**ANALYSIS**

**Of the Draft Law of Ukraine "On the State Policy of the Transition Period"**

The Draft Law of Ukraine "On the State Policy of the Transition Period" (hereinafter - the Draft), published on the website of the Ministry of Reintegration of the Temporarily Occupied Territories on January 11, 2021, is the first comprehensive publicly presented document on the formation and implementation of the state policy in the context of the armed conflict and further deoccupation of the currently occupied territories of Ukraine.

The Draft covers various areas of public policy: economic relations, access to justice, lustration, information security, the building of human resource base, etc. This is a positive step because the policy of the state in the transition period must be implemented in many directions. It also means that when writing the text of this Draft, its authors used a systematic approach to the formation of relevant policies.

Detailed analysis of the text of the Draft creates the need to dwell in more detail on some conceptual points. The failure to take them into account when finalizing the text of the Draft may lead to negative consequences, in particular, legal conflicts, inconsistencies with the Constitution of Ukraine and international obligations, as well as to contradictory interpretations and, accordingly, to various methods of the law enforcement.

1. **The chosen approach as to the need to develop one general law instead of special laws is controversial.**

According to the explanatory note to the Draft, it should ensure the unity and systemic nature of public policy approaches, codify existing legislative and regulatory acts and introduce regulation of a number of procedures related to the post-conflict period. In fact, during the development of this Draft, its authors decided on the need to form a single general Law that can answer all questions related to or will be related to overcoming the negative consequences of the armed conflict, deoccupation of the temporarily occupied territories of Ukraine.

However, this decision obviously has significant shortcomings.

*First,* a number of issues cannot (and should not) be regulated by this Law. For example, the issue of criminal liability and the principles of criminal prosecution (in particular, Articles 17, 23 of the Draft). The inclusion of these articles in the Draft directly contradicts Article 3 of the Criminal Code of Ukraine, according to which the main legislative act of Ukraine on criminal liability is the Criminal Code of Ukraine, which is based on the Constitution of Ukraine and generally accepted principles and norms of international law. In accordance with Part 3 of Article 3 of the Criminal Code of Ukraine, the criminal illegality of the act, as well as its punishment and other criminal consequences are determined only by this Code. At the same time, amendments to the legislation of Ukraine on criminal liability may be made only by laws amending the Criminal Code of Ukraine and / or the criminal procedure legislation of Ukraine, and / or the legislation of Ukraine on administrative offences.

Also, issues of amendments to the Tax Code of Ukraine may be carried out only by amending this Code (Article 2 of the Tax Code of Ukraine). However, Article 61 of the Draft contains direct indications that part of the articles of the Tax Code does not apply to taxpayers located in the temporarily occupied territories.

A number of issues proposed by the Draft should be defined by separate laws that are not temporary in nature (unlike the Draft). Thus, the issue of ensuring the rights of indigenous peoples should obviously be determined by a separate law, without reference to the conflict and the temporary occupation of part of the territory of Ukraine.

*Secondly,* due to the attempt to cover a large number of important issues, the Draft leaves serious "gaps" in the regulation of specific areas (spheres). For example, notwithstanding the importance of the institution of lustration to ensure the non-recurrence of the armed conflict in the future, only one article of the Draft (Article 24) is devoted to its regulation. In this article, the authors tried to generally describe the purpose, the list of persons to be lustrated, to determine the categories of persons who should not be lustrated, the procedure for lustration and for appealing its results, and to determine the grounds for Security Service of Ukraine to maintain an open register of information about bodies, organizations, enterprises and institutions of the occupying forces, the occupation administrations of the Russian Federation, as well as their leaders and officials. In addition to the fact that this article raises more questions than it answers, it should be noted that the Law of Ukraine “On Purification of Power” already exists. This Law has a very specific purpose and the subject of regulation and which cannot provide a solution to lustration in its current form. Obviously, a separate Law of Ukraine should be developed, which will define the essential elements and procedures of lustration as a condition for ensuring the non-recurrence of the armed conflict in the future.

