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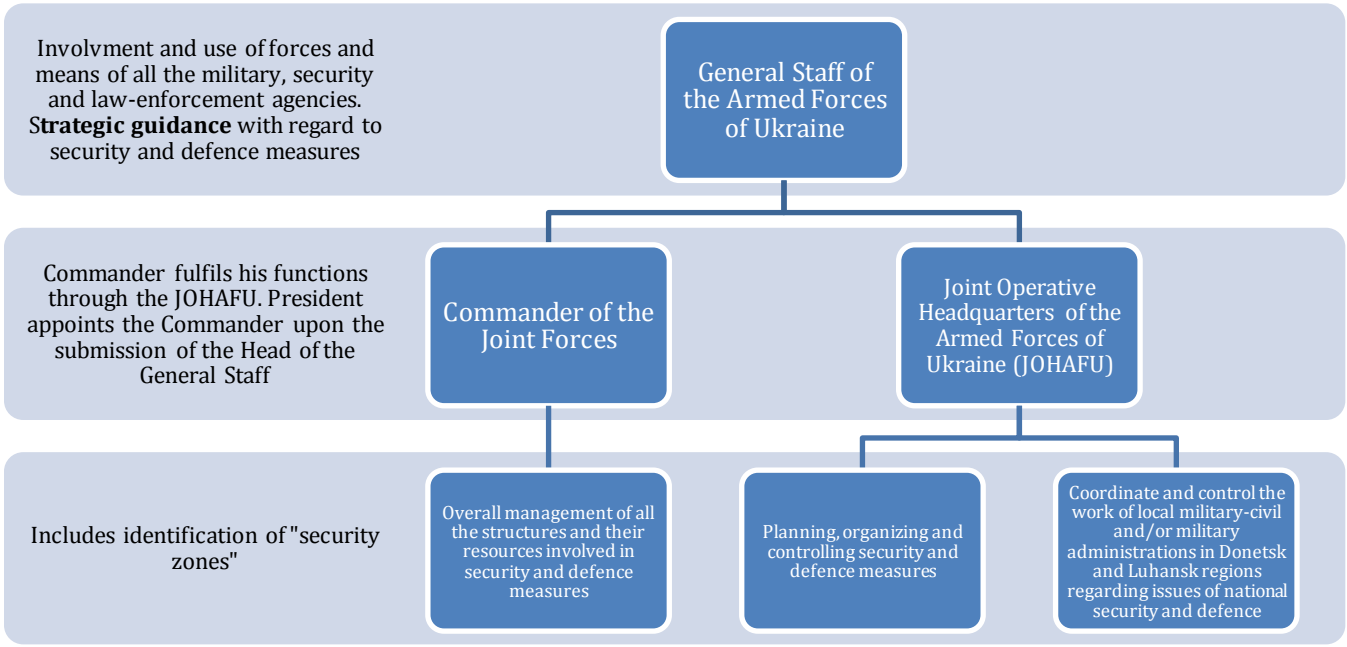
Briefing note: Analysis of the law of Ukraine "On particular aspects of public policy aimed at safeguarding state sovereignty of Ukraine over the temporarily occupied territory of Donetsk and Luhansk regions" [1]

On 18 January 2018, Parliament adopted the law "On particular aspects of public policy aimed at safeguarding state sovereignty of Ukraine over the temporarily occupied territory of Donetsk and Luhansk regions"[2]. The primary aims of this law are: to declare that the non-government controlled parts of the Donetsk and Luhansk regions are "temporarily occupied territories;" to identify the legal framework for security and defence activities in the east; and to lay down basic principles of human rights protection for the conflict-affected population. The law identifies the Russian Federation as the "aggressor state" and as the occupying power with all the pertinent references to international law, including international humanitarian law. The law attributes to the Russian Federation all responsibility for actions of the de facto authorities and of military formations in parts of Donetsk and Luhansk regions. The law identifies frameworks for conducting so-called "measures for ensuring national security and defence and for the cutting off and containing of the armed aggression of the Russian Federation" (hereinafter - "security and defence measures"). The law also states that Ukraine shall prioritize diplomatic and political means for settling the conflict.

The law gives the Cabinet of Ministers one month to elaborate all necessary by-laws and amend existing legislation for the full implementation of this law. At the same time it says that all previously existing provisions remain in force until replacement measures are adopted. This creates some flexibility in case it takes longer to elaborate necessary normative changes.

