

An internally displaced family in Triokhizbenka, Ukraine. Photo: NRC/ Ingrid Prestetun, November 2015

BRIEFING PAPER

UKRAINE: TRANSLATING IDPS' PROTECTION INTO LEGISLATIVE ACTION

Prominent gaps in Ukraine's IDP law remain despite some improvements

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More than 1.6 million people are registered as internally displaced in Ukraine. Most have been forced to flee their homes over the past two years as a result of the political chaos sparked by anti-government protests in 2014, Russia's annexation of Crimea, the self-proclamation of the "people's republics" of Donetsk and Luhansk and intense armed conflict in the east of the country.¹ Those who have fled from Donbas and Crimea to other regions in Ukraine are referred to as *pereselentsi*, a Russian term for "relocated people" or "migrants" that is taken locally to mean internally displaced people (IDPs).

The number of people registered as displaced has continued to grow despite the ceasefire envisaged under the February 2015 Minsk II agreement. As of November 2016, the Ministry of Labour and Social Policy (MoSP) put the number of registered IDPs in the country at 1,663,843.² The real number is likely to be different because the MoSP figure includes some registered IDPs who live in or have returned to non-government controlled areas (NGCAs), but excludes IDPs who are not willing, able or eligible to register.

This paper provides an overview of issues that have emerged during Ukraine's development of a normative response to internal displacement, and the challenges inherent in imple-

menting the regulatory framework that was established at the onset of the crisis. It focuses on three areas that are clearly problematic: IDPs' registration and the granting of a legal status for them; civil registration and the issuance of documents; and effective and non-discriminatory access to social benefits and pensions.

The analysis reveals that a number of legislative initiatives may be needed to address these concerns:

- Amend the law on civil status registration to ensure that IDPs living in NGCAs have access to the administrative procedures for the issuing of birth, marriage and death certificates, and to guarantee that the procedures do not discriminate against unregistered IDPs
- Decouple access to social benefits from the recognition of status as an IDP by amending or revoking the appropriate cabinet regulations
- Mandate the Ministry of Temporary Occupied Territories and Internally Displaced Persons to coordinate state policymaking on displacement, and ensure budget allocations for national policy implementation
- Eliminate legal provisions that require IDPs living in NGCAs to cross the contact line in order to obtain or renew their documents
- Ensure that IDPs living in NGCAs have unrestricted access to state services without reference to their registered place of residence

- Ensure that civil registration procedures are non-discriminatory toward IDPs
- Introduce amendments to guarantee thoroughly considered criteria for the termination of social payments

LEGISLATIVE DEVELOPMENTS TO PROTECT IDPS' RIGHTS

Faced with a growing displacement crisis, the Ukrainian government developed a law on IDPs' rights and freedoms with support from the protection cluster led by the UN Refugee Agency (UNHCR). The legislation was enacted in October 2014.³ It upholds core international standards reflected in the Guiding Principles on Internal Displacement and addresses key protection concerns by incorporating an anti-discrimination provision, a guarantee of assistance for voluntary returns and access to social and economic services including residence registration, employment and healthcare.

A number of gaps, however, became apparent during implementation. These related to IDPs' registration, their access to social benefits and civil documentation, and the absence of a government institution that acts as a focal point on IDPs.

Broadening the scope of protection

The eligibility criteria for registration as an IDP have improved with legislative developments. Cabinet resolution 509 and the 2014 law on IDPs originally included definitions that determined who was eligible for registration, and further cabinet orders dealt with applicable geographical areas. There were, however, significant inconsistencies between the law and the cabinet resolutions, and the issue was repeatedly flagged as undermining IDPs' registration and protection.⁴ Resolution 509 also stated that children could only be registered by their parents or legal guardians, which left unaccompanied minors poorly protected.

IDPs' limited eligibility also meant limited access to support. Cabinet resolutions 637 and 505 adopted on 5 November 2014 and 1 October 2014 respectively regulate social benefits and targeted financial support for IDPs. Only IDPs who hold a certificate confirming their registration as such are eligible to receive the state benefits offered to IDPs, however, and as stated in resolution 509 of 1 October 2014 - which was adopted to facilitate implementation of the 2014 law - registration is only possible in government-controlled areas (GCAs), obliging them to cross the line of control to register, excluding those displaced within NGCAs.