2. **Some of the provisions of the Draft violate the principle of legal certainty, which is one of the elements of the constitutional principle of the rule of law.**

In accordance with paragraph 3.2. of the decision of the Constitutional Court of Ukraine dd. January 23, 2020 №1-r/2020, legal certainty should be understood through its following components: precision, clarity, the unambiguity of law; the right of a person in his actions to rely on reasonable and predictable stability of existing legislation and the ability to foresee the application of legal norms (legitimate expectations). Thus, legal certainty implies that the legislator must strive for precision and clarity in the statement of the legal norms. Depending on the circumstances, each person should be able to

find out which legal norm applies in a particular case or have a clear understanding of the specific legal consequences in the relevant legal relationship given the reasonable and foreseeable stability of the legal norm.[1]

However, the Draft contains provisions in which the principle of legal certainty is violated. For example, the Draft provides for a retrospective determination of the dates of the beginning of the occupation (deoccupation) of settlements in Donetsk and Luhansk oblasts and the list of occupied territories itself. Unlike the situation with the temporarily occupied territory of the Autonomous Republic of Crimea and the city of Sevastopol, where the territory and date of its occupation were defined very specifically back in 2014, determining the date and the list of occupied territories in Donetsk and Luhansk oblasts is not an easy task. First, the date of the beginning of the temporary occupation of the territories in Donetsk and Luhansk oblasts is not yet determined. Moreover, there can be no single date for the occupation of settlements in the east of the country. Judging by the text of the Draft, the date of the occupation and deoccupation of settlements will be determined later by a separate procedure.

No less important is the question of defining the territories as temporarily occupied. Article 3 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine" clearly defines what the temporarily occupied territory of Crimea is. Regarding the temporarily occupied territories in Donetsk and Luhansk oblasts, the boundaries and list of districts, cities, towns and villages, parts of their territories temporarily occupied in Donetsk and Luhansk oblasts were determined by the Decree of the President of Ukraine[2] only in February 2019. In fact, before the adoption of this Decree, different definitions were applied to the territory not under the control of the Government of Ukraine: "settlements on the territory of which public authorities temporarily do not exercise their powers", "ATO territory", "OOS territory" and others. At the same time, there continued to exist the Resolution of the Verkhovna Rada of Ukraine "On Recognition of Certain Districts, Cities, Towns and Villages of Donetsk and Luhansk Oblasts as Temporarily Occupied Territories" dd. March 17, 2015, № 254-VIII (which is currently in force). Thus, in fact, the territories that in 2019 were defined as temporarily occupied territories in Donetsk and Luhansk oblasts, at different times since 2014 had different status, the list of these territories was different.

At the same time, numerous provisions of the Draft contain references to the date of the beginning of the occupation of the settlement as a condition for the application of this or that provision (for example, recognition of bad debts for taxes, fees and mandatory payments arising from the date of temporary occupation of the settlement to the date of deoccupation). This situation makes the Draft unpredictable if it is adopted, which violates the principle of legal certainty.

3. **There is a risk of nullifying Ukraine's positive obligations, in particular as regards compensation for the value of the destroyed or damaged property.**

[1] http://www.ccu.gov.ua/sites/default/files/docs/1_p_2020.pdf
[2] Decree of the President of Ukraine dd. February 7, 2019, №32/2019 "On the boundaries and list of districts, cities, towns and villages, parts of their territories, temporarily occupied in Donetsk and Luhansk oblasts"

One of the four main elements of transitional justice is the issue of redress for victims of conflict. However, it is a matter of concern that the Draft provides for legal norms under which Ukraine's obligations to establish a mechanism for compensation for damage caused by the conflict can be nullified.

Thus, Part 2 of Article 9 of the Draft stipulates that "*state policy of the transition period is aimed at protecting people and citizens - their lives, health and dignity, constitutional rights and freedoms, safe living conditions*", while Article 2 stipulates that *"responsibility for violations of human and civil rights and freedoms in the temporarily occupied territories guaranteed by the Constitution and laws of Ukraine, international treaties, approved by the Verkhovna Rada of Ukraine, rests with the Russian Federation as an occupying power in accordance with the principles and norms of international law."* Following this wording, all responsibility for any damage rests with the Russian Federation, herewith the responsibility for redress is removed from the state of Ukraine. This wording is identical to the provision of Part 4 of Article 2 of the Law of Ukraine 2268-VIII "On Peculiarities of State Policy to Ensure State Sovereignty of Ukraine in Temporarily Occupied Territories in Donetsk and Luhansk Oblasts", which the authors of the Draft propose to exclude from the text of epy Law 2268-VIII.

However, the transfer of this legal norm to the new law is not a positive practice, because the fact that one state imposes in its national legislation the obligation to pay compensation to another state (in this case, Russian Federation) violates the principle of sovereign equality of states and will not have legal consequences for the aggressor state.