Institutional structure related to the conducting of security and defence measures

The law introduces changes to the command structure for the implementation of security and defence measures in Articles 7-9[3]:



[1] As the purpose of this document is to analyse the provisions of the law, the document draws on terminology used in the law. The analysis does not imply UNHCR's endorsement of this terminology.

[2] The President signed the law on 21 February 2018. It was published on 23 February and entered into force on 24 February 2018. The text is available online (in Ukrainian): http://zakon0.rada.gov.ua/laws/show/2268-viii

[3] They are further elaborated in the Law on Defence of Ukraine. Amendments are also expected with the adoption of the law on National Security (the draft is under Parliament's consideration).

The Cabinet of Ministers is responsible for providing all means and resources to all the military, security and law-enforcement agencies[4] involved in security and defence measures.

Although the law declares Ukraine's commitment to diplomatic and political settlement of the armed conflict (Preamble), the structure presupposes active use of armed forces "as per Article 51 of the United Nations Charter" (Article 11).

Part four of Article 13 (Final and Transitional Provisions) stipulates amendments to a number of legal acts that may modify the work of local authorities and limit local self-government. It also introduces necessary amendments that would allow smooth transfer of powers to military administrations in case martial law were introduced in some parts of Donetsk and Luhansk regions.

Various provisions amend the laws of Ukraine "On local self-government", "On military-civil administrations" and "On martial law"(see points 2, 3 and 4 of the said part 4 of Article 13). Analysis of these amendments leads to the following conclusions:

- Two types of civil-military administration may exist: the current type of civil-military administration functions within the ATO and is under the general control and coordination of the anti-terrorist centre; another type of civil-military administration may be established within the framework of the security and defence measures and under the coordination of the Commander of the Joint Forces. The interlink between the two structures is unclear.
- Preconditions for introduction of the martial law regime in some parts of Donetsk and Luhansk regions are established. In particular, legislation on martial law is amended to introduce the possibility of substituting any local state administration and/or any civil-military administration with a military administration (if martial law is introduced by presidential order upon the submission of either the oblast state administration or the military command[5]).
- In case military administrations are established, self-government authorities (local councils) of the same level are dismissed until martial law is lifted. This concerns Donetsk and Luhansk regions only.
- If martial law were adopted, the President would have control over the entire structure of governance in Donetsk and Luhansk regions as he would appoint the heads of military administrations of all levels, as well as of the Commander of Joint Forces who would submit candidatures for the posts of heads of military administrations.

Legal regimes of different conflict-affected territories

The law identifies several geographic areas that have different legal regimes and where state authorities exercise different functions.

	Temporarily occupied territories (TOT)	Security zones	Areas of implementation of security and defence measures
Description of territory according to the law	Territories where the Russian armed groups and the Russian occupying administrations[6] fulfil general control (Article 1). The law declares that irrespective of duration, no territorial title stems from the occupation for the	Territories adjacent to the areas of hostilities (point 2 part one Article 8). However, "areas of hostilities" are not identified.	Areas where the measures for ensuring national security and defence and for the cutting off and containing of the armed aggression of the Russian Federation in Donetsk and

[4] "Military, security and law-enforcement agencies" include the Armed Forces of Ukraine, the State Security Service of Ukraine, the State Service of Special Communication and Protection of Information, the Department of State Security, the Special State Transport Service, law-enforcement organs with special functions, the National Police of Ukraine, the National Guard of Ukraine, military prosecutors and the State Emergency Service of Ukraine (Article 8 of the analysed Law).

[5] The law of Ukraine "On martial law regime" does not specify the level of "military command" but in the view of the current law it may mean the Commander of the Joint Forces, since according to further amendments this individual is going to be responsible for direction, coordination and control over the activities of oblast level military administrations.

[6] Paragraph 13 of the Preamble to the law states that "armed groups of the Russian Federation" include regular armed forces and irregular armed squads "established, controlled and financed by the Russian Federation". Under the "occupying administration of the Russian Federation" the law also means self-proclaimed republics, which are "under the control of the Russian Federation".