Several legal developments have since broadened the scope of IDPs' protection by ensuring access to rights for those who were previously not eligible to register. On 24 December 2015, parliament adopted an amendment to the 2014 law that expanded the definition of an IDP to include displaced foreigners and stateless people.⁵ Cabinet resolution 352 adopted on 8 June 2016 allows for the acceptance of a wider range of evidence for registration, including various types of documents, photos and videos, and establishes an unlimited validity period for registration certificates. It also confirms that IDPs registered in NGCAs who have served or are currently serving prison sentences are eligible to apply.

These developments also improved the protection of internally displaced children. Resolution 352 simplified registration procedures for those with no parents or legal

guardians present. Local governments are now authorised to register unaccompanied children in an effort to ensure that they are quickly assigned carers. Cabinet resolution 1014, which amended resolution 505, improved their protection by enabling distant relatives and temporary carers to apply for financial assistance on their behalf. Law 936-VIII (2254), which came into effect on 21 February 2016, enables IDPs aged 14 to 17 to apply for registration independently.⁶

These provisions are particularly important. The conflict has affected around 580,000 children in Donetsk and Luhansk regions, of whom 14,500 were already deprived of parental care before the fighting broke out.⁷ Unaccompanied children also continue to cross the contact line.⁹ In April 2016, 21 displaced orphans without valid certificates confirming their registration as IDPs were identified in Odessa *oblast*.¹⁰

Less cumbersome registration process

Legislative developments have also simplified the registration process for IDPs. The process is directly linked to Ukraine's residence registration system, and originally IDPs had to present a valid identification document and permanent residence registration in a recognised conflict zone to register and receive a certificate. If an IDP was absent when the state migration service arrived unannounced to verify their current address, their certificate was invalidated. IDPs who lost or lacked valid identification documents were not eligible to register.

The application of cabinet resolutions regulating registration and social benefits for IDPs exposed their practical shortcomings and identified a pressing need to adopt further amendments to guarantee an inclusive approach. As a result, cabinet resolutions 352 and 365 - both adopted on 8 June 2016 - established the unlimited validity of certificates and less rigorous proof of residence requirements, including the cancellation of the need for state migration service stamps confirming place of residence. These measures make it easier for IDPs to qualify for social payments on the basis of registration at their place of habitual residence.

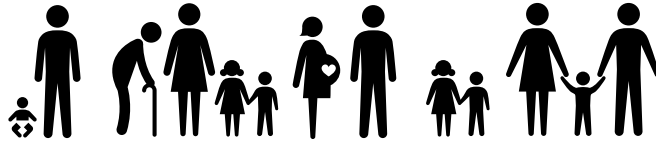
Improvements in civil registration

The inability of IDPs living in NGCAs to apply for civil documentation has been a major concern for local NGOs and international organisations, and a source of frustration for IDPs. The 2014 law only guarantees IDPs' rights and freedoms in areas under government control, leaving those in NGCAs and contact line settlements such as the Yasunuvata and Maryinka districts of Donetsk with no access to the national civil registration system.¹¹

In an effort to close this gap, new legislation introduced in February 2016 allows relatives and other legal representatives to apply to courts in GCAs to establish details of births and deaths in NGCAs.¹² It also stipulates that such cases should be given immediate consideration and prompt judicial rulings. According to data from the Ministry of Justice, 6,000 IDPs living in NGCAs exercised their rights under the new amendment in the first three months after its enactment, which has improved their access to social benefits.¹³