Thus, in its Opinion on the Law on the Occupied Territories of Georgia (CDL-AD (2009) 015, March 17, 2009), the Venice Commission stated the following:

*"… 37. Article 7 of the Law on the Occupied Territories of Georgia explicitly fixes the responsibility of the Russian Federation for human rights violations, moral and material damage and destruction of cultural heritage in Abkhazia (Georgia) and South Ossetia (Georgia). As a rule, questions of international responsibility cannot be regulated on the basis of national law, but are solved on the basis of international law.*

*38. Concerning human rights violations, according to the jurisprudence of the European Court of Human Rights, an extraterritorial application of the ECHR is possible if the State exerts "effective overall control" over a certain territory. This seems to be the case for the Russian Federation both in Abkhazia (Georgia) and in South Ossetia (Georgia). But it has also to be realised that the responsibility of the occupying power based on the extraterritorial application of human rights conventions does not completely exonerate the other State from any responsibility. It may be noted for example that the whole Law is an indication of Georgia's concern for the said territory, and taking into account the case-law of the ECtHR (Ilascu and others v. Russian Federation and the Republic of Moldova), the intention of the State to regulate the legal relations within the occupied territory may represent an indication of its responsibility for the respective territory.*

*39. The reimbursement of "moral and material damages inflicted on the Occupied Territories" regulated in Article 7 para. 3 will also have to be fixed on the basis of international law. Georgian courts would not be competent to adjudicate on claims against the Russian Federation according to the principles of State immunity…"*

Thus, the imposition of liability for the damage caused and, as a consequence, compensation for this damage exclusively on the aggressor state does not mean that the state of Ukraine is not liable to persons under its jurisdiction. In this context, it is worth recalling the concept of the State's "positive obligations", which was developed in the judgments of the European Court of Human Rights on the application of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular, Article 1 of Protocol No. 1 to the Convention. The case-law of the Court contains many judgments under which, even if a State does not control part of its territory, it is not exonerated from its obligations under the Convention and Protocols thereto.[3] The right of a person affected by an armed conflict, for example, to claim compensation for destroyed or damaged property derives from the protection of a person's property rights. In addition, it is also clear from the case-law of the Court that in the event of an armed conflict, the State has an obligation to put in place appropriate mechanisms to compensate for the value of the property, housing and land in case of failure to ensure the possibility to return there or if the property was destroyed.[4] In this context, it is worth recalling Article 17 of the Law of Ukraine "On Enforcement of Judgments and Application of the Case-Law of the European Court of Human Rights", according to which courts use the provisions of the Convention and the case-law of the ECtHR as a source of law.

In addition, the authors of the Draft should note that if such wording in Article 2 of the Draft remains, it will destroy already existing and operating mechanism for payment of compensation for housing that was destroyed as a result of armed aggression by the Russian Federation. Such a mechanism was introduced by the Resolution of the Cabinet of Ministers of Ukraine № 767 of 02.09.2020 and in accordance with its provisions payments are already being made. That is, by adopting such a Resolution, the state of Ukraine has already undertaken to compensate for the destroyed housing. In addition, the existence of such a provision in Article 2 of the Draft will also nullify the positive obligations of the state to those whose relatives died as a result of the armed conflict or suffered significant damage to health.

4. **The concept of general unification of approaches and the state policy regarding the temporarily occupied territory of the Autonomous Republic of Crimea and the city of Sevastopol and the temporarily occupied territories in Donetsk and Luhansk oblasts needs to be refined**

We fully share the idea of synchronizing approaches to ensuring the rights and freedoms of residents of the temporarily occupied territories in Donetsk and Luhansk regions and the temporarily occupied territory of the Autonomous Republic of Crimea and the city of Sevastopol. However, it should be noted that there are certain reservations concerning the approach according to which for all issues related to the occupation of Crimea and parts of Donetsk and Luhansk oblasts there are common answers.

In 2018, the Verkhovna Rada of Ukraine adopted the Law of Ukraine 2268-VIII "On Peculiarities of the State Policy to Ensure the State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Oblasts". It was this Law that laid the normative grounds for such synchronization of approaches to all temporarily occupied territories of Ukraine. In particular, in accordance with paragraph 8 of Article 2 of this Law, the procedure for regulating legal transactions and exercising the rights of individuals, as well as the state of Ukraine, territorial communities of villages, towns, cities

[3] For example, the judgments in the cases of Ilashku and Others v. Moldova and Russia, Catan and Others v. Moldova and Russia
[4] For example, the judgments in the cases of Sargsyan v. Azerbaijan, Chiragov and Others v. Armenia, Dogan and Others v. Turkey.

located in the temporarily occupied territories in Donetsk and Luhansk oblasts, public authorities, local governments and other public law entities, are extended, subject to necessary changes (mutatis mutandis), to the temporarily occupied territories of Ukraine in Donetsk and Luhansk oblasts. The exception is the procedure for entry and exit from the temporarily occupied territories in Donetsk and Luhansk oblasts, established in accordance with this Law, and the procedure for the territorial jurisdiction of cases under the jurisdiction of the courts located in the temporarily occupied territories in Donetsk and Luhansk oblasts, established in accordance with Law of Ukraine "On the Administration of Justice and Criminal Proceedings in Connection with the Anti-Terrorist Operation." That is, starting from 2018, approaches to **ensuring the procedure for regulating legal transactions and exercising rights** in all occupied territories of Ukraine were to be determined by the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territories of Ukraine". In practice, this has not been fully implemented. However, as far as ensuring human rights and freedoms is concerned, most of this synchronization has taken place (except for issues related to securing the right to a pension, moving things across the demarcation line / administrative border with the temporarily occupied territory).