	Russian Federation (part two Article 2). The Russian Federation is declared responsible for violating the rights of civilians on the TOT (Article 7 part two)		Luhansk oblasts take place (part four Article 12)
Authority responsible for defining this territory	President, upon the submission of the General Staff of the Armed Forces of Ukraine	The Head of the Headquarters of the Armed Forces of Ukraine based on the submission of the Commander of the Joint Forces	President of Ukraine for identification of temporal scope; Commander of the Joint Forces for restrictions on presence in the area.
Geographic scope	Include "boundaries, list of rayons, cities/towns and villages" (will coincide with the territories beyond governmental control; includes sea, air and subsoils)	Due to the operative and dynamic nature of hostilities, it is hard to set those and security zones in the law. However, the law also does not identify how far "security zones" could stretch (how many kilometres from the outer line of active hostilities).	Not provided. It is not clear to which extent these areas may coincide with security zones and areas of hostilities
Temporal scope	President will declare de-occupation upon the joint submission from the Minister of Defence and the Minister of Interior (Article 7 part three).	Not provided	The initiation and conclusion of such measures are to be declared by a separate decision of the President of Ukraine in his role as the Supreme Commander (part three Article 8)
Expected restrictions	Rules for crossing the boundary with the TOT and transferring goods (including personal belongings) shall be laid down by the Cabinet of Ministers of Ukraine (Article 12 part three). Commander of the Joint Forces may limit individuals' entering the TOT (no provision regarding leaving the TOT) in case of "real danger to life and safety of individuals crossing the boundary" (Article 12 part two).	Expanded functions of military, security and law-enforcement agencies (see next section)	The Commander of the Joint Forces may temporarily (for the period of implementation of security and defence measures) restrict presence of individuals not involved in security and defence measures in the area of their implementation (part four Article 12). Potential risks of this provision are described below ("Implications for humanitarian access").
Comments	While elaborating further by-laws, the following advocacy priorities are identified: (1) the Armed Forces are called to use Cabinet of Ministers Decree 1085-r as a reference point for the development of the list of occupied settlements and settlements along the line of contact. Ensure that all the recommendations previously voiced by international and non-governmental organizations are taken into account; (2) Rules of goods (personal belongings) transfer across the TOT boundary must be based on the principle of listing of	Taking into account extensive functions (set out in Article 12 and described below) of military, security and law-enforcement agents involved in security and defence measures and their potential impact on personnel of humanitarian organizations and non-governmental organizations, as well as on civilians, it is important to understand the geographic scope of such functions.	The "zone of the anti-terrorist operation (ATO)" is mentioned in final provisions as a subcomponent of the security and defence measures (Article 13 part four point 3). This may indicate an intention to have the two legal regimes run concurrently on the same territory.

	prohibited rather than permitted items; (3) New rules of crossing the line of contact must not be changed to the detriment of rights of individuals crossing the contact line. Every step shall be taken in order to clarify functioning of the entry-exit checkpoints and their maintenance; simplify (or, at a minimum, preserve) the existing system of e-passes in order to prevent any drastic change for individuals; properly communicate any changes related to crossing the contact line to individuals on both sides.		

Special functions of law-enforcement and military formations in security zones

The law gives military and law-enforcement agencies special functions in security zones (see part six of Article 12). Some of the functions may have implications for the human rights protection of civilians residing in areas close to the hostilities. They may also affect the work of humanitarian organizations working close to the contact line. Since there is uncertainty about the geographic and temporal scope of security zones, the extent of the impact is unclear. The table below describes the special functions and their potential impact.

Function	Potential impact
Use of weapons and special tools in case of an extreme necessity towards individuals who have committed or are committing an offense, or are impeding the conduct of security and defence measures, or attempting an unauthorized entry into areas where security and defence measures are taking place. Apprehend such individuals and transfer them to units of the National Police.	The law uses a term “offense,” not a “crime”, which creates scope for weapons or special tools to be used disproportionately. Mitigation measures may include elaboration of respective instructions for the involved personnel of military, security and law-enforcement agencies.
Check documents; in case an individual fails to provide documents, apprehend him/her for identification. Search individuals, their belongings and any accompanying means of transportation.	There are no qualifying criteria outlining the acceptable purpose and means for conducting these checks and searches. This is left to the sole discretion of any military and law-enforcement agent involved in the security and defence measures. Mitigation measures may include elaboration of respective instructions for the involved personnel of military, security and law-enforcement agencies.
Temporarily restrict movement of pedestrians and vehicles on the streets; restrict entering and leaving certain areas; remove individuals from certain areas/objects.	There are no exceptions for diplomats, workers of special monitoring missions or humanitarian organizations. On the one hand, this function may be used to protect civilians from the effects of hostilities. On the other hand, with no clear grounds for such actions, this could be overused or used arbitrarily to restrict activities of certain organizations/individuals. Mitigation measures may include elaboration of respective instructions for the involved personnel of military, security and law-enforcement agencies.

