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ON

THE DRAFT LAW OF UKRAINE

**“ON ENSURING OF RIGHTS AND FREEDOMS OF
INTERNALLY DISPLACED PERSONS”**

I. Introduction

By letter of 19 September 2014, the Permanent Representative of Ukraine to the Council of Europe, upon instructions by the Government of Ukraine, requested the Council of Europe to prepare an Opinion on the draft Law of Ukraine “On ensuring of rights and freedoms of internally displaced persons” № 4490a-1 registered at the Verkhovna Rada of Ukraine on 28 August 2014 (“draft Law”).

The present opinion was prepared by the Directorate General of Human Rights and Rule of Law of the Council of Europe on 8 October 2014 based on the text of this draft Law translated in to English by the UNHCR Regional Representation for Belarus, Moldova and Ukraine (<http://unhcr.org.ua/en/2011-08-26-06-58-56/news-archive/1231-internally-displaced-people>).

II. General remarks

The Council of Europe has long taken an interest in the issue of internally displaced persons (“IDPs”), from a human rights perspective, in particular in the light of the European Convention of Human Rights and the European Social Charter. In 2006, the Committee of Ministers of the Council of Europe agreed on 13 recommendations on IDPs (CM Rec(2006)6 “On internally displaced persons”). This recommendation essentially builds on the United Nations Guiding Principles on Internal Displacement and underlines the binding obligations undertaken by the CoE member states under Articles 2, 3, 5 and 8 of the ECHR, and stresses the right for IDPs to be provided with documents necessary for the effective exercise of their rights without unreasonable conditions being imposed, to enjoy their property and possessions, to exercise their right to vote, to return voluntarily to their homes or places of habitual residence or to resettle in another part of the country. The Recommendation also stresses that conditions for the proper and sustainable integration of following their displacement shall be ensured. IDPs shall not be discriminated against because of their displacement and this may require the obligation to consider specific treatment tailored to meet their needs. Particular attention shall be paid to the protection of IDPs belonging to minorities and to assistance requirements of the most vulnerable groups. Moreover, the Parliamentary Assembly of the Council of Europe (“PACE”) has addressed the issue of IDPs in several specific recommendations and resolutions¹.

¹ Recommendation 1424 (1999)1 “On Evaluation of the humanitarian situation in the Federal Republic of Yugoslavia, particularly in Kosovo and Montenegro”; Recommendation 1631 (2003) “Internal displacement in Europe”; Resolution 1879 (2012) “The situation of IDPs and returnees in the North Caucasus region”; Resolution 1708 (2010) / Recommendation 1901 (2010) “Solving property issues of refugees and displaced persons”; Recommendation 1877 (2009) “Europe’s forgotten people: protecting the human rights of long-term displaced persons”; Recommendation 1802 (2007) “Situation of longstanding refugees and displaced persons in South-Eastern Europe”; Resolution 1404 (2004) “The humanitarian situation of the displaced Chechen population”.

The draft law in question is assessed in the light of the above, taking into account the relevant case-law of the European Court of Human Rights² and the decisions of the European Committee of Social Rights³.

III. Comments

The draft law is a comprehensive legislative instrument that addresses most of the important and urgent questions relating to protection of IDPs, namely:

- the law sets the principle of Ukraine's obligation to prevent internal displacement and to safeguard the rights and freedoms of IDPs, including the right to return and further reintegration (Article 2); it further sets out clearly the principle of non-discrimination of IDPs
- it further sets the right to protection from forceful displacement and forceful return (Article 3)
- provides for the registration of IDPs, the provision of a necessary certification and of basic personal documents by the competent authorities in the place of the IDPs factual place of residence (Articles 4-6)
- Ensures their rights to employment, education, pension rights, social security and social services (Article 7), affirms that they shall enjoy voting rights (Article 8) and provides a list of additional rights and obligations of IDPs (Article 9)
- Sets out the distribution of tasks and competencies of central and local bodies in providing assistance to IDPs and effective access to their rights (Art 10 and 11) as well as the principle of their cooperation and coordination (Art 16)
- Sets out the reasons for withdrawing the IDP registration certificate (Art 12)
- Establishes the right to appeal against a decision, act or omission affecting the rights of IDPs (Art 13)
- Provides that the "support" and the safeguard of the rights of IDPs are "expenditure obligations" of Ukraine and local governments (Art 15); comprises a provision to facilitate loans to IDPs (Art 17)
- Establishes the principle of cooperation with other states and international organisations to prevent displacement and assist IDPs (Art 18).

