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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

OPINION

ON THE DRAFT LAW "ON THE PRINCIPLES OF STATE POLICY OF THE TRANSITION PERIOD"

Adopted by the Venice Commission
at its 128th Plenary Session
(Venice and online, 15-16 October 2021)

on the basis of comments by

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I. Introduction

1. By letter of 4 June 2021, Mr Oleksii Reznikov, Deputy Prime Minister of Ukraine, Minister for Reintegration of the Temporarily Occupied Territories of Ukraine, requested an opinion of the Venice Commission on the draft law "On the Principles of State Policy of the Transition Period" (CDL-REF(2021)055).

2. Ms Veronika Bílková, Mr Martin Kuijer and Ms Angelika Nussberger acted as rapporteurs for this opinion.

3. On 20-21 September 2021, a delegation of the Venice Commission composed of Ms Bílková and Ms Nussberger, accompanied by Mr Dürr and Mr Janssen from the Secretariat, visited Kyiv and had meetings with the Deputy Prime-Minister/Minister for Reintegration of the Temporarily Occupied Territories of Ukraine; the Permanent Representative of the President of Ukraine in the Autonomous Republic of Crimea; the Chairperson and members of the Parliamentary Committee on Human Rights, De-occupation and Reintegration of the Temporarily Occupied Territories in Donetsk, Luhansk Oblasts and the Autonomous Republic of Crimea, the city of Sevastopol, national minorities and interethnic relations; the Chairperson of the Parliamentary Committee of Legal Policy; MPs – members of the inter-faction groups "Crimean Platform" and "National Platform for Reconciliation and Unity"; representatives of the Prosecutor General's Office, the Supreme Court and the Ombudsperson; representatives of non-governmental organisations (NGOs) and the international community represented in Kyiv. The Commission is grateful to the Council of Europe Office in Ukraine and to the Ukrainian authorities for the excellent organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the draft law provided by the Council of Europe Office in Ukraine at the request of the Government of Ukraine. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings. Following an exchange of views with Mr Ihor Yaremenko, Deputy Minister for Reintegration of the Temporarily Occupied Territories of Ukraine for European Integration, it was adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021).

II. General comments

A. International issues

6. The draft law is based on the premise that both the Donetsk and Luhansk oblasts and the Autonomous Republic of Crimea and the city of Sevastopol are part of Ukraine but are illegally occupied (and, in the case of Crimea and Sevastopol, also illegally annexed) by the Russian Federation. This understanding is clearly expressed in the draft law through references to armed aggression of the Russian Federation and temporary occupation of those regions. This assumption in the draft law is opposed by the Russian Federation, which considers the Autonomous Republic of Crimea and the city of Sevastopol as part of its territory since March 2014.The Russian Federation has not recognised the self-proclaimed Donetsk and Luhansk People's Republics.[1]

7. The Venice Commission takes note of the series of resolutions issued by the UN General Assembly and the Parliamentary Assembly of the Council of Europe, which have declared the annexation of the Autonomous Republic of Crimea and the city of Sevastopol by the Russian

[1] The two entities have only been recognised by another self-proclaimed entity whose status is not recognised, South Ossetia.

Federation unlawful under international law.[2] The Parliamentary Assembly of the Council of Europe furthermore stated that the self-proclaimed "people's republics" of Donetsk and Luhansk "established, supported and effectively controlled by the Russian Federation – are not legitimate under Ukrainian or international law." According to the Parliamentary Assembly, "this applies to all their 'institutions', including the 'courts' established by the *de facto* authorities."[3]

8. In its Opinion on "whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution is compatible with constitutional principles",[4] the Venice Commission concluded that the decision of the Supreme Council was not compatible with the Constitution of Ukraine and that, moreover, "circumstances in Crimea did not allow the holding of a referendum in line with European democratic standards".[5]

9. That said, it should be noted that the question of the legal status of the territories concerned is not the subject of the present opinion.

10. In 2014 and 2015, respectively, the so-called Minsk agreements were concluded within the OSCE framework. The first agreement (Protocol on the results of consultations of the Trilateral Contact Group), signed on 5 September 2014 by the representatives of Ukraine, the Russian Federation, the OSCE and by Mr Zakharchenko and Mr Plotnitski sought to implement an immediate ceasefire in the eastern part of Ukraine. Since the agreement failed to achieve its goals, another package of measures, called Minsk II, was negotiated on 11 February 2015 by Ukraine, the Russian Federation, France and Germany. It was endorsed by the Security Council of the United Nations on 17 February 2015 by Resolution 2202 (2015). In addition to an immediate ceasefire, the package foresaw a pull-out of heavy weapons, effective monitoring of the ceasefire, ensuring access for humanitarian aid as well as granting pardon or amnesty in relation to events in eastern Ukraine, carrying out a constitutional reform in Ukraine (decentralisation), reinstatement of full control of State border by Ukrainian government and the organisation of local elections in the temporarily occupied territories in accordance with Ukrainian legislation.[6]

B. The draft law

11. The draft law was prepared by the Ministry for Reintegration of the Temporarily Occupied Territories of Ukraine. The first draft was sent for comments to State bodies as well as international organisations, non-governmental organisations and research institutes in December 2020-January 2021. According to official information,[7] the Ministry obtained some 110 reactions, in light of which

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[2] See for instance PACE Resolution 2198 (2018), Resolution 2133 (2016), Resolution 2112 (2016), Resolution 2063 (2015), Resolution 1990 (2014) and Resolution 1988 (2014). GA Res 68/262 of 27 March 2014.

[3] See PACE Resolution 2133 (2016).

[4] Venice Commission, CDL-AD(2014)002, para 28.

[5] See also Venice Commission, Opinion on "whether Draft Federal constitutional Law No. 462741-6 on amending the Federal constitutional Law of the Russian Federation on the procedure of admission to the Russian Federation and creation of a new subject within the Russian Federation is compatible with international law", CDL-AD(2014)004, para 46: The Venice Commission concluded that this draft law was not compatible with international law. Subsequently, the procedure of admission of Crimea as a new subject was not followed and the draft law was abandoned.

[6] On the last point, see Venice Commission, CDL-AD(2015)029rev, Secretariat Memorandum on the Compatibility of the Draft Law on amending the Constitution of Ukraine as to Decentralization of Power as submitted by the Verkhovna Rada to the Constitutional Court of Ukraine on 16 July 2015 (CDL-REF(2015)035rev) with the Opinion on the Amendments to the Constitution of Ukraine regarding the Territorial Structure and Local Administration as proposed by the Working Group of the Constitutional Commission in June 2015 (CDL-AD(2015)028).

[7] Кабінет Міністрів схвалив проект закону про перехідний період, 4 серпня 2021 року, available at: https://www.kmu.gov.ua/news/kabmin-shvaliv-proekt-zakonu-pro-perehidnij-period

it revised the draft law. The second version was submitted for consideration by State bodies on 28 May 2021 and, after another round of revisions, adopted by the Cabinet of Ministers on 4 August 2021. On 8 August 2021, the draft law was submitted to the Verkhovna Rada[8] (the national Parliament) where it was registered on 9 August as governmental draft law # 5844.

12. Two alternative draft laws were registered in Parliament on 31 August 2021.[9] During the meetings in Kyiv, the rapporteurs were also informed that in 2020 the Working Group on Reintegration of Temporarily Occupied Territories of the President's Legal Reform Commission developed a draft concept,[10] on the initiative of the President. In line with the request, this opinion analyses only the draft law # 5844 submitted by the Cabinet of Ministers.

13. When adopting the draft law, the Cabinet of Ministers sought to implement the Decree of the President of Ukraine of 2 June 2021, which had been issued on the basis of the decision of the National Security Council "On some issues of intensifying the process of peaceful settlement of the situation in Donetsk and Luhansk regions",[11] as well as the Law-making Plan of the Verkhovna Rada for 2021 and the Plan of Priority Actions of the Government for 2021.