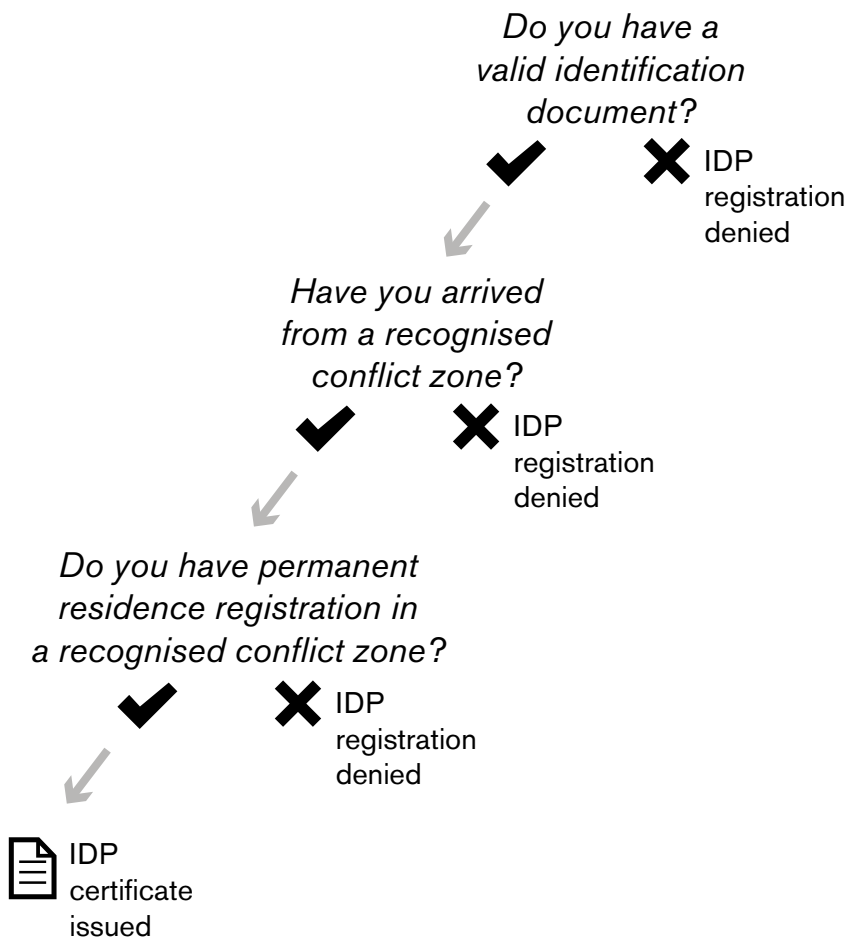
Formal obstacles to registration of IDPs in Ukraine

IDPs must acquire a permit to cross to a GCA.



Non-government-controlled area (NGCA)

Government-controlled area (GCA)



✗

Not counted or eligible to register:

People displaced within a NGCA

People displaced from an unrecognised conflict zone in a GCA

Other obstacles to registration



Limited mobility



Fear of conscription



Fear for safety of relatives who did not flee



Fear of confiscation or damage to property left behind



Lack of information

Institutional reform

Following a series of calls from the international community, including the Council of Europe, in April 2016 the Ukrainian government established the Ministry of Temporary Occupied Territories and Internally Displaced Persons (MTOTIDP) via cabinet resolution 376.¹⁴ The new entity, which focuses on IDPs' issues, is the designated focal point for improving the protection of their human rights and coordinating a comprehensive response to internal displacement across government and international stakeholders.¹⁵

The resolution does not assign a leading role to the new ministry in tackling the displacement crisis, but rather outlines its participatory role in the formulation and implementation of state policy on IDPs. Given that MoSP had previously been leading efforts to deal with displacement, and the division of responsibilities is unclear, there is a risk that functions will be duplicated. To avoid this happening, the new ministry's role needs to be revised to make it the main coordinating body.¹⁶

Before MTOTIDP was established, the cabinet of ministers adopted the Comprehensive State Programme for Support, Social Adaptation and Reintegration of IDPs until 2017, along with an accompanying action plan. At the time of writing, however, no funds have been allocated for its implementation, which makes the programme little more than a statement of intent.¹⁷ Both the establishment of the new ministry and the adoption of the state programme signify progress toward a long-term strategy on displacement, but further work is required to define MTOTIDPs' responsibilities in achieving the targets envisaged in the programme, and to secure funding for it to carry them out.

CONTINUING CHALLENGES

Overly strict registration requirements

Despite the legislative developments outlined above, IDPs living in NGCAs still have to cross the contact line to register and claim the social benefits that registration brings, as stipulated in cabinet resolutions 637 and 595. This setup may encourage further waves of displacement from NGCAs to GCAs rather than within NGCAs.¹⁸ It also compels IDPs to flee onward to certain areas, regardless of the risks inherent in making the journey, or those that they may or may not face in NGCAs.