The Draft proposes to go further and actually erase any legal boundaries between the temporarily occupied territories. However, the state policy regarding the occupied territories of Crimea and the temporarily occupied territories in Donetsk and Luhansk oblasts may have and in fact has its peculiarities, including those related to the international assessment of the nature of the armed conflict. As a result, the regulation of issues concerning the access to pensions and the assessment of the acquisition of Russian citizenship by residents of the temporarily occupied territories may be different.

Thus, in the occupied territory of the Autonomous Republic of Crimea and the city of Sevastopol from April 1, 2014, all citizens of Ukraine who had a registration of residence in Crimea, were "automatically" recognized as citizens of the Russian Federation. The occupying power created all social and economic conditions (impossibility of receiving a pension, preserving property rights, receiving free medical care without an RF passport, etc.) to force Crimeans to obtain Russian passports issued by illegitimate occupation authorities of the Russian Federation in Crimea. In the report issued in 2017[5] the UN High Commissioner for Human Rights equated such imposed citizenship with coercion to swear allegiance to the occupying power in violation of the Geneva Convention IV. The UN General Assembly condemned the imposed citizenship in Crimea, including the UN General Assembly Resolution 75/192 of December 16, 2020 "The situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine".[6]

In contrast to the situation in the temporarily occupied territory of Crimea, the Russian Federation is acting differently in Eastern Ukraine, creating conditions for the simplified acquisition of Russian citizenship by residents of Donetsk and Luhansk oblasts. Passports of citizens of the Russian Federation for "humanitarian purposes" are issued on the territory of the Russian Federation upon applications by citizens of Ukraine. Despite the information that the occupying power, through occupation administrations, forces Ukrainian citizens living in the temporarily occupied territories of Donetsk and Luhansk oblasts to obtain Russian citizenship (especially it concerns employees of so-called "budget"

[5] https://www.ohchr.org/Documents/Countries/UA/Crimea2014_2017_EN.pdf
[6] https://undocs.org/en/A/RES/75/192

institutions), the national legislation of Ukraine has not established the fact of coercion, and as a result, non-recognition of Russian passports issued to residents of the occupied territories in Donetsk and Luhansk oblasts. Therefore, there is neither practice nor a legislative framework for defining the acquisition of Russian citizenship by residents of the occupied territories of Donetsk and Luhansk oblasts as automatic or forced.

An attempt to fully universalize approaches to all temporarily occupied territories of Ukraine leads to a violation of the principle of legal certainty, as well as to a retrospective revision of approaches of the national legislation, for example, in determining the start dates of occupation of the occupied territory.

5. **Recognition of a number of laws of Ukraine as invalid creates gaps in normative regulation.**

The Draft proposes to recognize as invalid a number of Laws of Ukraine, in particular:

1) the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine" (except for Article 15, which shall expire on February 20, 2024);

2) the Law of Ukraine "On Interim Measures for the Period of the Anti-Terrorist Operation" (except for parts one and three of Article 2, which shall expire on January 1, 2022);

3) the Law of Ukraine "On the Administration of Justice and Criminal Proceedings in Connection with the Anti-Terrorist Operation";

4) the Law of Ukraine "On Creation of a Free Economic Zone "Crimea" and Peculiarities of Economic Activity in the Temporarily Occupied Territory of Ukraine."

Such an approach could be considered acceptable subject to the transposition (taking into account) of the legal norms that currently allow regulating the issues of realization of human rights and freedoms, as well as the issues of economic relations in accordance with the Draft. However, this did not happen in full.