² See among other cases, *Saghinadze and others v. Georgia*, *Khamidov v. Russia*, *Gulmammadova v. Azerbaijan*, *Soltanov and Others v. Azerbaijan*, *"Isgandarov and Others v. Azerbaijan*

³ For example, decision of the European Committee of Social Rights (ECSR) on collective complaint 52/2008 COHRE v Croatia, decision of 22 June 2010.

Whereas many of the provisions summarised above will require further clarification and precision to ensure a smooth implementation of the rights of IDPs, the draft law as such provides the necessary basis for addressing the urgent needs for IDPs.

There are however some points that might be improved to facilitate the protection of IDPs in accordance with the relevant European and international standards:

1. The definition of internally displaced person in Article 1 of the draft Law narrows the personal scope of the protection granted to Ukrainian citizens only.

The UN Guiding principles that constitute the basis of the CM Rec (2006) 6 and whose promotion and implementation the Committee of Ministers sought in adopting the said Recommendation, do not refer to citizenship as an element of the definition of IDPs. The above mentioned principles define IDPs as *“persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.”* The quality of IDP shall not depend on citizenship, but rather on lawful residence on the (area of the) territory of Ukraine that is affected by the event generating the displacement. It should in this respect, comprise foreigners and stateless persons who are in need of protection and who reside lawfully on the territory of Ukraine. It is to be recalled in this respect that PACE Rec 1802 (2007) on the situation of longstanding refugees and displaced persons in South Eastern Europe expressly refers to the need of protection of refugees and stateless persons. Moreover, PACE Rec 1424 (1999) on *“The humanitarian situation in the Federal Republic of Yugoslavia, particularly in Kosovo and Montenegro”* expressly states that *“all internally displaced persons in need of protection and humanitarian assistance should be treated in compliance with the principles of the European Convention on Human Rights irrespective of their nationality or ethnic group. The major concern should always be the protection of people”*.

Admittedly, the draft Law under consideration provides in its “Final and Transitional provisions” that *“the Cabinet of Ministers of Ukraine, within three months from the entry into force of this Law shall ... prepare and submit for consideration of the Verkhovna Rada of Ukraine proposals regarding amendments and additions to the Laws of Ukraine “On legal status of foreign citizens and stateless persons”, “on refugees and persons in need of complementary protection”, “on the Unified demographic registry and documents that prove citizenship of Ukraine and identify a person’s special status” that will ensure provisions similar to those mentioned in this law for such categories as foreign citizens, refugees and stateless persons”*. Therefore, the concern expressed in the previous paragraph is known to the Ukrainian authorities and a commitment is taken, in the draft Law, to regulate the situation of foreigners, refugees and stateless persons in a subsequent legislative instrument.

The concern however remains in that the law does not provide any transitional protection for displaced foreigners, refugees or stateless persons, pending the scheduled regulation. At the same

time, the needs of foreigners, refugees or stateless IDPs remain as well as the need to respect their basic rights during this transitional period.

It is therefore advisable to foresee in the transitional provisions of the law (or in any regulation that the executive may adopt) that **the rights of IDPs that are foreigners, refugees or stateless persons who reside lawfully on the territory of Ukraine or have a right for temporary residence on the territory of Ukraine shall be protected, in accordance with the international obligations of Ukraine, pending the adoption of the law that shall regulate their status as IDPs. This protection shall comprise the issue of the necessary identification documents by the authority that is responsible to issue identification documents for IDPs that are Ukrainian citizens.**

It is, of course, to be understood that the quality of “IDP” does not confer to the foreigner, refugee or stateless person more rights than he/she might have under Ukrainian law prior to his/her displacement (eg, the right to vote);

2. The description of the event generating displacement in the definition of IDPs.

The draft law indicates as one of the reasons for displacement the “*massive*” violations of human rights. By contrast, the UN Guiding principles’ definition does not contain the adjective “massive”, but simply refer to “human rights violations”. Whereas it is clear that not every human rights violation is likely to generate forced displacement, the qualification of the human rights violations as “massive” in the definition of IDPs should not be construed in such a way as to limit the scope of the protection that the legislator seeks to grant under this law.

3. The guarantee for integration or resettlement

In its Recommendation (2006)6 the Committee of Ministers stated: “..... *Conditions for proper and sustainable integration of internally displaced persons following their displacement should be ensured*”. Similarly, in its Recommendation 1877 (2009) the PACE invited the governments of all member states of the Council of Europe: “*to continue to support the process of voluntary return, local integration and integration elsewhere in the country of IDPs*”. The UN Guiding principles set as aim of protection to be granted “*facilitating voluntary return of (IDPs) to their abandoned residence places, local integration or steady resettlement and in safety and with dignity*”.