As such, cabinet resolutions 637 and 595 are not compliant with the Guiding Principle 14, which guarantees IDPs' freedom of movement and choice of residence. They also violate Guiding Principle four, which prohibits discrimination based on their "legal status, property, birth or any other similar criteria" and the non-discriminatory provision of article 24 of Ukraine's law on IDPs. The Court of Cassation has ruled resolution 595 discriminatory and therefore illegal in its provision to stop paying social benefits and pensions to NGCA residents, but the government is still to act on the ruling and payments remain suspended.

Obstacles to obtaining civil documentation

Despite the improvements in civil registration procedures outlined above, the system is still not comprehensive and continues to create obstacles for some IDPs. Unlike other Ukrainian citizens, who can apply for documentation at local registry offices, IDPs who cross the contact line from NGCAs



Internally displaced women in eastern Ukraine. Photo: NRC, 2015

have to resort to court procedures.¹⁹ This dual treatment arguably runs contrary to Guiding Principle four on non-discrimination. It also puts an extra burden on an already overstretched judiciary and on IDPs themselves, who struggle with time-consuming and discriminatory practices.

The strict requirement for identification documents leaves those without them less protected and more vulnerable. Internally displaced Roma people tend not to have access to financial and social support programmes because many lack such documents. Around 6,000 Roma have been unable to register as IDPs, and the impact on their standard of living has led to secondary displacement either within GCAs or back to NGCAs.²⁰

Besides resolving issues of discrimination, there are other arguments for ensuring IDPs' access to administrative procedures. First, it is difficult for their families to meet the cost of judicial procedures. This may mean births are not registered, which in turn would leave the children in question stateless. The adoption of draft law no.4394 On Amendments to the Law of Ukraine 'On Court Fees', which waives court fees for low-income IDPs, would go some way to addressing the issue.

Second, only relatives and legal representatives of the deceased may apply to court via a simplified procedure to register a death.²¹ Third, experience shows that the courts tend to rule applications inadmissible on the basis of lack of jurisdiction.²² The result is a lack of remedy to facilitate all IDPs' access to civil documentation.

Drawing on the country's commitments under the fourth Geneva Convention and the 1971 advisory opinion of the International Court of Justice, which urge states to facilitate the identification of children, Ukraine should ensure that all IDPs have access to the administrative procedures for the issuing of birth certificates, regardless of their location.^{23 24} Arrangements including legislative reform should be made to ensure that administrative registration procedures are available to all.

Verification of social payments

In response to allegations of IDPs using fraudulent registration certificates bearing incorrect addresses to receive financial support, in February 2016 the government suspended social payments to 150,000 beneficiaries.²⁵ MoSP issued a letter instructing all of its regional offices to introduce a verification procedure for IDPs' registration certificates and authorising payments to be cut in cases of fraud. There is no official figure for the suspensions, but some sources suggest as many as 500,000 people may have been affected.²⁶

Civil society and international organisations were severely critical of the suspensions, the lack of transparency surrounding the new verification procedure and the absence of clearly defined regulations, which might have led to its application being arbitrary. To ensure that the verification procedure is effective and consistent, on 8 June 2016 the government adopted cabinet resolution 365, which establishes a mechanism for the renewal of IDPs' social entitlements and another to control payments at their habitual places of residence.

For addresses under verification, the resolution envisages visits by a local inspector from the government's social protection department at least every six months to fill in a living conditions assessment form. Local departments of the Ministry of Internal Affairs, state migration service, state security service, national police, state finance inspectorate, state audit service and pension fund may also be involved in the verification process if the local authority creates a working group for the purpose.

If an IDP is absent from their habitual place of residence, a note requesting them to report to the social protection department within three days is issued, followed by a registered letter. If the IDP fails to report in time, the inspector asks the state border service to determine whether the person in question has left to the NGCAs. If an IDP is absent from their registered habitual place of residence for more than 60 days without having notified the authorities, they may lose their registration certificate, targeted support and social benefits. Those who feel they have sufficient grounds for absence can apply to extend the period to 90 days.

The social protection department is authorised to conduct further checks if it receives new information about changes in IDPs' habitual place of residence or on the basis of recommendations from the Ministry of Finance or Oschadbank, Ukraine's state savings bank.

Resolution 365 includes some positive developments - such as the provision for IDPs to receive social benefits at their habitual place of residence and clearly defined criteria for residence verification - but there are major concerns about its lawfulness. This undermines citizens' right to benefits under the system of "general mandatory state social insurance". It also violates Guiding Principle 17, which guarantees the right to respect for family life; and 18, which protects the right to an adequate standard of living.