Thus, for example, the Law of Ukraine "On Interim Measures for the Period of the Anti-Terrorist Operation" defines temporary measures to provide support to business entities operating in the territory of the anti-terrorist operation and persons living in the area of the anti-terrorist operation or relocated from it during its holding. The territory of the anti-terrorist operation is defined as the territory of Ukraine, where the settlements defined in the list approved by the Cabinet of Ministers of Ukraine are located, where the anti-terrorist operation was launched in accordance with the Decree of the President of Ukraine "On the Decision of the National Security and Defense Council of April 13, 2014 "On Urgent Measures to Overcome the Terrorist Threat and Preserve the Territorial Integrity of Ukraine" of April 14, 2014, № 405/2014. Currently, the list of these settlements is approved by the Order of the Cabinet of Ministers of Ukraine of December 2, 2015, № 1275-r and it includes both settlements located in the temporarily occupied territories of Ukraine and in the territories controlled by the Government of Ukraine. Therefore, the provisions of the Law of Ukraine "On Temporary Measures for the Period of an Anti-Terrorist Operation" apply not only to the temporarily occupied territories in Donetsk and Luhansk oblasts.

However, the Draft retains some of the provisions of the Law of Ukraine "On Interim Measures for the Period of the Anti-Terrorist Operation", which now apply only to the temporarily occupied territories (for example, a moratorium on the accrual of penalties and fines). Some provisions are not reflected in the Draft (in particular, the moratorium on inspections, peculiarities of state registration of legal entities and individuals-entrepreneurs and others).

6. **The Draft has a very overloaded structure, and also contains a duplication of provisions of other laws of Ukraine. The Draft contains provisions of different levels, both general and very specific, which leads to gaps in regulation.**

The Draft has a complex structure and considerable volume. At the same time, some legal norms duplicate the provisions of other laws of Ukraine.

For example, Part 9 of Article 9 contains a list of principles of transition policy, which are mostly fully disclosed in the Constitution of Ukraine. However, the Draft has a separate article for each of the twelve principles. These are such basic principles as the rule of law, legality, unitarity and territorial integrity of Ukraine, equality before the law, respect for human dignity and so on.

At the same time, part 1 of Article 25 of the Draft (guarantees of freedom of conscience and religion) duplicates Articles 34, 35 of the Constitution of Ukraine.

In addition, given the goal identified by the authors of the Draft, it should be a framework and define the basic approaches to the state policy of the transition period. Instead, the Draft is neither a framework (due to a large number of very narrow point regulations) nor sufficiently detailed. As a result, due to an incomplete settlement of certain legal relations, gaps may arise.

For example, Part 1 of Article 28 of the Draft lists ways to ensure that the occupation of Ukrainian territory is not repeated, in particular general positions on the implementation of an effective defence, humanitarian, educational policy, strengthening the protection of the state border, the implementation of measures for full membership in the North Atlantic Treaty Organization. Whereas Part 2 deals with a very narrow issue, namely the prohibitions for the manufacturing, distribution, public use of symbols and awards of the occupying forces, the occupation authorities of the Russian Federation, as well as state awards, departmental and other insignia of the aggressor state which is connected with the temporary occupation. And Part 3 contains exceptions to the general regulation on prohibitions. The text of the Draft contains no more information about measures to prevent occupation, although it is obvious that the first general part of the Article needs to be detailed. As a result, there is a multilevel regulation in one legal norm, which should have been a framework in nature.

7. **Some terminological novelties do not comply with international law and give rise to conflicts with the provisions of national legislation of Ukraine.**

The Article 1 of the Draft contains a number of definitions that are new to Ukrainian legislation (in particular, "transitional period", "conflict period", "post-conflict period", "transitional justice", "temporary occupation", "convalidation", "deoccupation", etc).

However, some of these novelties are not defined very precisely, sometimes definition is incorrect, which leads to contradictions with the norms of international law, as well as with the provisions of national law. In addition, the scope of some concepts, which are presented quite broadly in the definitions, is significantly narrowed in the text of the Draft.

Thus, it is not expedient to single out the terms “transition period”, “conflict period”, “post-conflict period”. Analyzing the definition of these concepts, it should be noted that the terms “conflict period” and “post-conflict period” are in fact components of the term “transition period”, which is *“a period of time during which public policy is aimed at restoring the territorial integrity of Ukraine within the internationally recognized state border and ensuring the state sovereignty of Ukraine in the temporarily occupied territories, overcoming the consequences of the armed aggression of the Russian Federation, reintegration of the deoccupied territories, restoration of the constitutional order of Ukraine and building sustainable peace* there.” The definition of "conflict" and "post-conflict" periods are characterized by the fact that the first covers the time when active hostilities are carried out to restore territorial integrity, and the second covers the time when the reintegration of deoccupied territories and the restoration of constitutional order in them takes place. Although the general concept of the state policy in the transition period and the text of this Draft are built on this division of the transition period into “conflict” and “post-conflict”, it is not expedient to separate two essentially similar terms.