14. The draft law is intended to serve as a framework document. It is supposed to be complemented by other, more specific legal acts. As explicitly stipulated in Article 2 of the draft law, "the legislation of Ukraine on the transitional period shall be based on the Constitution of Ukraine and shall consist of this Law, other legislative acts of Ukraine, international treaties of Ukraine approved by the Verkhovna Rada of Ukraine, and regulations adopted on the basis of and in implementation of this Law as well as on the international law principles and standards". This opinion can therefore not be complete as the effects of the law will very much depend on the regulations enacted on that basis.

15. Regarding the question of how the draft law relates to other existing legislation, it would be advisable to elaborate on this issue in the draft. It seems logical to assume that its provisions are to be considered either as (i) an addition to ordinary legislation in the absence of other relevant legal provisions, or (ii) a *lex specialis* replacing other comparable provisions in already existing legislation.[12] The correlation is not always evident and should be clarified.

16. During the meetings in Kyiv, several interlocutors stated that some provisions of the draft law were inconsistent with existing legislation and that the assignment of certain powers to the President (e.g. the determination of the limits of the temporarily occupied territories under Article 4 and of the timeframes of the temporary occupation under Article 6 of the draft law) might be incompatible with the relevant constitutional provisions.[13] The authors of the draft law indicated that in their view, the above-mentioned draft provisions were in line with the constitutional powers of the President in the area of security and defence. The present opinion cannot assess these

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[8] Проект Закону про засади державної політики перехідного періоду, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72625

[9] Draft law # 5844-1 "On the Principles of Reintegration of the Temporarily Uncontrolled Territories of Ukraine", which was prepared by an independent MP and member of the inter-factional caucus "National Platform for Reconciliation and Unity"; and draft law # 5844-2, which was developed by MPs – members of the European Solidarity Party.

[10] The draft "National Concept of Transitional Justice" has not yet been approved and is not publicly available.

[11] Указ Президента України Про рішення Ради національної безпеки і оборони України від 2 червня 2021 року «Про деякі питання активізації процесу мирного врегулювання ситуації в Донецькій та Луганській областях».

[12] Moreover, according to the final and transitional provisions (Section VII of the draft law) a number of existing regulations shall cease to have effect, see the comments in chapter IV.E. below.

[13] See Article 106 of the Constitution which contains a list of presidential powers; according to item 31, the President also "exercises other powers determined by the Constitution".

questions in detail, but it needs to be stressed that consistency of the legal framework and respect of the Constitution are of utmost importance.

17. The Venice Commission notices that the draft law apparently aims at providing a specific narrative of the past, thus excluding alternative narratives; the relevant regulations contain specific messages for the Ukrainian public. This approach turns certain parts of the draft law from a normative act into a political programme. While such programmatic provisions can be part of a preamble, the body of laws should be limited to normative provisions. Some important elements have improved in the latest draft in comparison to earlier versions. That said, the Commission recommends to avoid deepening the conflict lines. Many draft provisions focus on Ukraine's response to the "aggressor State" and the "occupying power". A more victim-centered approach might be advisable.

18. The Venice Commission acknowledges that the draft law has been prepared through an inclusive process which involved, especially in the first stage, consultations with various national and international stakeholders. However, it also notes that, according to the information given to the rapporteurs during their visit, the inclusion in the draft law of suggestions from those consulted might have been rather limited. Furthermore, certain categories of persons directly concerned by the draft law, mainly those living in the eastern provinces of Ukraine and in the Autonomous Republic of Crimea and the city of Sevastopol, may have had a rather limited possibility to take part in these consultations. The Venice Commission recommends to the Ukrainian authorities to try to involve these categories of persons in the ongoing process, the ongoing conflict permitting, also in view of the implementation of the draft law and the preparation of any other complementary legal acts. The Minsk agreements called for continuing an inclusive national dialogue.[14] Positively, a provision has been included in the latest version of the draft law according to which civil society institutions and population groups negatively affected by the armed aggression shall be invited to participate in the development and implementation of the public transition policy (Article 7(2)(13)).

III. Relevant standards and legal framework

19. There is no legally binding instrument at the international level that would regulate the issues related to transition periods and to transitional justice. The concept of transitional justice is nonetheless well-established internationally. The United Nations (UN) has been the most active in this area.

20. In 2005, the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[15] This non-binding instrument confirms that States have the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law. This obligation entails the duty to prevent and/or investigate gross violations of international human rights law and serious violations of international humanitarian law and to provide victims of such violations with adequate remedy. Such a remedy shall encompass equal and effective access to justice, adequate, effective, and prompt reparation for harm suffered and access to relevant information concerning violations and reparation.

21. Over the years, the UN has issued several reports and studies related to various aspects of transitional justice. Of particular importance are the following reports and studies:

[14] Protocol on the results of consultations of the Trilateral Contact Group, signed on 5 September 2014, point 7.

[15] UN Doc. A/RES/60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005.

- Report of the UN Secretary-General, "The rule of law and transitional justice in conflict and post-conflict societies", issued in 2004;[16]
- Report of the Office of the United Nations High Commissioner for Human Rights, "Study on the right to the truth", issued in 2006;[17]
- "Analytical study on human rights and transitional justice", issued in 2009;[18]
- Guidance Note of the Secretary-General, "United Nations Approach to Transitional Justice", issued in 2010.[19]

22. In 2011, the UN Human Rights Council, by its Resolution 18/7 established the mandate of a Special Rapporteur on the Promotion of Truth, Justice, Reparation and guarantees of non-recurrence. Since 2011, the Special Rapporteur has published several reports dealing with various aspects of transitional justice, e.g., reports on Apologies for gross human rights violations and serious violations of international humanitarian law (2019) or on Memorialisation processes (2020).

23. The UN defines transitional justice as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[20] Despite the diversity of measures that can be adopted in various countries in the transition periods, it has become common to distinguish several main components of transitional justice. Those are:

a) prosecution initiatives, aimed at ensuring that those responsible for committing crimes, including gross violations of international human rights law and serious violations of international humanitarian law, will be held accountable;
b) initiatives in respect of the right to truth, which assist transitional societies to establish truth about past events, including gross violations of international human rights law and serious violations of international humanitarian law;
c) initiatives related to reparation, which focus on victims and seek to provide them with remedy in compliance of the 2005 Basic Principles;
d) institutional reforms, which seek to transform public institutions in such a way to make them sustain peace, protect human rights and foster a culture of respect for the rule of law;
e) national consultations, which involve all segments of the population in the discussion about the future of the country.

24. Within the Council of Europe, attention has been paid to certain tools of transitional justice, especially lustration. Lustration (or vetting) consists in the removal from civil service and State functions of individuals or groups of individuals too closely related to the previous undemocratic regime to be considered trustworthy. In the UN classification, lustration would fall in between prosecution initiatives and institutional reforms.

25. The criteria for lawful lustration were defined in the Resolution of the Parliamentary Assembly 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems.[21] The criteria are the following: guilt, being individual, rather than collective, must be proven in each individual case; the right of defence, the presumption of innocence and the right to appeal to a

[16] UN Doc. S/2004/616, The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General, 23 August 2004.
[17] UN Doc. E/CN.4/2006/91, Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights, 8 February 2006.
[18] UN Doc. A/HRC/12/18, Analytical study on human rights and transitional justice, 6 August 2009.
[19] Guidance Note of the Secretary-General United Nations Approach to Transitional Justice, United Nations, 2010.
[20] Guidance Note of the Secretary-General United Nations Approach to Transitional Justice, United Nations, 2010, p. 2.
[21] Resolution of the Parliamentary Assembly 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems, 28 June 1996.

court must be guaranteed; the different functions and aims of lustration, namely protection of the newly emerged democracy, and criminal law, i.e. e. punishing people presumed guilty, have to be observed; and lustration has to have strict limits of time in both the period of its enforcement and the period to be screened. The criteria are explained in more detail in the report attached to Resolution 1096 (1996),[22] which contains guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a State based on the rule of law.