Article 2 of the draft law rightly sets the return of IDPs to their previous places of residence “and further re-integration” as one of the objectives of the measures to be taken by Ukraine.

To be compatible with international and European standards, the terms “*return of (IDPs) to their previous places of residence and further reintegration*” must be understood as referring both to the return and to **reintegration and resettlement elsewhere in the country**. It is moreover necessary, in order to avoid any possible ambiguities as to the scope of guarantees sought by this law to clearly indicate that the return aimed at should be voluntary.

It is therefore suggested to add “**voluntary**” before the word “return” in Article 2. Moreover, in order to stress the quality of the conditions that the law pursues to secure for the return or reintegration of IDPs, it is advisable to add “**in safety and dignity**” as prescribed in the UN Guiding principles.

The last sentence could thus read: “**voluntary** return of such persons to their previous places of residence **or resettlement and reintegration elsewhere in Ukraine, in safety and dignity**”.

4. Registration of internally displaced persons under Article 4 of the draft law

The Committee of Ministers in its recommendation №7, Rec(2006)6 stated that: “*Internally displaced persons shall be provided with all documents necessary for the effective exercise of their rights as soon as possible following their displacement and without unreasonable conditions being imposed*”. Article 4 of the draft law aims at satisfying the recommendation of the CM and, as such, is very welcome.

It is important to note that according to the UN Guiding principles, a person is an IDP and needs the specific protection related to this status as from the moment of departure of his/her place of habitual residence for the reasons mentioned in Article 1 of the draft Law. The registration foreseen in Article 4 aims at facilitating the assistance to be provided and the exercise of IDPs rights. In other terms, the registration confirms the IDP situation but does not create it. The rights of an IDP remain in cases of loss or of delayed issuance of the registration document.

The practical problems that may be created by the delayed issuance of registration documents are minimised under the draft law, as in accordance with the Art 4 para 8, the registration certificate must be issued on the same date on which the application is made (and the transitional provisions in the draft law require the code of administrative offenses to be amended to provide for penalties for the violation of the draft law).

However, the risk of IDPs being unable to exercise their rights or benefit from the protection foreseen in the law remains in cases where the submission of the application is not fully completed because of a necessary document lacking, for example the document that identifies a person as Ukrainian citizen (see Art 4 par 7). The same risk will emerge in cases where registration may not be completed for practical reasons, for example, in the case of the administration’s inability to cope with the number of applications as a result of massive influx of IDPs. Similar problems will emerge in cases where a refusal to register is challenged before the competent courts, as foreseen in Article 4, para 11 of the draft law.

It is therefore advisable to interpret Article 4 in such a way that will make it possible to grant temporary protection for all persons who have applied, or who have challenged the refusal of their registration as IDPs, pending the decision on their appeal for review.

5. Other rights of internally displaced persons.

Article 9 of the draft law sets out a list of rights of IDPs. This needs of course to be construed as a list of specific rights for IDPs, deriving from their specific situation, and without prejudice to other rights that these persons may have in accordance with Ukrainian or international law.

It is advisable to introduce in this list the following rights that derive directly from the European Convention on Human Rights and its Protocols, as applied to IDPs:

The right to know the fate and whereabouts of their missing relatives, guaranteed by Article 3 of the ECHR, as interpreted by the ECtHR in many judgments concerning missing persons. It is to be noted in this respect, that the corresponding obligation of the Ukrainian authorities is, in accordance with the case law of the Court, an obligation of means (and not an obligation of result), in the sense that the authorities satisfy the requirements of Article 3 ECHR by doing everything possible with a view to identifying the missing persons relatives.

The right to family unity, as required by Article 8 of the ECHR: It is to be noted that this right is already implicitly recognised in the draft law as Article 11 par 3 requires “the central executive body responsible for implementing migration policies” to “*facilitate re-unification of families of IDPs through informing them about the factual whereabouts of members of their families*”. This provision rightly and fully reflects the requirements of the Committee of Ministers Recommendation (2006)6 which reads as follows: “*Member states shall, in accordance with Article 8 of the European Convention on Human Rights, take appropriate measures to facilitate the reunification of families which are separated by internal displacement. Such measures may include locating missing family members, notably those that have been taken hostage. Competent authorities should convey to relatives of an internally displaced person, upon their request, any information they may have on his/her whereabouts*”.