Enter (penetrate) any buildings, objects, transport. Use transport and means of communication of any individual if required by the necessity of security and defence measures. There is an exception for the expropriation of transport and means of communication of diplomatic missions and international organizations.	This provision may result in undocumented use of civilian property, including houses and other buildings, vehicles and means of communication. Mitigation measures may include elaboration of respective instructions for the involved personnel of military, security and law-enforcement agencies. It is also important that the authorities clearly document such cases, and that civilians are aware of the possibility of such scenarios and provided with respective documents certifying use of their property.

Recommendation: since the law sets out a framework for conducting security and defence measures, it is advisable that special by-law(s) shall be passed in order to ensure that security measures are not implemented to the detriment of human rights observance. Particular attention shall be paid to the proper documentation of military use of civilian houses and other property in order to ensure property rights observance. Any implementation of these special functions should be necessary, proportionate and non-discriminatory.

Human rights implications for residents of TOT, residents of areas where security and defence measures take place, and residents of security zones

The law contains a number of important provisions that signify adherence to international obligations and aim at establishing an environment conducive to the protection of human rights. For example, the law states that a special order of safeguarding human rights of civilian population covers the TOT in Donetsk and Luhansk regions as per international treaties, rules and principles of international law and according to national legislation (Article 2 part five). It declares protection of rights, freedoms and legitimate interests of individuals and legal entities to be one of the aims of public policy on safeguarding state sovereignty of Ukraine on TOT (Article 4, point 2) and tasks respective state authorities and their personnel to implement measures to protect rights and freedoms of civilians (Article 5, point 1).

Article 6 of the law is fully devoted to the human rights protection of residents of the TOT and in this regard includes: protection of fundamental political and civil rights; releasing persons detained in the TOT; contribution to ensuring remedies for breached material rights; provision of legal and humanitarian aid; and ensuring access to medical and social services on government-controlled territory. The law expands the functions of the Ministry of TOT and IDPs by giving it responsibility for implementing measures related to safeguarding social, economic, ecological and cultural needs of the residents of TOT.

The final text of the law contains certain improvements as compared to previous draft texts. For example, the final text eliminated provisions that would have: (i) imposed blanket criminal responsibility on individuals participating in occupying administrations and/or armed groups; (ii) permitted wiretapping without court authorization throughout the territory of Ukraine; and (iii) disproportionately expanded the law enforcement functions of the military prosecutors' offices.

Below is the summary of important human rights issues addressed in the law.

- *Birth and death related documents* are exempt from the general rule of non-recognition of documents issued by occupying administrations[7]. According to the law, they may be attached to applications for birth/death registration in Ukraine, which potentially would simplify the current judicial procedure for birth registration.

[7] The law is ambiguous in stating that all activities of the occupying power non-compliant with international law are illegal and any acts issued in relation to such activities are null and void. However, registration of birth and death cannot be non-compliant with international law, since these are natural facts that take place in lives of every individuals. On the contrary, non-recognition of facts of birth and death would lead to impossibility to be recognized as a person before the law and thus to impossibility to utilize any of human rights. Therefore, although the message of recognition of documents related to birth and death is a positive development, interpreted literally as per part three of Article 2, it is put into a controversial context.

However, establishment of administrative procedures would require the elaboration of by-laws with detailed procedures.[8]

Recommendation: elaborate necessary by-laws that would ensure a system of birth/death registration that is responsive to the specific needs of persons living in NGCA, such as through an administrative procedure. In order to prevent discrimination, the same measures should apply to residents of Crimea.

- Final provisions amended the law on court fees, *lifting court fees* for cases related to establishment of legal facts, such as *birth and death*, as well as facts related to *breach of rights to movable and immovable property*. This may include facts necessary for the instatement of pensions (including proof of work experience, work in harsh conditions, education etc.). If applied to the range of legal facts, this provision would increase access to justice, civil documentation and property. However, the provision is written in very complicated manner and has reference to forced displacement and a link to enforced disappearances. If interpreted literally, it may mean that only IDPs (and not residents of TOT) may be exempt from court fees in cases related to the recognition of legal facts.