26. The criteria of lawful lustration have also been extensively discussed in the case-law of the European Court of Human Rights (ECtHR).[23]

27. The Venice Commission has dealt with transition periods and transitional justice in three main sets of opinions. The first set relates to the legal regime applicable to the occupied territories in Georgia.[24] The second set pertains to the lustration (vetting) processes carried out in several countries of Central and Eastern Europe as part of the democratisation process (Albania, Ukraine).[25] The third set concerns property restitution measures carried out in the same context.[26]

28. Since 2014, Ukraine has enacted a series of legal acts that apply to conflict-related issues. These encompass among others the Law on Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine (Law No. 1207 of 15 April 2014), the Law on the Autonomous Republic of Crimea (Law No. 95 of 17 March 1995), the Law about temporary measures for conducting anti-terrorist operation (Law No. 1669 of 2 September 2014) and the Law about features of State policy on ensuring the State sovereignty of Ukraine in temporarily occupied territories in the Donetsk and Luhansk regions (Law No. 2268 of 18 January 2018). The present draft law – as complemented by more specific implementing regulations – is supposed to replace the application of most of these legal acts (Section VII).

IV. Analysis of the Draft Law

29. The aim of the draft law, according to the request, is "to establish a general regulation for amnesty; introduce elements of transitional justice; create preconditions for convalidation; establish a reserve of public servants and police officers for future de-occupied territories and resolve other issues related to the de-occupation and reintegration of the temporarily occupied (de-occupied) territories, overcome the consequences of the armed aggression of the Russian Federation against Ukraine".

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[22] Doc. 7568, Measures to dismantle the heritage of former communist totalitarian systems, 3 June 1996.
[23] See ECtHR, *Sidabras and Džiautas v. Lithuania,* Applications Nos 55480/00 and 59330/00, 27 July 2004; *Rainys and Gasparavičius v. Lithuania,* Applications Nos 70665/01 and 74345/01, 7 April 2005; *Turek v. Slovakia,* Application No. 57986/00, 14 February 2006; *Ždanoka v. Latvia,* Application No. 58278/00, 16 March 2006; *Matyjek v. Poland,* Application No. 38184/03, 30 May 2006; *Bobek v. Poland,* Application No. 68761/01, 17 July 2007; *Luboch v. Poland,* Application No. 37469/05, 15 January 2008; *Adamsons v. Latvia,* Application No. 3669/03, 24 June 2008; *Žičkus v. Lithuania,* Application No. 26652/02, 7 April 2009; *Schulz v. Poland,* Application No. 43932/08, 13 November 2012; *Naidin v. Romania,* Application No. 38162/07, 21 October 2014.
[24] See Venice Commission, Opinion on the Law on occupied territories of Georgia, CDL-AD(2009)015; Final Opinion on the Draft Amendments to the Law on Occupied Territories of Georgia, CDL-AD(2009)051; Opinion on the 2013 Draft Amendments to the Law on Occupied Territories of Georgia, CDL-AD(2013)036.
[25] See, for instance, Venice Commission, Opinion on the Law on Government Cleansing ("lustration law") of Ukraine as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015, CDL-AD(2015)012; Opinion on draft constitutional amendments enabling the vetting of Politicians (Albania), CDL-AD(2018)034.
[26] See, for instance, Venice Commission, Amicus Curiae Brief for the Constitutional Court on the restitution of property (Albania), CDL-AD(2016)023.

30. This is not a typical approach to transitional justice. The draft law is a piece of legislation targeting several different problems arising out of the current situation with a view to future (uncertain) developments. It is understandable that one single law may be designed for the whole complex of problems. Yet, the solution found combines answers to very different questions – questions that can be answered by Ukraine in the present situation, and questions that will be relevant only in case of a complete change of the current circumstances. This makes it difficult to provide for a coherent approach to such problems as financing and planning of the measures envisaged.

31. The draft law consists of seven sections. Section I defines certain basic terms used in the text and sets the main principles of the draft law. Section II introduces some of the basic elements of transitional justice, as defined in the draft law. Section III deals with elections, referendums and establishment of local government bodies in the occupied and de-occupied territories. Section IV indicates certain activities to be carried out during the whole transition period. Sections V and VI set the measures to be taken during the conflict and post-conflict periods, respectively. Section VII contains final and transitional provisions.

A. Section I. General Provisions (Articles 1-8)

32. Section I of the draft law defines certain basic terms used in the text. Among them are the terms transitional period and transitional justice, which are crucial to determining the scope of application of the draft law and its main goals.

33. While it is to be commended that the drafters of the law thus try to contribute to its clarity and to the efficiency in its application, it is problematic that the definitions are not always congruent with the respective terms used in public international law. This is especially true for the central terms of “transitional period” and “transitional justice”.

34. Transitional period is defined as “the period of time during which the State implements its policy to counter the armed aggression of the Russian Federation against Ukraine, restore territorial integrity of Ukraine within its internationally recognised borders, and ensure the State sovereignty of Ukraine, restore the operations of central and local government authorities in the temporarily occupied territories as well as eliminate the consequences of the Russian aggression against Ukraine, reintegrate the temporarily occupied (de-occupied) territories and their residents, build sustainable peace, and prevent further occupation” (Article 1(1)(1)). The transitional period has two phases – the conflict period, where “measures are taken to reintegrate the temporarily occupied territories and their residents, counter the armed aggression of the Russian Federation against Ukraine, restore territorial integrity of Ukraine, and ensure Ukraine's State sovereignty in the temporarily occupied territories, build sustainable peace, and prevent further occupation” (Article 1(1)(2)) and the post-conflict period, where measures are taken to eliminate the consequences of these events (Article 1(1)(3)).

35. Transitional justice is defined as “measures specified in this Law and other laws to eliminate the consequences of violations of law, human and civil rights and freedoms caused by the armed aggression of the Russian Federation against Ukraine, including measures to restore the rights and freedoms, compensate for damages, ensure justice and reconciliation, and prevent further occupation” (Article 1(1)(4)).

36. As has been commented by several of the national and international stakeholders during the consultation of the first version of the draft law, these definitions are rather narrowly conceived, and they take a one-sided approach to the transitional period. First, they reduce the thrust of the conflict in Ukraine to its inter-state dimension, i.e., to the involvement of the Russian Federation. Secondly, the measures of transitional justice are designed to overcome the consequences of human rights

violations “caused by the armed aggression of the Russian Federation against Ukraine” (Article 1(1)(4)). There is a risk that this provision be interpreted as referring solely to human rights violations committed by certain actors involved in the armed conflict.

37. As mentioned above, according to UN standards transitional justice is a holistic concept which should address crimes perpetrated by all the parties to the conflict and aim for reconciliation. While in the present case, as explained by the Ukrainian authorities, the need for transitional justice arose from foreign armed aggression, the Venice Commission notes that sustainable peacebuilding requires an approach as comprehensive as possible. The Venice Commission therefore recommends broadening the concepts of “transitional period” and “transitional justice” throughout the draft law, in line with international standards. As for the definition of the “post-conflict period”, the important element of “building sustainable peace” should be reinforced by including the objective of reconciliation.

38. The Commission further notes that the draft law employs many other terms that are not explicitly defined in the law and that have a specific meaning in international law – such as “act of armed aggression”, “occupation” and “effective control”. Against this background, the provision of Article 1(2) gives rise to concerns. According to this provision “other terms and definitions shall have the meaning established by other laws of Ukraine”. In case the definitions used in other domestic laws are different from the meaning of those terms in international law, the precision of the law would be reduced. It should be made clear that such terms are to be understood in line with the meaning these concepts have under public international law.

39. Several provisions of Section I invoke and directly regulate concepts known from public international law, such as responsibility of States for internationally wrongful acts (Article 3) or occupied territories (Articles 4-6). While it is legitimate for States to have their own position on the interpretation of such concepts and their applicability to specific events, it is rather unusual to manifest this position in an internal legal act. The Venice Commission recalls that international law is an autonomous legal order and that individual States may not alter the meaning of its concepts unilaterally.