The draft law does not expressly foresee a right for IDPs to access and enjoy their property or to be compensated for loss of property or loss of use of their property. In its Recommendation (2006)6, the Committee of Ministers stressed that “*Internally displaced persons are entitled to the enjoyment of their property and possessions in accordance with human rights law. In particular, internally displaced persons have the right to repossess the property left behind following their displacement. If internally displaced persons are deprived of their property, such deprivation should give rise to adequate compensation*”. Article 1 of Protocol No. 1 of the European Convention for Human Rights provides that “*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. ...*” Moreover, in its judgment in the case of “*Saghinadze and others v. Georgia*” (Application no. 18768/05) the European Court for Human rights stated that “*the concept of “possessions” in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent of the formal classifications in domestic law.....*”. It must be stressed that litigation before the European Court of Human Rights concerning IDPs very often relates to Article 1 of Prot No 1 ECHR.

The fact that the right to enjoy their possessions and the ensuing right to compensation is not expressly mentioned in the list of rights set out in Article 9 of the draft law is not problematic, in so far as it is possible for IDPs to submit any claims that may be related to access to, loss of property or use of property to the competent administrative and judicial authorities in accordance with Ukrainian civil and administrative law.

6. Central executive body

It may be advisable to specify the “central executive body” that will be entrusted with the supervision and coordination of IDPs’ protection in the law. The uncertainty as to which authority will be in charge of the overall policy may create difficulties in the implementation of the law. The central body concerned should be **specific and entirely devoted to IDP protection**. It should be of a **high level** (possibly linked to the Prime Minister or one Vice Prime Minister) in order to have the required authority to coordinate and supervise the action taken to protect IDPs. It should also be adequately staffed and have the necessary resources to perform its duties. Such a body can be entrusted with recording information and keeping the unified registry database foreseen in para 7 of the final and transitional provisions of the draft law, as well as with the “coordination centre” tasks, foreseen in para 8 of the same final and transitional provisions.

If the law does not specify and/or create such a specific, high level, central executive body, it will be necessary to create it very soon after the adoption of the law.

7. Technical issues

Article 9 of the draft law poses as a condition for a person to qualify as IDP, that he/she shall *adhere to the Constitution and laws of Ukraine*. As Article 12 para 5 of the law provides clearly that the commission of “*crimes or of actions aimed at the violent overthrow or change of the constitutional order or seizure of state power, offense against the territorial integrity of Ukraine, as well as acts of terrorism, crimes against humanity or war crimes*” is a ground for withdrawing the certificate of registration of IDP., the condition included in Article 9 seems redundant.

It is advisable to reconsider the use of various terms designating the factual place of residence of IDPs. The draft law uses a variety of terms such as “place of stay”, “factual place of stay”, “factual place of residence” that might cause confusion.

8. Issues relating to the implementation of the law

After its adoption, the law will need to be implemented smoothly, with due regard to the pragmatic needs of IDPs and without unnecessary bureaucracy. It is advisable that the Parliamentary Commissioner for Human Rights (**Ombudsperson**) of Ukraine be consulted and involved in the process of implementation. The experience of other Member States of the Council of Europe shows that the Ombudsman intervention may be determinant for the efficiency of the action taken by government authorities at central and local level and for the effective protection of IDPs’ rights.

The draft law clearly foresees **the right of IDPs to vote** in Article 8. As this right should be ensured in the forthcoming parliamentary elections, it would be advisable that concrete steps be taken to ensure that the necessary changes in voting lists are in place.

The protection of IDPs is not only a question of legislation. It very much depends on the financial means devoted to IDPs and their protection, reintegration or return. **Facilitating financial aid from abroad** is therefore of particular importance. In addition, it is necessary to secure that any form of assistance provided to IDPs actually reaches the beneficiaries and is meaningfully used. In this respect the provisions of Article 15 par 3 and 4 clearly provide that humanitarian assistance (including international aid) for IDPs shall be exempted from taxes and other mandatory payments, and that customs clearance of such assistance shall be carried out under simplified procedures. These provisions are very welcome and need to be followed up in practice by concrete regulations or, where appropriate, changes in existing legislation on customs and taxes.

Conclusion

The draft law provides the necessary basis for addressing in law the urgent need for protection of IDPs. Its adoption is therefore strongly recommended.

The improvements suggested in the present opinion will contribute to its clarity.

Many of its provisions will require additional normative efforts to be fully effective and guarantee in practice the rights of IDPs; the smooth implementation of the law will also require additional institutional adjustments.