Besides, it should be noted that Article 1 of the Law of Ukraine "On Mobilization Training and Mobilization" defines a "special period" that *“occurs from the moment the mobilization decision is announced (except for the target one) or made known to the executors in case of covert mobilization or from the moment of the imposition of martial law in Ukraine or in some of its localities and covers the time of mobilization, wartime and the partial reconstruction period after the end of hostilities.”* Thus, as can be seen, the definitions of the “conflict” and “post-conflict” periods already partially coincide with the definition of the “special period”, which may cause misreading of the relevant legal norms and confusion in their application.

The Draft contains the concept of “transitional justice”, which is defined as *“a set of measures aimed at overcoming the consequences of violations of the law, human and civil rights caused by the armed aggression of the Russian Federation, including their recovery and redress for damage, and ensuring accountability, justice and reconciliation.”* However, even though Section 3 of the Draft discloses the content of transitional justice, it clearly does not meet the definition, because it narrows transitional justice to fairly cursory issues of responsibility (including lustration), guarantees of freedom of conscience and religion in the occupied territories, gender justice, ensuring the right to the truth and measures not to repeat the occupation. Thus, the content of Section 3 of the Draft significantly narrows the concept of transitional justice contained in Article 1 of the Draft.

The definition of temporary occupation deserves special attention. First, it contradicts the formal logic, as the definition of temporary occupation is defined by another “unknown” (absent in Ukrainian legislation) concept of “effective general control” (which is later defined by reference to the ECtHR decisions in Article 4 of the Draft, although the ECtHR in accordance with its mandate does not establish the fact of the occupation of the territory, and reference to its practice does not add legal certainty to the

concept). [7] Secondly, it is inappropriate to invent a definition of occupation whereas it is provided for in the 1907 Hague Regulations. It would be appropriate while defining the term "temporary occupation" to rely on Ukraine's inability to exercise control and functions of state power due to the presence of the Russian armed forces or remote management of irregular armed groups and, accordingly, the performance of public administration functions by representatives of the Russian Federation or formations under their control..

Besides, Article 1 of the Draft does not contain a definition of the term "lustration", although such a term is used in the title of Article 24 of the Draft. Furthermore, the second part of Article 1 of the Draft states that *"other terms in this Law are used in the meaning given in other laws of Ukraine unless otherwise provided by this Law"*. However, the lack of definition of the relevant term and the wording of the second part of Article 1 of the Draft, as well as the title of Article 24 of the Draft contradict the current Law of Ukraine "On Purification of Power": Article 1 of the relevant law defines the cleansing of power (lustration) as the prohibition for certain individuals to hold certain positions (to be in the service) (except for elected positions) in public authorities and local governments. While Article 24 of the Draft actually defines lustration as a **restriction** on holding positions. Besides, according to the wording of the Law of Ukraine "On Purification of Power", lustration does not apply to elected positions, but Article 24 of the Draft does not contain any reservations or exceptions in this regard.

In addition to the concept of "lustration", which is currently absent in the Draft, it is worth adding a definition of at least the following concepts:

- "armed aggression" in accordance with UN General Assembly Resolution 3314 (XXIX) of December 14, 1974, which defines aggression as the use of force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other way incompatible with the Charter of the United Nations;
- "demarcation line", "administrative border";
- "national dialogue";
- "temporarily occupied territories", which is used throughout the Draft. In defining this concept, it is appropriate to use the provisions of the Geneva Convention IV and the 1907 Hague Regulations.

Some of the definitions provided in the Draft need refinement. In particular, the definition of "sustainable peace" as a process, because based on the nature of the concept, sustainable peace is the result. Therefore, in the Draft, it is appropriate to use the term "sustaining peace" instead of this concept in accordance with UN Security Council Resolution 2282 (2016) of April 27, 2016. Besides, given that the right to information is a fundamental human right over which the state cannot exercise sovereignty, it is more appropriate to replace the term "information sovereignty" with "information security" in accordance with the Doctrine of Information Security approved by the Presidential Decree of February 25, 2017, № 47/2017, and add its definition to Article 1 of the Draft.

**8. Some of the solutions proposed in the Draft are not sufficiently substantiated**

[7] It is important to note that it is inappropriate to use the concept of "general effective control" in relation to Ukraine, as Ukraine is sovereign over the occupied territories, and therefore it is necessary to talk about full control, not its minimal presence.

During seven years of the armed conflict in Ukraine, both international and national organizations, and various expert communities have developed a number of recommendations on how to address certain issues related to overcoming the negative consequences of the armed conflict. However, the proposals set out in the text are not those that previously were supported or at least discussed by the expert community.