40. Thus, they may not define unilaterally under what conditions their international responsibility or the responsibility of another State will be triggered and what the extent of such responsibility will be. Such questions are regulated under customary international law, as codified in the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts,[27] and in specific treaties, such as the European Convention of Human Rights. Therefore, the articles of the draft law concerning the international responsibility of the Russian Federation (e.g. Article 3(2)) can only reflect the Ukrainian understanding of international law. Similarly, whenever the term “illegal” or “illegality” is used (e.g. in Article 5(1) and (2)), it can only be understood as referring to illegality under Ukrainian law.[28] This does not mean that this understanding is wrong under public international law but the draft law should either make clear that it provides the Ukrainian understanding of these concepts, or the regulation of concepts governed by international law should be removed.

41. It is the 1907 Hague Convention IV, the 1949 Geneva Convention IV and the 1977 Additional Protocol I to the Geneva Conventions, that define which territories are to be considered as occupied territories, where the rules of occupation apply. Against this background, the provisions of Articles 4 and 6 of the draft law, which seek to define the temporarily occupied territories and the timeframes, are problematic and should either be removed or revised by referring to the applicable international law.

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[27] https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[28] See also Venice Commission, Opinion on the Law on occupied territories of Georgia, CDL-AD(2009)015, para 37.

42. The Venice Commission recalls in this connection that by virtue of Article 27 of the 1969 Vienna Convention on the Law of Treaties, a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Similarly, a State may not invoke provisions of its internal law as a justification for its failure to respect a rule of customary international law. The norms of public international law apply by means of public international law and in the way and to the extent defined by it. There is thus no need, for instance, to declare that "the activity […] which contradicts the norms of international law, shall be illegal" (Article 5(2)). Such unnecessary provisions could be removed from the draft.

43. Article 5(6) states that "Ukraine is not responsible for the actions and decisions of the Russian Federation or its occupying forces and occupation administrations". Such a provision is not at odds with the position taken by the European Court of Human Rights which accepted Russia's 'jurisdiction' on the basis of its effective control over Crimea.[29] However, the wording of the provision fails to acknowledge the fact that the Ukrainian authorities retain a residual responsibility,[30] which is acknowledged and reflected in several other provisions of the draft law, most notably in Article 3(2): "Ukraine shall take all possible measures to protect and restore human and civil rights and freedoms in the temporarily occupied territories."

44. Several provisions of Article 5 deal with the validity of legal acts carried out during the conflict period by authorities not recognised by Ukraine, such as the adoption of normative instruments, the acquisition of citizenship, the issuance of identity documents, the confiscation of property, etc. The draft law declares all these legal acts null and void. Article 13 foresees that certain exceptions to this rule may be prescribed by law with respect to registration of civil status acts and for educational documents, but there is no similar exception foreseen for other legal acts and no procedure prescribed for individuals to be able, for instance, to obtain new identity documents replacing those issued by authorities not recognised by Ukraine (Article 5(5)). In the view of the Venice Commission, the proposed legislation is very far-reaching, especially taking into account that the relevant territories have already been outside the control of the Ukrainian authorities since 2014 so that a "clean slate" – as if nothing had happened over the years – is illusory. For the sake of safeguarding the human rights of those living in those territories, a more differentiated approach is recommended.[31]

45. Draft Article 5(10) stipulates that "any property and assets of the occupying forces and occupation administrations of the Russian Federation, including of the Black Sea Fleet of the Russian Federation, located in the de-occupied territories (including any property and assets created during the temporary occupation) shall become the property of Ukraine." This provision risks to cause significant practical problems as the restitution of property issue in Albania[32] and in Georgia[33] demonstrate.

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[29] ECtHR, *Ukraine v. Russia*, [GC], Admissibility decision, Application Nos 20958/14 and 38334/18, 14 January 2021.

[30] Cf. the case-law of the ECtHR with respect to Moldova, e.g. *Ilaşcu and Others v. Moldova and Russia* [GC], Application No. 48787/99, 8 July 2004, para 333: "…where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, … The State in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention."

[31] See also Venice Commission, Opinion on the Law on occupied territories of Georgia, CDL-AD(2009)015, para 43, which states that the freedom to recognise or not to recognise acts of State issued by other States or by *de facto* authorities ends where basic human rights would be violated.

[32] Cf. Venice Commission, Amicus Curiae Brief for the Constitutional Court on the restitution of property, CDL-AD(2016)023.

[33] Cf. Venice Commission, Opinion on the Draft Law of Georgia on Property Restitution and Compensation on the Territory of Georgia for the Victims of Conflict in the Former South Ossetia District, CDL-AD(2006)010.

46. Article 7 provides a list of aims and basic principles of State policy of the transition period. Those aims and principles are mostly linked to the territorial integrity of Ukraine and the protection of human rights of its inhabitants. It would be more logical to insert such a basic provision at the very beginning of the draft law.

47. Article 7(1) refers to "individuals and citizens". It is not quite clear from the text whether all citizens of Ukraine and other individuals shall be treated equally. Most of the rights mentioned in this context (especially life, health, dignity, safe living conditions) do not allow to privilege citizens. It should be made clear that the approach is understood to be inclusive meaning all individuals living in the temporarily occupied territories and not only Ukrainian citizens, as was confirmed by the authors of the draft law. At the same time, there might be frictions with the rights of the internally displaced persons who might want to come back to the region. It would be recommendable to find a formula of how to solve foreseeable conflicts.

48. In this context, attention is also drawn to Article 31(2)(6), whereby within six months after de-occupation it shall be verified whether "nationals of the aggressor State and other foreigners and stateless persons" are staying legally and "follow-up decisions" shall be made pursuant to the Law on the Legal Status of Foreigners and Stateless Persons. This provision appears problematic with regard to Article 8 of the ECHR (right to respect for private life) and the corresponding case-law of the European Court of Human Rights[34] and should be reconsidered. Moreover, care needs to be taken to ensure respect of Article 4 of Protocol No. 4 to the ECHR (prohibition of collective expulsions of aliens). The authors of the draft law indicated that no such collective expulsion or repressive actions were intended.

49. Under Article 7(2)(10)-(12), special protection shall be granted to internally displaced persons, indigenous peoples and national minorities. The previous version of the draft law contained a special provision on the rights of indigenous peoples (draft Article 8). This provision has now been removed, which is to be welcomed since its presence seemed to establish a certain hierarchy between this and other categories of vulnerable persons.

B. Section II. Certain Aspects of Transitional Justice (Articles 9-14)

50. Section II focuses on several tools of transitional justice. More specifically, it foresees the use of criminal prosecution, lustration, gender justice, the right to truth, in/convalidation of transactions and documents, and State policy for sustainable peacebuilding. When compared with the UN definition of transitional justice, mentioned above, the range of tools seems relatively limited.

51. It is especially surprising that the victims' right to remedy and reparation is not elaborated upon in any detail either in Section II or in Sections IV-VI. While the introduction of some general provisions in Articles 3 and 7 is already a step ahead as compared to previous versions of the draft law, and while precise regulations on that matter may be developed in separate legislation, at least some basic principles should be included in the draft law itself. In line with the requirements set by the UN standards referred to above,[35] it should be made clear that victims of violations of international human rights law and international humanitarian law are guaranteed equal and effective access to justice, adequate, effective, and prompt reparation for any harm suffered and

[34] See e.g. ECtHR, *Kurić and Others v. Slovenia*, Application No. 26828/06, GC, 26 June 2012: The Court recalls that "measures restricting the right to reside in a country may, in certain cases, entail a violation of Article 8 of the Convention if they create disproportionate repercussions on the private or family life, or both, of the individuals concerned" (para 355) and states that "an alien lawfully residing in a country may wish to continue living in that country without necessarily acquiring its citizenship" (para 357).

[35] *Inter alia*, UN Doc. A/RES/60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005.

access to relevant information concerning violations and reparation. Reparation should be ensured for any harm occurred in connection with the conflict (not only that caused by the Russian Federation), and the draft law should provide for more details on the extent of the compensation and the way in which it will be determined.

52. Article 9 is meant to set principles of liability for criminal offences committed in connection with the temporary occupation. The provision distinguishes several categories of persons for which different rules concerning their criminal liability shall apply.

