public consultations – within certain limits as some security information will be sensitive – would play a key role in ensuring effective decisions that enjoy public confidence. These types of good practice provisions have not been adequately introduced in the proposed amendments. Such a collaborative and inclusive process, coupled with transparent decision-making (comprehensive and clear reasoning for the decision provided in written form that systematically addresses each of the established assessment criteria), would also serve to bolster public trust in the electoral process and guard the decision-making body/bodies against accusations of politicisation.

3. Criteria to be provided for the assessment of the (im)possibility to hold elections or referendums

37. As a positive development, the proposed amendments introduce a requirement for the NSDC to apply pre-established criteria in its assessment of the security situation in relation to the possibility or impossibility of holding elections or referendums in certain territories. In line with stakeholder recommendations, the application of established assessment criteria would enhance the legal certainty, consistency, and accountability of the decision-making process, and should contribute to building public trust. In addition to the application of assessment criteria, consideration should be given to referencing in the law the overarching principle of protecting electoral rights in the course of making any decision on the impossibility of holding elections/voting in certain territories and that in making the decision, all options that would support upholding electoral rights should be considered by the decision-maker. In addition, it is important for the drafters to take into account that the legitimacy of the outcome of a particular local election or referendum could potentially be questioned if the voting takes place despite a decision to effectively disenfranchise a portion of the electorate that could impact the results.

38. However, the draft amendments do not introduce the assessment criteria into the legislation; rather, the NSDC is mandated to unilaterally establish the criteria without guaranteed involvement

³⁹ Article 17, subsections 1 and 4, of the Law “On the Central Election Commission”.

of other relevant authorities, such as the CEC, or stakeholder consultation. This is problematic for several reasons. Firstly, the NSDC, as a national security policy body, is not well-positioned to exclusively develop criteria for assessing the feasibility, even from a security standpoint, to prepare and conduct elections in accordance with the law. Other relevant bodies and electoral specialists should also be involved in this process. Moreover, placing the authority to develop the criteria and make the final decision on the matter in the hands of a single authority – which is also going to apply them – creates an unnecessary risk for conflict of roles.

39. In addition, it is unclear why the legislators did not determine the criteria and incorporate them directly into the legislation, as this would contribute to legal certainty and enhance legal stability of the criteria compared to the status of regulation or policy, particularly in light of the politically sensitive nature of the matter and risk of political abuse.⁴⁰ Moreover, the amendments do not provide a timeline for the NSDC to establish the criteria. Although the Explanatory Note refers to the problematic manner by which the decisions on the impossibility of holding elections in certain areas were made in past elections - that is, unjustifiable and inconsistent decisions based on non-transparent criteria - and acknowledges the need for clear and objective assessment criteria to be established, the legislators do not go so far as to actually establish them. This is so, even though the Explanatory Note makes references to the type of assessment criteria which should be established, such as geographic proximity of the concerned communities to the contact line, past experience in administering the vote in certain territories, functioning of other aspects of public life in the relevant areas, and objective information (scaled) on any escalation of the security situation in those territories.

Consequently, the Venice Commission and ODIHR recommend that the main assessment criteria be determined by parliament after consultation of both the CEC and the NSDC, and within a broadly inclusive and transparent consultation process, and be introduced in the law. At the same time, it would be advisable to leave some scope for the criteria to be expanded on the basis of experience gained on their application in practice.

4. Procedural issues

40. The draft law leaves open a number of procedural questions which need to be clarified. To start with, it is not clear what triggers the whole assessment process and which body will raise the question whether an election or referendum can be held in certain places. Is it the CEC or the security body such as the NSDC, or even the civil-military administrations which may be closer to the ground? The draft amendments do not give a clear answer to those questions. They provide that the CEC, if necessary, shall request the NSDC to decide on the possibility to ensure the preparation and conduct of elections and referendums in certain territories, but it is uncertain whether this is meant to be an exhaustive regulation of the launch of proceedings. Moreover, the exact meaning of the term “if necessary” in this context is unclear, and the question arises how the NSDC should handle any request made to it by the CEC and whether it would be obliged to start the assessment process. As a key principle in line with national and international obligations, the draft law could explicitly affirm that the holding of elections/voting on the whole of the government-controlled territory is the default, and that no decision needs to be sought or made to allow for the holding of elections/voting in certain territories.