Recommendation: there is a need to ensure that residents of TOT (irrespective of their origin from Crimea or Donetsk and Luhansk regions) are exempt from court fees in cases related to the establishment/recognition of legal facts including facts of birth and death[9].

- The currently existing *judicial jurisdiction* for cases that originate in the non-government-controlled areas of Donetsk and Luhansk regions was preserved as per the law on the administration of justice and criminal procedures[10]. This is an improvement since the previous draft would have required all cases to be heard in Kyiv, a provision that would have made justice less accessible.
- The law declares the *preservation of property rights* of individuals declared in part six of Article 2. This provision makes it clear that property rights remain intact irrespective of changes in legal status of an individual or his/her registration as an IDP. The provision aims at preserving rights to movable property and to immovable property located in the TOT. If interpreted in light of Ukraine's international legal obligations, the provision on preservation of rights to movable property would include the right to pension for residents of TOT Donetsk and Luhansk regions. Under the provisions of international law and case law of the European Court for Human Rights (ECtHR), pensions are considered a type of property. Furthermore, this interpretation is reinforced by other provisions in the law (such point 4 of part one of Article 6), which say that the Ukrainian authorities shall implement measures in order to safeguard social and economic needs of residents of TOT. Pensions are an important source of income for many individuals and satisfy their economic needs. Taken together, these provisions would support the adoption of a mechanism that would ensure access to pensions.
- The law does not provide a clear-cut answer to the issue of *compensation for destroyed or damaged property*. The law states that responsibility for pecuniary and non-pecuniary damage *caused to Ukraine* is laid on the Russian Federation (part four of Article 2). However, this particular provision says nothing about damage caused to individuals or enterprises. The law declares that Ukraine bears no responsibility for illegal actions of

[8] The text of part four of Article 2 is ambiguous. On the one hand, it states that activities of the occupying power contrary to the norms of international law are illegal. On the other hand, the wording of the second half of the sentence implies that birth and death registration are examples of illegal activities conducted by the occupying authorities. This literal interpretation may lead to the illogical conclusion that birth or death registration is an example of an illegal activity. To avoid contradiction, it is advisable to interpret this provision in light of international humanitarian law (IHL). IHL lays out the obligations of an occupying power, which include "taking all measures… to restore and ensure, as far as possible, public order and civil life" on the occupied territory (Article 43 of the 1907 Hague Regulations). The Fourth Geneva Convention on the Protection of Civilian Population (1949) suggests that the occupation may entail changes in administration, institutional setting and/or normative regulation. However, it underlines that any changes shall not diminish or in other way affect benefits to the civilian population as listed in the text of the Convention (Article 47 of the IV Geneva Convention). Therefore, the law's provisions shall be read with the view that the lawmaker intended to prohibit only those activities and acts stemming from them that violate international law and IHL in particular. If interpreted to the contrary (as if "all activities of an occupying power are illegal"), the provision may have unexpectedly negative and overly broad implications for the whole population of the TOT.

[9] At the time of preparation of this analysis an oral confirmation has been received from the State Court Administration that all residents of the TOT (including Crimea and Donetsk and Luhansk regions) are exempt from court fees in cases related to birth and death registration.

[10] The law of Ukraine "On fulfilment of justice and administration of criminal cases due to the anti-terrorist operation" was adopted in summer of 2014. The full text in Ukrainian is available online: http://zakon2.rada.gov.ua/laws/show/1632-18

the Russian Federation and its occupying administration (part six of Article 6). However, damage caused to property could be attributed to different parties to the conflict. Furthermore, the law states that Ukraine must contribute to ensuring restoration of breached material (property) rights of civilians at the TOT (point 2 of part one of Article 6). Whether or not this includes a right to be compensated for lost or damaged property depends on further implementation of the law.

- The law says that residents of the TOT shall benefit from receiving medical and social services on government-controlled territory (point 5 of part one of Article 6). If fulfilled, this provision may have a positive effect on the well-being of these persons, as well as on preservation of social cohesion.

The Cabinet of Ministers of Ukraine is expected to conduct permanent monitoring of the human rights situation on the TOT and to share this information with international organizations. The Ombudsperson is expected to provide Parliament when requested with a special report on the observance of human rights on the TOT.