Thus, in accordance with Part 9 of Article 8 of the Draft, the transition period ends 25 years after the date of restoration of the territorial integrity of Ukraine within the internationally recognized state border. At the same time, neither the explanatory note, nor the public communication of the Ministry, nor the previously published studies provided a justification as to why such a term was chosen, and even more, explicitly was established in the Draft as the legal norm.

Or, for example, in accordance with Part 4 of Article 70 of the Draft, within two years after the end of the conflict period, measures are taken to establish a national dialogue and restore the functioning of the Ukrainian language as the state language. However, it is not clear why such a deadline is justified for the organization of a national dialogue.

A separate issue arises regarding the convalidation of legal transactions. The concept of convalidation as a procedure for recognizing the validity of legal transactions committed under the occupation was used in Croatia (in 1997 the relevant Law on Convalidation was adopted there).[8] This law established a mechanism for recognizing documents and decisions (acts of individual action) issued during the occupation, subject to their harmonization with Croatian law, before issuing, where appropriate, official Croatian documents for their replacement.[9]

Taking into account the international experience and recommendations of national experts, it would be appropriate to provide for Ukraine an approach based on the presumption of legality of the legal transaction (at least after the deoccupation of the territory). It is the most expedient, requires less financial, organizational, human and technical resources (ie, is more efficient) for recording by the state authorities of Ukraine of certain transactions, which are confirmed by documents issued by the occupation authorities. However, the Draft envisages the exact opposite approach, namely the convalidation of all legal transactions that were committed in the occupied territories. Thus, Article 33 of the Draft stipulates that the convalidation of legal transactions committed on the territory of a temporarily occupied settlement, after its deoccupation, is carried out by the central executive body, whose powers include the implementation of the state policy in the field of convalidation. At the same time, national and regional convalidation commissions ("republican" for the Autonomous Republic of Crimea, "oblast", "city" for the city of Sevastopol) are formed as part of this central executive body from civil servants. In addition to the fact that such a structure creates numerous corruption risks, it is not clear what this vision of “confirmation” of all legal transactions that took place during the occupation is based on, instead of introducing a special procedure only for those legal transactions for which there are reasonable doubts.

In addition to creating a new procedure for convalidation of legal transactions, the authors of the Draft propose to change the existing court procedure for establishing the legal facts of birth and death in

[8] https://www.zakon.hr/z/1377/Zakon-o-konvalidaciji

[9] Lutkovska V.V., Lukyanenko Zh.V. Comparative analysis and recommendations to Ukraine on reparations and the status of documents issued in the temporarily occupied territory. At the link: https://rm.coe.int/recognition-of-civil-documentation-ukr/1680a0c5e2

the temporarily occupied territories of Ukraine. To do so, it is proposed to amend Article 317 of the Civil Law Code and provide that the Civil Registry Office has the right to apply to the court instead of a natural person-applicant to establish the facts of birth and death in the occupied territories. In this case, such an obligation arises for the registry office if the documents submitted by the applicant are insufficient to establish the fact of birth / death that occurred in the occupied territories, administratively. Consideration of cases on the establishment of facts that have legal significance is carried out in a separate proceeding. Applicants in such cases may be individuals or their representatives. The essence of a separate proceeding concerns the confirmation of the presence or absence of legal facts that are important for the protection of the rights and interests of a person or the creation of conditions for the exercise of personal non-property or property rights or confirmation of the presence or absence of undisputed rights. In this case, the registry offices cannot be applicants on their own, as the rights they protect do not belong to them. Besides, they cannot represent the applicants as they do not have such powers.

Therefore, welcoming the introduction of the administrative procedure for recognizing the facts of birth and death that took place in the temporarily occupied territories of Ukraine, we consider it appropriate to leave the judicial procedure for establishing these facts in a simplified procedure as it is now, with the parallel introduction of administrative procedures for establishing the facts of birth and deaths in the occupied territories.

### 9. The risk of deterioration of the situation of persons in comparison with the current situation

Declaring a common approach to all temporarily occupied territories of Ukraine (the Autonomous Republic of Crimea and the city of Sevastopol, separate territories of Donetsk and Luhansk oblasts), the provisions of the Draft extend to all occupied territories the legislation that currently applies to only one of the occupied territories. And this can have significant negative consequences if the legal norms that are disseminated are outdated or lead to human rights violations.

Thus, in accordance with Part 2 of Article 56 of the Draft, entry of persons, movement of goods into the temporarily occupied territories and departure of persons, movement of goods from such territories are carried out through entry-exit checkpoints, where border and customs control is introduced. According to Part 4 of the same Article of the Draft, the supply of goods (works, services) from the temporarily occupied territories and to the temporarily occupied territories is prohibited for the period of temporary occupation, except for:

1) personal belongings of citizens specified in Part 1 of Article 370 of the Customs Code of Ukraine (except for goods specified in paragraph 24 of Part 1 of this Article), which are moved in hand luggage and / or accompanied luggage;

2) socially significant foodstuffs moved by individuals, the total invoice value of which does not exceed the equivalent of ten subsistence minimums for able-bodied persons, established on January 1 of the relevant year, and the total weight of which does not exceed 50 kilograms per person, according to the list to be approved by the Cabinet of Ministers of Ukraine.