41. The draft law also does not make clear the timing of any decision on the (im)possibility of holding elections/voting in certain territories – whether before and/or after the call of elections, or how close to an election. In addition, the draft amendments do not provide whether and how the decision can be rescinded, reversed or revised prior to a scheduled election due to new

⁴⁰ In a meeting with the Parliamentary Committee responsible for the draft amendments, it was explained that the criteria were left out of the draft legislation in order to maintain flexibility to amend them on an expedited basis should changing circumstances call for it.

information or changed circumstances, which should be possible for the sake of security of the electorate and to ensure protection of electoral rights. These types of issues raise the question about whether the legislators expect the relevant executive body that will be making the decision to adopt regulations under the revised legislation to elaborate on the process. In any case, the legislation should include key provisions but if it does not comprehensively govern the decision-making process, then it should explicitly mandate the adoption of such regulations.

42. The draft amendments propose to modify which authoritative bodies will inform or advise (the NSDC) on the decision regarding the possibility or impossibility of holding an election or referendum in certain territories. However, the bodies are not listed in the draft legislation. Instead, the amendments grant the NSDC full discretion to determine the list of national security and defence authorities to undertake the assessment (applying the established criteria) of the possibility or impossibility of holding an election or referendum in certain territories. It is unclear why the list of authorities is not incorporated into the amendments in order to provide legal certainty and consistency in the process, instead leaving it to a policy decision or presidential decree. Moreover, the draft provisions do not regulate the manner of collaboration of the yet-to-be listed agencies that will undertake what the legislation envisions to be a singular assessment. The draft amendments also leave open the question of whether the NSDC's decision on the impossibility of holding an election/referendum or voting in the concerned territories can deviate from the conclusion of the multi-agency assessment on the matter, and if so, on what grounds.

43. The substantive participation of multiple agencies in the assessment of the security situation in certain territories with regard to the possibility or impossibility of holding elections in those areas in accordance with the law, is a positive feature of the draft amendments. However, considering that the assessment concerns the exercise of electoral rights, and in light of the politically sensitive and complex nature of the matter, it is unclear why the CEC is excluded from participating in the assessment as the amendments provide that the NSDC may only list national security and defence authorities. It should also be noted that the draft amendments reduce the role of the civil-military administrations in the decision-making process: their current power to provide the CEC with their "conclusion" on the matter has been modified to provide the NSDC with "information" (relevant to the established assessment criteria). While introducing national authorities to conduct the assessment addresses some stakeholder concerns and public criticism during the 2020 local elections, excluding regional authorities from the group of assessors does not seem necessary or advisable, particularly as the assessment is of a regional nature.

44. Moreover, the draft amendments do not address the timing and interplay between information provided to the NSDC by the civil-military administrations and the assessment submitted by the responsible listed authorities. For instance, is the information from the civil-military administrations to be provided prior to or following the finalisation of the assessment? Should the NSDC forward the information to the authorities undertaking the assessment or does the NSDC consider the information separately from the assessment? What if the information and assessment are not consistent?

45. The Venice Commission and ODIHR recommend including in the law a non-exhaustive list of authorities competent to assess the security situation regarding the possibility of holding an election or referendum in certain territories, involving the CEC and regional authorities in the assessment process, and regulating the manner of collaboration of the bodies involved in this process. While it is up to the Ukrainian legislator to determine the details of that collaboration, establishing a formalised inter-agency mechanism, such as a committee and/or working group, in which all relevant authorities and stakeholders - those involved in both electoral and security matters - collaborate on a single assessment and conclusion, might offer an effective solution for handling such an inter-disciplinary, politically sensitive and complex issue. The assessors should be required to provide their information/opinions in a format that systematically addresses each of the established assessment criteria. The law should also provide that any decision to cancel elections/voting in certain areas can only be taken after consultation with the CEC, including

about possible alternative measures to conduct the election/voting in insecure areas. Finally, it would be advisable to establish a formal review mechanism to take place a few months after an assessment and decision on the impossibility to hold an election or referendum in certain territories to evaluate how the process worked.