53. The first category encompasses "persons who did not commit offences in the temporarily occupied territories" (para 1). The prosecution and punishment of those persons shall not be allowed. The second category encompasses members of the occupying forces or occupation administration of the Russian Federation, as defined in Article 1(1)(7) and (8) of the draft law. These persons may not be discharged from criminal liability and may not be amnestied,[36] if they committed one of the criminal offences enumerated in Article 9(2). The third category includes foreigners and stateless persons who have been part of the occupying forces or occupation administration of the Russian Federation. They are subject to the same regulation as the previous category. The last category, which is not explicitly mentioned in the text, would be composed of those who committed crimes in the temporarily occupied territories but do not belong to the second or third category. Those persons, as it seems, shall in principle be held liable but could be discharged from criminal liability or amnestied by the regulation which is to be drafted by means of Article 9(4).

54. Article 9 gives rise to concern. First, in the absence of the implementing legal act foreseen in Article 9(4), it is difficult to assess the compatibility of the whole system of prosecution with international legal standards. Secondly, it remains unclear why criminal offences committed outside the temporarily occupied territories shall not be subject to prosecution and whether this rule shall apply to all criminal offences, including common crimes, or not. It also remains unclear why the impossibility to discharge certain persons from criminal liability or to amnesty them for crimes listed in Article 9(2) is limited to certain categories of persons. The Venice Commission recalls that in case of crimes under international law or treaty crimes (i.e., crimes whose perpetrators Ukraine has committed to prosecute under international treaties), there is an obligation to prosecute under international law that cannot be suspended unilaterally by a national legal act (such as amnesty law). Thirdly, the differentiated treatment of various categories of perpetrators of crimes is not fully comprehensible, is problematic with respect to the principles of equality before the law and non-discrimination and will not be conducive to peacebuilding and reconciliation. Such a differentiation is not foreseen in the Minsk agreements either.[37] Fourthly, several paragraphs of Article 9 refer to criminal offences committed "in connection with the temporary occupation". This concept is not defined and lacks legal clarity. Finally, the relationship between Article 9 and the provisions of the Amnesty Law and the Criminal Code is unclear. It is recommended to revise Article 9 to address the aforementioned concerns.

55. Article 10 introduces restrictions on the right to be elected in local elections and hold office (lustration). These restrictions shall apply to persons "who, by their decision, action or inaction, have taken and/or facilitated measures seeking to undermine the national security and defence of Ukraine or violate human rights and freedoms". The Article provides a list of persons who are supposed to meet this definition (para 3) and a list of those who are supposed not to meet it (para

[36] The discharge from criminal liability is regulated by Chapter IX of the Criminal Code and it includes the following grounds: effective repentance, reconciliation of the offender and the victim, admission by bail, change of situation and statute of limitations (Articles 45-49). Amnesty is regulated by Article 86 of the Criminal Code.

[37] See the Protocol on the results of consultations of the Trilateral Contact Group, signed on 5 September 2014, point 6.

5). The vetted persons are divided into several groups, for which different rules would apply (para 4). These draft regulations call for a number of comments.

56. First of all, the provisions lack the necessary precision and clarity. *Inter alia*, the general reference in para 1 to "inaction" of persons which may lead to disqualification is too broad and needs to be further qualified. Moreover, it is unclear why para 3 distinguishes between certain categories of persons who are subject to the same rules, e.g. persons who did cause injury to life or health of civilians and those who did not. Furthermore, the concept of persons who served in the occupation administration "to support vital functions" in the temporary occupied territories and are therefore exempted from disqualification (para 5) is unclear and needs to be defined.

57. Secondly, in light of international standards for lustration rules, the current draft provisions meet several principal concerns. In 2014, the Venice Commission issued the Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine[38] which recalls the main principles applicable to lustration (vetting) processes, with reference to the Resolution by the Parliamentary Assembly of the Council of Europe 1096 (1996) on 'Measures to dismantle the heritage of former communist totalitarian systems' and to the extensive case-law of the European Court of Human Rights. Notably, in accordance with the PACE Resolution, guilt, being individual, rather than collective, must be proven in each individual case. Article 10(4) of the draft law foresees that individual circumstances will be taken into account, but it remains unclear what exactly that would mean. Would the body mandated to carry out the vetting procedure need to establish for each individual that s/he has engaged in the activity described in para 1, or would the individual have to prove that s/he has not engaged in such an activity?

58. Furthermore, the Guidelines attached to PACE Resolution 1096 (1996)[39] make it clear that "lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy" (para d)). However, the draft law does not specify which offices the vetted persons will not be entitled to hold.

59. The Guidelines also stipulate that "lustration shall not apply to elective offices" (para e)), because it should be left up to voters to elect whomever they wish. In contrast, the draft law foresees that lustration will apply to local elections.[40]

60. It is also recalled that lustration should be a temporary measure and that it shall "be administered by a specifically created independent commission of distinguished citizens nominated by the head of State and approved by parliament" (Guidelines, para a)). The draft law sets no time limit, and it does not provide any information on the way in which lustration processes will take place.

61. The Venice Commission notes that according to Article 10(2) of the draft law, the grounds and procedures for disqualification shall be laid down by law. This is a reference to future legislation. The absence of these regulations makes the assessment of the draft law difficult. That said, it is recommended to remedy the above-mentioned shortcomings and to include more detailed

[38] Venice Commission, Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015, CDL-AD(2015)012.

[39] 'Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law'.

[40] In this connection, see also the Venice Commission's Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guideline I. 1.1.d, according to which deprivation of the right to be elected is subject to several cumulative conditions; *inter alia*, the deprivation must be based on mental incapacity or a criminal conviction for a serious offence and it may only be imposed by express decision of a court of law. The draft law does not ensure that those conditions are respected.

provisions in the draft law itself, to make sure that the basic principles of lustration processes referred to above are respected.

62. Article 11 deals with the gender dimension of transitional justice. While the inclusion of this topic and the emphasis on "meaningful participation of women in all measures of transitional justice" could in principle be seen as a positive element, the added value of these rather vague provisions remains unclear. Article 7(2)(6) already includes general principles such as equality before the law, gender equality, non-discrimination and positive action. However, it is unclear how these principles would be applied. If Article 11 has mainly symbolic significance, it might be preferable to move it to the preamble. It should also be noted in this context that the relationship between Articles 11 and 9 is unclear, as it is not stipulated whether criminal offences based on gender/gender identity may be subject to discharge from criminal liability and amnesties.[41]

63. Article 12 on ensuring the right to truth stipulates that "the State shall promptly inform the public, providing reliable, accurate, and complete information about the causes, evolvement, and consequences of the armed aggression of the Russian Federation against Ukraine, except as otherwise established by the Law of Ukraine 'On Access to Public Information'."

64. Although the right to truth is not explicitly enshrined in any human rights instrument, it is now generally recognised as part of customary international law or, alternatively, as a general principle of law.[42] According to a comprehensive study produced by the Office of the UN High Commission for Human Rights in 2006, the right applies to "all gross human rights violations and serious breaches of international humanitarian law".[43] The use of the term "all" makes it clear that when implementing the right to truth, attention has to be paid to establishing truth about all violations and not only those committed by certain specific actors, as is however the case with Article 12 of the draft law which is limited to the "armed aggression of the Russian Federation against Ukraine".

65. The right to truth is victim-oriented, so the primary focus should lie on providing victims with information about "the causes leading to the person's victimisation; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators".[44] Here, Article 12 falls short of these standards as it only focusses on the armed aggression of the Russian Federation against Ukraine and not on individual victims.

66. The right to truth also has a societal dimension. "Society has the right to know the truth about past events concerning the perpetration of heinous crimes, as well as the circumstances and the reasons for which aberrant crimes came to be committed, so that such events do not reoccur in the future".[45] The right to truth shall not entail establishing one single narrative about the conflict period. Article 12 is problematic in this respect as it introduces an official narrative. In the view of the Venice Commission, it is crucial that Article 12 be revised in light of the preceding paragraphs.