The verification procedure also covers pensions, despite the different nature of the entitlement, which should not be linked to a person's status as an IDP or their place of residence. Ukraine's own pensions legislation, international customary law and the European Court of Human Rights' decision in the case of *Pichkur v Ukraine* all establish that the denial of pension payments on the basis of place of residence is unlawful and discriminatory.

The suspension of pension payments on any basis also violates point eight of the Minsk II Agreement, which envisages the full restoration of social and economic connections, including pensions, and the fact that IDPs in NGCAs are obliged to cross the contact line to receive them impedes their registration and triggers de facto displacement.²⁷

Civil society and international organisations are also concerned that resolution 365 authorises the Ministry of Finance and Security Service to issue a list of IDPs recommended for additional checks. One of the grounds for the suspension of social payments is information obtained from Oschadbank under cabinet resolution 637 which indicates that an IDP has savings of more 14,500 Ukrainian hryvnia (\$560).²⁸ Cabinet resolution 505 makes people with such savings ineligible for financial targeted assistance.

The disclosure of bank account information is a clear violation of privacy protected by international legal norms. The government's disregard for customary norms paves the way for the deterioration of the rule of law in the country at large.

There are also significant concerns about the potential effectiveness of resolution 365. Residence verification has been hampered by the absence of a unified database on IDPs. Cabinet resolution 646 adopted on 22 September 2016 addresses the issue by establishing such a database, but the process of incorporating its data into the verification process has not yet been harmonised. Limited human resources, and specifically the ratio of social protection department inspectors to IDPs, also significantly undermine the effectiveness of the mechanism.²⁹

Resolution 365 has equipped regional and district authorities with guidelines on how to implement Ukraine's law on IDPs at the local level, but further work and monitoring is required to ensure that application of the verification procedure is standardised across all *oblasts* to reinforce legal certainty. This need is evident from incidents such as the call en masse for IDPs in Dnipro to visit the local authorities in person for verification purposes, which is not envisaged in the legislation.³⁰

Ukrainian civil society has also severely criticised the use of additional data as a basis to deny or suspend IDPs' social entitlements, and there is alarm at the prospect of lists of IDPs becoming a tool to mask arbitrariness, given the lack of clearly defined criteria to trigger additional checks that may lead to the cancellation of their registration certificates.³¹

There is also emerging concern about the cabinet resolution 365 that stipulates the basis for the termination of social payments. A recent court decision required an IDP from Zaporizhzhya to return all of the money they had received as targeted assistance on the basis that they owned a premises of six square metres in which to house a family of three. This sets a precedent under which ownership of a living space in a GCA becomes a criteria for the termination and reclamation of such assistance, and shows that the resolution needs to be reformulated to avoid blanket terminations of social payments in situations when they are most needed.³²

CONCLUSION

Despite positive legislative developments to address legal gaps in Ukraine's 2014 law on IDPs, the amendments so far have not eliminated all of the challenges displaced people face. Areas such as registration and the granting of a legal status, civil registration and the issuance of documents, and non-discriminatory access to social benefits remain problematic. IDPs' rights do not derive from their inclusion on a register. Registration should not result in a real or perceived status that might put IDPs at risk, hamper their access to benefits or create incentives for people who are not displaced to pretend to be IDPs.

Some of the initiatives have been hampered by a failure to enact implementing regulations within a given timeframe, while others have not been implemented in the absence of procedural instructions.³³ On the one hand, the adoption of numerous legislative measures governing the application of the 2014 law demonstrates the government's political will to address IDPs' pressing needs and prioritise their protection. On the other, a proliferation of bylaws signals shortfalls in the provisions they aim to amend, and the need for clear accompanying instructions to avoid confusion arising from rapidly changing regulations.

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CONTACT

Valeriia Amitina
Consultant
amitina_valeriia@student.ceu.edu

Nadine Walicki
Senior Strategic Advisor on
Development
+41 22 552 36 35
nadine.walicki@idmc.ch

Alexandra Bilak
Director of IDMC
+41 22 552 36 11
alexandra.bilak@idmc.ch

IDMC
Norwegian Refugee Council
3 rue de Varembe
1202 Geneva, Switzerland
www.internal-displacement.org
+41 22 552 3600