5. Complaints and appeals

46. Regardless of which body is the final decision-maker on the impossibility to hold elections/referendums or voting in certain territories, electoral stakeholders should be guaranteed the opportunity to challenge such decisions before an appeal body, as described in Article 2.3 of the ICCPR and Article 13 of the ECHR. The OSCE Copenhagen Document states that everyone should have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.⁴¹ The Code of Good Practice in Electoral Matters calls for an effective system of appeal in electoral matters and it makes it clear that the appeal body must have the authority in particular over such matters as the right to vote. Moreover, final appeal to a court must be possible.⁴²

47. The current legal framework provides that “decisions, actions, or inaction relating to the election process may be contested by filing a complaint to a court or to an election commission”⁴³ and that a decision, action, or inaction of the CEC “shall be contested exclusively by filing a lawsuit to a court”.⁴⁴ Such an appeal may be lodged by electoral subjects including voters.⁴⁵ However, it is not clear what the possibilities of complaints and appeals would be in case the decision on the impossibility of holding an election or referendum was made by the NSDC and put in effect by the President of Ukraine, as foreseen in the draft law.⁴⁶ This should be clarified, as well as the relation between possible appeals against the NSDC decision/presidential decree and against other relevant CEC decisions, in particular those on the election results.

48. To ensure timely legal remedy, it is imperative that the draft law establish expedited deadlines for submission and adjudication of complaints/appeals challenging a decision on the impossibility of holding elections/voting, applicable whether or not such decision is made before or after the official election period commences.⁴⁷ In this respect, the timelines should ensure that a final judicial ruling is issued sufficiently in advance of the scheduled election to allow for organisation of elections/voting in case the court overturns a decision not to hold elections/voting in certain territories. In addition, to ensure access to effective legal remedy, the legal procedure for handling formal election disputes should be devoid of formalism, in particular concerning the admissibility

⁴¹ OSCE Copenhagen Document, paragraph 5.10.

⁴² Venice Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, Guidelines II.3.3.a and d. See also Guideline II.3.3.b which states the procedure must be devoid of formalism, in particular concerning the admissibility of appeals.

⁴³ Article 63(1) of the Election Code.

⁴⁴ Article 64(2) of the Election Code.

⁴⁵ Indeed, as mentioned above, the CEC Resolution No. 161 of 8 August 2020 on the impossibility of holding local elections in certain territories was challenged before the administrative courts – and it was overturned by the Sixth Administrative Court of Appeals, whose decision has been appealed to the Supreme Court.

⁴⁶ Article 55(2) of the Constitution provides that “everyone has the right to challenge in court the decisions, actions or commissions of bodies of state power, [...] officials and officers”.

⁴⁷ The Code of Administrative Proceedings provides expedited timelines for election-related cases that are lodged after an official election period commences, while the standard lengthier timelines apply to cases lodged outside an electoral period. As the decision not to hold the 2020 local elections in the 18 territories was made prior to the start of the election period, the finalisation of the court case challenging the concerned decision extended well beyond the scheduled election date.

of appeals.⁴⁸ The Venice Commission and ODIHR recommend that the legal framework clearly ensures the opportunity for timely, substantive and independent consideration of complaints lodged by electoral stakeholders who seek to challenge a decision on not holding elections/referendums or voting in certain territories.

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⁴⁸ Guideline II.2.2.b, Venice Commission Code of Good Practice in Electoral Matters. During the 2020 local elections, the District Administrative Court in Kyiv denied substantive review of those pre-election complaints challenging the CEC's decision on the impossibility to hold elections in the 18 communities, on grounds of technical deficiencies.