67. Article 13 indicates that it shall be possible to validate certain transactions carried out in the temporarily occupied territories (para 1), registrate civil status acts fulfilled in these territories (para

[41] And, in fact, whether they can be subject to criminal prosecution in the first place – there seems to be no specific provision on gender offences in the Criminal Code.
[42] See Yasmin Naqvi, The right to the truth in international law: fact or fiction?, *International Review of the Red Cross,* Vol. 88, No. 862, 2006, pp. 245-273.
[43] UN Doc. E/CN.4/2006/91, *Study on the right to the truth,* 8 February 2006, para 34.
[44] *Ibidem*, para 38.
[45] *Ibidem,* para 58.

2) and verify academic experience (para 3). The details of these processes shall be prescribed by laws which, however, are not available so far. Generally, such a unified regulation for all temporarily occupied territories can be considered a positive development. Previous legal regulation, which consisted of separate laws governing the Autonomous Republic of Crimea and parts of Donetsk and Luhansk Oblasts, could have potentially resulted in discriminatory treatment. That said, the draft provisions of Article 13 call for the following critical comments.

68. Regarding para 1, it is not clear which transactions are null and void under this draft law and at the same time subject to convalidation[46] (perhaps those mentioned in Article 5(2)?), as this provision only explicitly refers to transactions which are null and void by this law and *not* subject to convalidation (namely those mentioned in Article 5(12)). This needs to be clarified in the draft.

69. As for para 2, it needs to be clarified in the draft what the connection is, if any, between this provision and Article 5(2) on illegal acts by the occupying forces. In this connection, it should be noted that while under international law official acts of illegal authorities are illegal and invalid, "this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants" (so-called Namibia exception).[47] Moreover, questions concerning State registration procedures under Ukrainian law are raised. In particular, the March 2021 Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the Human Rights Situation in Ukraine stated that the Ukrainian government "did not establish an administrative procedure for birth registration for children born in armed group-controlled territory, and that such certificates can only be obtained through court proceedings" (para 44). This creates logistical problems and imposes an additional financial burden on civilians seeking to obtain birth or death certificates. Registration of birth is a right that flows from Article 7 of the Convention on the Rights of the Child and Article 24(2) of the International Covenant on Civil and Political Rights.

70. Finally, the provisions of para 3 of Article 13 also need to be formulated more clearly. It seems that there are two types of situations: (i) academic certificates issued in temporarily occupied territories, which are not to be recognised but can be obtained in Ukraine taking into account the qualifications, academic performance and periods of study in the temporarily occupied territories (upon verification); (ii) academic degrees and titles, which are not to be recognised and are not subject to attestation. The difference between the two situations should be specified in further detail. Moreover, bearing in mind the *Namibia* exception and human rights law, a blanket non-recognition of academic degrees seems unduly detrimental to inhabitants of the territory. More generally, it is difficult to see why it would not be possible to accept the academic certificates, degrees and titles that substantively meet the criteria of comparable awards in Ukraine. It is therefore advisable to reconsider the rigorous approach laid down in para 3.

71. Article 14 sets the basis for a national policy on sustainable peacebuilding aimed at "laying the foundations for sustainable peace and development, strengthening social cohesion, national unity, and community resilience" (para 1). It foresees the establishment of the Ukrainian National Center for Peacebuilding (para 2) tasked with "collecting, recording, maintaining, storing, and processing of information, including restricted information, about the state of human and civil rights and freedoms, and compliance with the principles and provisions of international humanitarian law in the temporarily occupied territories in connection with the temporary occupation, as well as information about any damage caused" (para 3). The Venice Commission welcomes that the information to be collected and preserved by that body is not limited to the violations of human

[46] Convalidation is defined in Article 1(1)(5) as "a procedure for validating a null transaction deemed void by this Law".

[47] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Reports 16, para 125. The recognition of such civil registration documents would in no way imply recognition of the status of the territory or officials operating there.

rights or international humanitarian law committed by any specific actors. That said, care needs to be taken to ensure that the competences of the new Center do no conflict with those of other bodies such as those entrusted with pre-trial investigation.

C. Section III. Elections, Referendums and Formation of Local Government Authorities in the De-occupied Territories (Articles 15-17)

72. In accordance with Article 15, in the temporarily occupied territories no elections or referendums shall be organised but citizens of Ukraine living in these territories shall be provided with opportunities to take part in the elections/referendums (local elections/referendums excepted). Pursuant to Articles 16 and 17, in the de-occupied territories elections shall be organised, referendums may be held, and local self-government bodies shall be established, if it is possible to do so in compliance with national legislation and international electoral standards.

73. 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".[48] In the same report, the Venice Commission recalled that "it is undisputable that the individuals residing in the annexed territory are entitled to continue to participate in the elections of the State to whom the territory lawfully belongs, whose nationality in principle they maintain from the standpoint of international law".[49]

74. At the same time, the Venice Commission pointed out that the right to elections was not an absolute right and that certain situations might temporarily prevent them from being held (or prevent a part of the population from taking part in them). The temporary loss of control by a State over parts of its territory may constitute such a situation. However, as already mentioned above with respect to Article 5(6) of the draft law, in line with the case-law of the European Court of Human Rights even such a temporary loss does not completely free the territorial State of its obligations under human rights law.[50] The State shall take any measures available to it to try to secure human rights of the inhabitants of the relevant territory and, once the control over the territory is re-established, it shall make it possible for the local inhabitants to enjoy all their human rights as early as realistically possible.

75. Articles 15-17 seem to be compatible with these obligations, as they foresee only temporary suspension of elections and their re-establishment in the de-occupied territory. At the same time, the provisions make the holding of elections and referendums and the establishment of local bodies conditional on the fulfilment of certain requirements, namely the ability to comply with certain electoral standards (Article 16(5)). While the Venice Commission welcomes the emphasis placed on the compliance with these standards (as well as the reference to relevant Council of Europe and OSCE standards in para 4), it stresses that the provision shall not be interpreted in such a way as to unnecessarily delay the restoration of the right to vote in any territories. The drafters of the law may wish to consider clearly expressing the responsibility of the Ukrainian authorities to take positive measures to ensure that an enabling environment is created in which the benchmarks of para 5 are met. Furthermore, the preconditions for holding or not holding local elections should be regulated more precisely.

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[48] Venice Commission, 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, CDL-AD(2019)030, para 18.
[49] *Ibidem,* para 34.
[50] ECtHR, *Ilascu and Others v. Moldova and Russia* [GC], Application No. 48787/99, 8 July 2004, paras 322-352.

76. According to the Minsk agreements, early local elections should be held prior to complete de-occupation.[51] However, the authors of the draft law explained to the rapporteurs that in their view, they could not ensure the holding of elections in accordance with OSCE standards (as required by Minsk II[52]) as long as they did not have effective control over the territories concerned. The Venice Commission notes that under the Minsk agreements, questions related to local elections are to be discussed and agreed upon in the framework of the Trilateral Contact Group.

77. As far as the formation of the authorities of the Autonomous Republic of Crimea and local authorities in the de-occupied territories is concerned, the rapporteurs noted that Article 17(3) grants one year for local councils and their executive bodies to receive regional and national funding. The draft law does not provide a justification for the measure and for that specific time limit. However, the budget of local bodies is an issue of utmost importance, since it has a direct impact on the performance of public functions of these local bodies. In this connection, attention is drawn to international standards which include the principle of financial autonomy of local authorities and the prerogative to adequate financial resources.[53] It would be advisable to reconsider the one-year time limit in Article 17(3) and to make it clear how the measure foreseen in this draft provision fits in the general funding regime of local authorities.

D. Sections IV.-VI. Other Measures Implemented During the Whole Transition Period, During the Conflict Period and During the Post-Conflict Period (Articles 18-38)

78. Section IV (Articles 18-26) foresees certain measures that shall be implemented during the whole transition period. Some of these provisions still relate to tools for transitional justice, others focus on competences of State bodies during the transition period.