Application of the law on TOT Crimea (2014)

The law says that the whole body of the law on TOT Crimea (2014)[11] is applicable *mutatis mutandis* to the TOT in Donetsk and Luhansk regions (part eight of Article 2) with two exceptions: the rules on crossing the boundary with the TOT and the rules of jurisdiction of courts. The caveat regarding "mutatis mutandis" means that certain provisions require adjustment prior their application to the factual circumstances of Donetsk and Luhansk regions. However, some provisions may be applicable with no modifications. Some provisions are neutral, while others may be beneficial or damaging:

- Protection of cultural heritage (if any) as per part seven of Article 5 of TOT Crimea law may be replicated.
- Application of the 2014 law may limit access to compensation for damage to private property (see part six of Article 5). The 2014 law states that the Russian Federation is responsible for any material and moral damage to individuals and enterprises caused in the course of occupation. Even though the 2018 law shall not have retroactive force in terms of compensation for lost or damaged property, this particular provision may limit the possibility to claim any compensation for property damage from Ukraine. This may be especially true since the 2018 law declared that the date of the start of the occupation is set in the TOT Crimea law (February 2014). Therefore, courts could interpret this article as applying to any damage occurring since February 2014. Up until now, individuals have been able to file claims in Ukrainian court for compensation of damaged property relying on the provisions in legislation on counter-acting terrorism. That is, they claimed compensation for property damaged by terrorism. It is not clear whether this argument will still be considered valid. Even if the ATO is considered a component of the security and defense measures, it will be necessary to provide additional legal arguments in light of these new provisions. The outcome will be clear only after a new round of adjudication to the highest levels. In any case, it would be beneficial to advocate for an administrative procedure for compensation in cases of lost/damaged property.
- The 2014 law states that residents of the TOT may receive a certificate confirming their place of factual residence on government-controlled territory from any State Migration Service office without IDP registration (part four of Article 6). Now this provision will also apply to persons from the TOT in Donetsk and Luhansk regions. They will be able to use these certificates for different purposes, including applying for social benefits (apart from the targeted IDP assistance), applying for pensions, enrolling children in schools or using services of local polyclinics. Use of this procedure does not prejudice any future or existing IDP registration.
- Article 8 of the TOT Crimea law allows residents of the TOT to participate in all-Ukrainian elections at any location in government-controlled territory without changing their "electoral address" and without the need to register as IDPs. This is based on special provisions of the law on State Registry of Electors of Ukraine. This may allow preserving political links with TOT.
- Article 11-1 concerns inheritance rights and if applicable to cases with property at the TOT Donetsk and Luhansk regions may be considered a *positive development* since it allows legal transfer of property rights in case of inheritance through services of any notary on government-controlled territory.

[11] The law of Ukraine "On ensuring rights and freedoms of citizens and legal regime at the temporarily occupied territory" is available online in Ukrainian: http://zakon2.rada.gov.ua/laws/show/1207-18

Implications for humanitarian access

The law states that the Commander of Joint Forces may temporarily restrict the stay of individuals "not involved in conducting" security and defence measures "for the duration of implementation of such measures" (paragraph four of Article 12). The modal verb "may" indicates that this is a discretion of the Commander of the Joint Forces, not his obligation. The criteria for the application of Commander's discretion are not identified in the law. On a positive note, the wording of this provision improved as compared to the previous draft. In the previous draft, it was required to obtain permission from the Commander of the Joint Forces to be present in this area. That would have created a general rule of non-access, and exceptional grants of access. As adopted, the law creates a general rule of access, and exceptional decisions on non-access. However, the present formula could result in limitations on humanitarian access:

- The duration of the temporary restriction of access to these territories is not clear. In particular, it is not clear if "temporarily" means "the period of implementation of such measures". If so, then "temporary restriction" may last from the moment of its announcement and until the end of the security and defense measures announced by the President.
- It is not clear who will be affected by this provision. It is also unclear if there are groups of individuals (civilian residents of such areas or workers of humanitarian organizations) with regard to whom temporary restrictions could be applied only in cases of extreme need (e.g. in life-threatening situations).

Recommendation: it would be advisable that the authorities explain the objective circumstances that would lead to the imposition of temporary restrictions on presence. This may help in planning operations related to humanitarian activities. Unimpeded access for humanitarian organizations is a precondition for provision of timely and effective assistance.

UNHCR Ukraine
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