These provisions, which are currently contained in the Law of Ukraine “On Creation of a Free Economic Zone “Crimea” and Peculiarities of Economic Activity in the Temporarily Occupied Territory of Ukraine”, regulate the movement of things across the administrative border with the temporarily

occupied territory of Crimea. According to the Draft, it is proposed to extend this practice to the crossing of the demarcation line in Donetsk and Luhansk oblasts, where completely different rules are currently in force, more progressive (in particular, instead of the list of permitted goods, there is a list of prohibited ones).

It is also worth mentioning that the use of the Customs Code of Ukraine within the country, as well as the establishment of a list of items allowed for transportation, has long been criticized by both national human rights organizations and international ones.[10] At the same time, the introduction of a customs regime within the country is a significant reputational risk for the state and does not contribute to establishing ties with the residents of the occupied territories, as the proposed restrictions primarily concern the citizens of Ukraine.

Concerning the issuing documents on birth, death, marriage or divorce, the authors of the Draft propose to introduce parallel administrative and judicial procedures. Herewith, the bodies of registration of civil status acts are entrusted with unusual functions of appealing to the court (while in similar situations that take place in the controlled territory of Ukraine, individuals apply to the court independently). If it was expected to relieve some of the burdens on people living in the temporarily occupied territories, the additional burden on registrars and courts was not taken into account, which could lead to a backlog of cases pending. Concerning the recognition of facts, the administrative procedure should be prioritized and established in detail and step by step, and the trial should be applied only to complex cases.

Part 3 of Article 25 of this draft law is discriminatory in relation to religious organizations (and their parishioners), the guidance centre of which is located on the territory of the Russian Federation. This wording contradicts Articles 21 and 35 of the Constitution, which guarantee the equality of all persons and freedom of thought and religion. It is proposed to change the wording "the guidance centre of which is located on the territory of the aggressor state" to "the guidance centre of which is located outside Ukraine."

**Conclusion:** The development and publication by the Ministry of Reintegration of the Temporarily Occupied Territories of the Draft Law "On the State Policy of the Transition Period" is a very important step to start a broad public discussion on issues related to overcoming the consequences of the Russian aggression against Ukraine, deoccupation and reintegration of the temporarily occupied territories of Ukraine. Besides, the Draft proposes a number of positive changes for people living in the occupied territories. In particular, it is the introduction of an administrative procedure for establishing the facts of birth and death for residents of the temporarily occupied territories in Donetsk and Luhansk oblasts, as well as in the Autonomous Republic of Crimea and the city of Sevastopol; determination of guarantees of pension provision for residents of the occupied territories without reference to the receipt of an IDP certificate; the abolition of the permit system for crossing the demarcation line, etc.

At the same time, the Draft contains rather controversial provisions, some of which may even worsen the situation with the realization of the rights and freedoms of victims of the conflict, compared to the

[10] Mid-term report by the Coalition of NGOs based on Report of the Working Group on the Universal Periodic Review for Ukraine: Measures of the state policy to build / restore the confidence of residents of the temporarily occupied territories to the Ukrainian state, government, society: analytical report (summary) / [V. Yablonsky, Yu. Tishchenko, O. Martynenko and others]; under general ed. Yu. Tishchenko. - Kyiv: NISS, 2019

current situation. Given that the state policy of the transition period really should cover a wide variety of areas, the very fact that the authors of the Draft have decided to do so is to be welcomed. At the same time, if we follow this logic, the relevant Draft should be a framework and contain a general concept for the implementation of such a policy, ie lay down the fundamental provisions for its implementation and define clear boundaries. However, the presented text of the Draft is not a framework and therefore has an ambitious goal to provide answers to the main questions that arise in connection with the armed aggression of the Russian Federation against Ukraine. Nonetheless, this goal obviously cannot be achieved within one Law. Thus, the question arises as to the expediency of adopting one general law instead of a number of special laws that will regulate specific legal issues related to the armed conflict in Ukraine and overcoming its negative consequences.

**Thus, the Draft Law "On State Policy of the Transition Period" needs to be significantly refined with the involvement of experts from national and international organizations, as well as relevant government agencies.**

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The Analysis was prepared by the experts of non-governmental human rights and charitable organizations:

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