79. Article 18 indicates nine measures to be implemented during the transition period. These measures set goals for various areas of State policy, i.e., defence policy (increasing the level of combat capability of the Armed Forces of Ukraine and other components of the defence forces), humanitarian policy (restoration and preservation of the national memory of the Ukrainian people), educational policy (formation of a strategy of civic education in the de-occupied territories, State support for the study of the Ukrainian language and the history of Ukraine), patriotic education measures (formation of civil awareness and commitment to defend Ukraine), information policy, foreign economic policy (diversification and avoidance of dependencies), energy policy (ensuring energy independence), security policy and foreign policy (gaining full EU and NATO membership). The Venice Commission notes that some of the goals do not seem to correspond to the selected area, e.g., restoration and preservation of national memory is usually not considered as part of humanitarian policy.

80. Article 19 indicates additional measures to be implemented during the transition period, including e.g. disarmament and ensuring social rights. Some of these measures are relatively specific (search for missing persons), others remain rather vague (protection of cultural values, national dialogue, etc.). There seems to be a partial overlap between Articles 18 and 19, for instance information security and education are listed in both of them and it is not clear whether there is any difference. For all the measures, implementing legislation would be necessary, yet it is explicitly foreseen only in paras 1(1)-(2). The Venice Commission assumes that the explicit references relate to the already existing pieces of legislation and that for other measures, implementing legislation will also be adopted. This however should be specified in the provision. In

[51] See the Protocol on the results of consultations of the Trilateral Contact Group, signed on 5 September 2014, points 9/10.
[52] See the Package of measures for the Implementation of the Minsk agreements of 12 February 2015, point 12.
[53] See e.g. Art. 9 of the European Charter of Local Self-Government, ETS 122. See also the report of the United Nations Human Rights Council A/HRC/30/49, paras 22/32.

the absence of such implementing legislation, the assessment of the compatibility of the individual measures with international standards is difficult.

81. The Venice Commission welcomes the inclusion, among these measures, of sustainable peacebuilding "which involves a national dialogue and other dialogue processes" (Article 19(1)(12)). It stresses that national dialogue makes an important part of transitional processes and can be conducive to national reconciliation. It also recalls that national dialogue, or national consultations, "are not one-way information or public relations exercises, but instead are a form of profound and respectful dialogue whereby the consulted parties are able to freely express themselves with a view to shaping or enhancing the design of transitional justice programmes".[54] All segments of the population, including vulnerable groups, therefore have to be involved in such a national dialogue and have to have an equal say. Moreover, it is within such a national dialogue that goals for various areas of the State policy should be determined.

82. The Venice Commission notes that it is legitimate for a State to pursue the goals of ensuring information security and overcoming propaganda, protecting cultural values and carrying out patriotic education. It understands that such measures might be especially important in the transitional period. At the same time, it stresses that they must take into account and respect human rights, including the right to freedom of thought, the right to freedom of expression and the right to education, and that they should be implemented in a manner conducive to national reconciliation.

83. Article 19(1)(5), on the measures of commemorating the victims of the armed aggression of the Russian Federation against Ukraine, is elaborated upon in more detail in Article 22. That provision foresees *inter alia* the establishment of the 'National Museum of Resistance to Russian Aggression against Ukraine' and of the 'National Day of Commemoration', the dismantling of monuments, memorial plaques and signs erected in the temporarily occupied territories and the erection of new monuments, memorial plaques and signs in these territories. The Venice Commission underlines that all these measures should be linked to the national dialogue and should be carried out in a manner conducive to national reconciliation. Care needs to be taken to ensure that this process effectively involves the population concerned and does not follow a top-down approach.

84. The Venice Commission welcomes that the draft law includes provisions aimed at ensuring social rights (Article 21) which are crucial for the population concerned. However, these provisions are quite vague and should be formulated with more precision. In particular, it remains unclear how pensions and other social benefits would be provided to persons living in the temporarily occupied territories, what is meant by "other benefits" (para 2), who would count as the "competent agencies of other States" (para 2) and how the "restructuring" of debts would be implemented (para 3).

85. Article 23 prohibits the production, distribution and public use of symbols and awards of the occupying forces and occupation administration and establishes exceptions to this prohibition (for documentary, educational, scientific and other similar purposes). It should be noted that symbols fall within the scope of application of the right to freedom of expression as guaranteed *inter alia* by Article 10 ECHR.[55] The case-law of the European Court of Human Rights indicates that "utmost

[54] OHCHR, *Rule-Of-Law Tools for Post-Conflict States. National consultations on transitional justice,* United Nations: New York and Geneva, 2009, p. 29.

[55] See for example ECtHR, *Donaldson v. UK*, Application No. 56975/09, 25 January 2011; ECtHR, *Vajnai v. Hungary*, Application No. 33629/06, 8 July 2008. In the latter case the Court found a violation of Article 10 ECHR, having regard to the indiscriminate nature and very broad scope of the ban on the use of totalitarian symbols, particularly in light of the absence of any real and present danger of the restoration of the communist regime or disorder triggered by the public display of the red star.

care must be observed in applying any restrictions" as regards symbols, especially if the symbol in question can have "multiple meanings."[56]

86. The Venice Commission has previously had an opportunity to consider the Ukrainian legislation on the condemnation of the communist and national socialist (Nazi) regimes and prohibition of propaganda of their symbols.[57] It stressed that States might resort to prohibiting and even criminalising the use of certain symbols. When they do so, however, they have to operate within the limits set by the ECHR and other human rights instruments and respect the principles of legality (the regulation is prescribed by law), legitimacy (the regulation pursues a legitimate aim) and necessity (the regulation responds to a pressing social need and is proportionate to the legitimate aim). The opinion also recalled that the relevant legislation needs to specify clearly and exhaustively what the prohibited symbols actually are, and that the sanctions entailed in the violation of the prohibition (if any) shall reflect the seriousness of the offence. These principles need to be implemented, either in Article 23 itself or in complementary legislation.

87. Articles 24-26 define specific powers conferred to the Cabinet of Ministers and to the Verkhovna Rada in the context of the implementation of the State policy of the transitional period and indicates certain specificities of the monetary politics in this period. Some of these provisions, especially Article 24(2) on "Special powers of the Cabinet of Ministers of Ukraine",[58] are drafted in a very general way, and it is thus necessary to make sure that they are not implemented in a too extensive or even arbitrary way, in violation of the principles of the rule of law.

88. Sections V and VI contain specific rules to be applied during the conflict and post-conflict period, respectively. Many of the provisions seem more like policy guidance than legal rules and remain relatively vague.

89. During the conflict period, steps shall be taken to ensure national security, protect human rights, establish military-civil administrations, establish a succession pool for service in the de-occupied territories and enact political and diplomatic measures and sanctions.

90. Measures to be taken during the post-conflict period include *inter alia* the creation of transitional structures, addressing priority humanitarian issues, identification of damages and facilities in need of restoration, restoration of justice, relaunching the circulation of the national currency, addressing the issue of release from detention facilities, restoration of Ukrainian as the official language and protection of the State border.

91. The Commission welcomes improvements of those Sections as compared to the previous version which had included some problematic provisions. It is commendable that an international transitional administration is envisaged for the post-conflict period.

92. That said, the current wording of draft Article 36 on release of persons from detention facilities gives rise to concern. There is a risk that this provision might amount to *de facto* pardon for common criminals. Ukraine should try to find a way to make such criminals bear the consequences of their unlawful acts without resorting to the recognition of decisions rendered by organs in the temporarily

[56] ECtHR, *Fáber v. Hungary*, Application No. 40721/08, 24 July 2012.
[57] Venice Commission, Joint Interim Opinion on the Law of Ukraine on the condemnation of the communist and national socialist (Nazi) regimes and prohibition of propaganda of their symbols, CDL-AD(2015)041.
[58] According to that provision, "the Cabinet of Ministers of Ukraine shall take all measures provided by the law of Ukraine to protect human and civil rights and freedoms, in particular, it shall establish procedures to monitor compliance with human and civil rights and freedoms and document any violations of such rights and freedoms and international humanitarian law in the temporarily occupied territories. It shall publish and provide such information to international human rights organisations and take measures to coordinate legal standoffs with the Russian Federation."

occupied territories. The rapporteurs were reassured by the Ukrainian authorities that there is no question of an unconditional amnesty and release of all persons in places of detention in the temporarily occupied territories.

93. Regarding the restoration of Ukrainian as the official language in the de-occupied territories (Article 37), the Venice Commission draws attention to Article 10 of the Ukrainian Constitution which guarantees the "free development, use, and protection of Russian and other languages of national minorities". In its previous opinion of 2019,[59] the Commission stated that it fully understood the need for the Ukrainian legislator to adopt measures to promote the use of Ukrainian as the State language and stressed the need to take proper account of the linguistic rights of Ukraine's minorities. In this respect, it is welcome that according to Article 37 of the draft law restoration of Ukrainian as the official language is "subject to guarantees of free development, use and protection of languages of Ukraine's indigenous peoples and ethnic minorities."

94. Finally, the timeframe for measures to be taken during the post-conflict period – six months for most of those measures – appears very short and should be reconsidered.

E. Section VII. Final and Transitional Provisions

95. Pursuant to item 1 of this section some provisions of the draft law shall take effect at a later stage, concurrently with the Law 'On Amendments to Certain Legislative Acts of Ukraine following the Enactment of the Law of Ukraine On the Principles of Public Policy for the Transition Period.' As mentioned earlier, the need for further implementing legislation makes it impossible to fully assess the implications of the draft law. It would be good to specify a timeframe for the development of that complementary legislation.

96. In accordance with items 2 and 3, a number of existing legislative acts shall cease to be in effect once the draft law (item 2) or the implementing legislation (item 3) enters into force. The Venice Commission is not in a position to evaluate these provisions, but it wishes to stress the importance of avoiding overlaps between different regulations as well as possible legal gaps, for the sake of legal certainty and consistency. During the meetings in Kyiv, several interlocutors told the rapporteurs that the current wording of the draft risked creating a significant legal vacuum, and that this was particularly worrying with respect to the situation of the Autonomous Republic of Crimea as practically all the existing specific legal acts would be revoked. Such a legal vacuum must be avoided. The rapporteurs noted with satisfaction that the authors of the draft law declared their readiness to amend the current text, to ensure that necessary regulations cease to be in effect only after new provisions have been put in place.

97. In this context, it is also necessary to highlight that according to the Constitution of Ukraine, the Autonomous Republic of Crimea and the City of Sevastopol have a special constitutional status[60] that is also reflected in the current legislation but not in the draft law.

V. Conclusion

98. The draft law "On the Principles of State Policy of the Transition Period" prepared by the Ministry for Reintegration of the Temporarily Occupied Territories of Ukraine is intended to provide the general legal framework for measures to be taken during the transitional period. It foresees to be complemented by more specific legal acts, some of which are explicitly referred to in the draft law. As a consequence, this framework text includes many rather general and vague provisions. In some cases, the provisions are policy guidance rather than a normative legal act. The fact that

[59] Venice Commission, Opinion on the Law on Supporting the Functioning of the Ukrainian Language as the State Language, CDL-AD(2019)032.
[60] See in particular Articles 133ff. of the Constitution.

the implementing legislation does not yet exist, makes the assessment of the draft law difficult. Overall, the Venice Commission underlines the importance of ensuring consistency of the draft law and any future implementing legislation with the existing legal framework, the Constitution and international law. Moreover, the creation of a legal vacuum due to the revocation of existing legal acts – in particular those concerning the Autonomous Republic of Crimea and the city of Sevastopol – must be avoided.

99. That being said, the Venice Commission understands the efforts by the Ukrainian authorities to create a uniform and comprehensive legal framework applicable to the transition period. It notes that this framework is, to a large extent, based on well-established principles of international law, including the rule of law and respect for human rights and for the principle of non-discrimination, and that it takes into account the needs of vulnerable groups within the society.

100. The Venice Commission furthermore acknowledges that the draft law has been prepared through an inclusive process which involved, especially in the first stage, consultations with various national and international stakeholders. However, according to the information given to the rapporteurs during their visit, the inclusion in the draft law of suggestions from those consulted might have been rather limited. Furthermore, certain categories of persons directly concerned by the draft law, mainly those living in the eastern provinces of Ukraine and in the Autonomous Republic of Crimea and the city of Sevastopol, might have had a rather limited possibility to take part in these consultations. It is crucial to involve these categories of persons in the subsequent discussions concerning both the implementation of the draft law and the adoption of any other legal acts to complement this draft law. The consultation process already led to welcome improvements, as compared to earlier drafts.

101. The Venice Commission notices with concern that the draft law apparently aims at determining a specific historic narrative of the past, thus excluding different narratives. The relevant regulations contain specific messages for the Ukrainian public. The Venice Commission wishes to stress the importance of reconciliation in order to avoid deepening the conflict lines.

102. The assessment of the draft law is complicated by the fact that it targets several different problems arising out of the current situation with a view to future (uncertain) developments. It aims to establish a general regulation for future amnesties, to introduce elements of transitional justice, to create preconditions for convalidation, to establish a reserve of public servants for future de-occupied territories and to resolve other issues related to the de-occupation and reintegration of the temporarily occupied (de-occupied) territories.

103. The draft law includes definitions of terms which are not always congruent to the respective terms used in public international law. This is especially true for the central terms of “transitional period” and “transitional justice”. These definitions are rather narrowly conceived, and they take a one-sided approach to the transitional period. First, they reduce the thrust of the conflict in Ukraine to its inter-state dimension, i.e., to the involvement of the Russian Federation. Secondly, the measures of transitional justice are limited to overcome the consequences of human rights violations “caused by the armed aggression of the Russian Federation against Ukraine”. The concepts should be broadened. According to international standards transitional justice is a holistic concept which must address the crimes and human rights violations perpetrated by all the parties to the conflict and aim for reconciliation. While in the present case, as explained by the Ukrainian authorities, the need for transitional justice arose from foreign armed aggression, the Venice Commission notes that sustainable peacebuilding requires an approach as comprehensive as possible. Furthermore, provisions on victims’ right to remedy and reparation should be set out in more detail.

104. Several other provisions directly regulate concepts known from public international law, such as responsibility of States (in the present case, the Russian Federation) for internationally wrongful

acts and occupied territories. While it is certainly legitimate for States to have their own position on the interpretation of such concepts, it must be stressed that international law is an autonomous legal order, and that individual States may not alter the meaning of its concepts unilaterally. Definitions of these concepts should be removed, or it should be made clear that that they reflect the Ukrainian understanding of international law.

105. A number of specific recommendations for further improvement of the draft provisions are included throughout the present opinion, many of which call for clearer and more precise regulations to ensure they comply with international standards and Ukraine's commitments resulting from the relevant international human rights instruments. Among these recommendations, the Venice Commission wishes to underline the following ones:

- to revise the provisions of Article 9 on liability for criminal offences committed in connection with the temporary occupation in line with international law, and to reconsider the differentiated treatment of various categories of perpetrators of crimes;
- to amend the provisions of Article 10 on disqualification/lustration in line with international standards to ensure *inter alia* that lustration is limited to the most important positions within the State, that it does not apply to elective offices, that it is properly administered by an independent body and subject to procedural guarantees including individualised liability, protection of personal data and availability of adequate judicial review;
- to revise the provisions of Article 12 on ensuring the right to truth to make sure that they aim for establishing truth about all violations and not only those committed by certain specific actors, that they are clearly victim-oriented and that they do not entail establishing one single narrative about the conflict period;
- to formulate the provisions of Article 13 on convalidation more clearly and in line with international standards, notably to provide for adequate administrative procedures for registration of civil status acts which were fulfilled in the temporarily occupied territories and review the restrictive approach concerning the recognition of academic certificates, degrees and titles issued in those territories
- to reflect the special constitutional status of the Autonomous Republic of Crimea and the city of Sevastopol in the draft law.

106. The Venice Commission remains at the disposal of the Ukrainian authorities for any further assistance they may need, notably as concerns further implementing legislation. Over time, it may also be necessary to adapt the law to changing circumstances in the territories concerned.